Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-98-01259-CV

———————————

JUGINDER SINGH GAHUNIA, Appellant

V.

ACORN PRIVATE LIMITED, CO., Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 97-22920

O P I N I O N

Appellant, Juginder Singh Gahunia, appeals from a $50,000 judgment entered against him after a trial to the court. In three points of error, he complains that (1) the pleadings do not support the judgment, (2) there is no evidence to support the judgment, and (3) the trial court erred in not recognizing that appellee had contracted with another party. Acorn raises one cross point of error complaining that Gahunia has waived his appeal by consenting to the judgment. We affirm the trial court's judgment.

BACKGROUND

Acorn Private Limited was interested in purchasing land in India. Acorn entered into negotiations with Kuwait-Indo International for the purchase of a 3.75 acre tract of land in India. The president of Acorn requested Gahunia guarantee the transaction.[1] The real estate land contract listed Acorn as "Purchaser" and Kuwait and Gahunia collectively as "Sellers." The contract stated that a fifty-thousand dollar ($50,000) escrow deposit, which was to be treated as a down payment, was delivered to "Seller." A $50,000 cashier's check, dated one day after the real estate contract, made payable to Kuwait and remitted by Acorn was admitted into evidence. The contract provided that "in the event Seller shall fail to fully perform any of its obligations hereunder or shall fail to consummate the sale of the property for any reason, Purchaser may: (1) enforce specific performance of this agreement; (2) request that the Escrow Deposit shall be forthwith returned by Seller to Purchaser or (3) bring suit for damages against seller." Further, "Mr. Juginder Singh Gahunia is a personal guarantor for the Escrow Deposit in the event of a breach by the Seller. The Seller agrees to pay for costs of litigation and attorneys fees in the event the Escrow Deposit is not returned to Purchaser."

Following a trial to the court, judgment was entered against Gahunia for $50,000, attorneys fees, pre-judgment and post-judgment interest, and costs of court. In addition, the court made the following findings of fact and conclusions of law: (1) Acorn, Kuwait, and Gahunia entered into a real estate contract; (2) Acorn tendered, and Kuwait and Gahunia accepted, the $50,000 earnest money agreed to in the contract; (3) Krishna Ranjan Sinha, president of Kuwait, cashed the earnest money check and has apparently left the United States; (4) Gahunia is listed in the contract as a seller and a recipient of the earnest money, and he agreed to personally guarantee the earnest money in the event of any breach by the sellers; and

[1] From the testimony elicited at trial, it seems that the original intent was to have Gahunia serve only as an escrow agent.

(5) the real estate that is the subject of the contract was not transferred, nor was the $50,000 returned.

APPELLEE'S CROSS POINT

Before we reach Gahunia's points of error, we will address Acorn's cross point of error claiming that Gahunia waived his appeal by signing an agreed or consent judgment. After the case was tried before the court and the court entered judgment in favor of Acorn, the court asked Acorn's counsel to draft the judgment and have Gahunia's counsel "check it for form." The judgment was submitted to Gahunia's counsel with the phrase "approved as to form and content" above the signature lines for the parties and their attorneys. Gahunia and his counsel both signed the judgment. Acorn contends that the "approved as to form and content" language prohibits Gahunia from now attempting to set aside the judgment on appeal. We disagree.

An agreed judgment is one entered on agreement of the parties, which receives the sanction of the court, and it constitutes a contract between the parties to the agreement. *See* BLACK'S LAW DICTIONARY 842 (6th ed. 1990). A consent judgment is a judgment in which the provisions and terms are settled and agreed to by the parties to the action. *See id*. While it is true that consent to the trial court's entry of judgment waives a right to appeal, to have a valid consent judgment, each party must explicitly and unmistakably give its consent. *See Baw v. Baw*, 949 S.W.2d 764, 766 (Tex. App.—Dallas 1997, no writ). For example, the phrase "approved as to form and substance" standing alone is insufficient to establish a consent judgment. *See id*.

In this case, there is no indication in the record that the parties settled their claims or came to an agreement as to the case's disposition. *See Oryx Energy Co. v. Union Nat'l. Bank of Texas*, 895 S.W.2d 409, 417 (Tex. App.—San Antonio 1995, writ denied). To the contrary, the record reveals the parties did not agree on the case's outcome, which is evidenced by the necessity of the trial on the merits. There being no agreement of the parties before the judgment was entered, no agreed or consent judgment was possible. Therefore, Gahunia did

not waive his right to appeal by signing the judgment with the "approved as to form and content" language. Acorn's cross point is overruled.

LACK OF PLEADINGS TO SUPPORT THE JUDGMENT

Gahunia, in his first point of error, claims that the trial court erred in granting judgment for Acorn because the pleadings and the evidence do not support the judgment. It is well settled that the judgment of the court cannot stand unless it is supported by the pleadings. *See Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983); TEX. R. CIV. P. 301. Thus, a party may not be granted relief in the absence of pleadings to support such relief. *See id.* (citing *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979)).

To determine whether a cause of action was pled, we look at whether there are sufficient allegations to give fair notice of the claim, not whether certain magic words are used in certain portions of the petition. *See Stoner*, 578 S.W.2d at 683. The court must find the plaintiff's pleadings adequate to state, with reasonable certainty and without reference to information from another source, the elements of the cause of action and the relief sought with sufficient particularity upon which a judgment may be based. *See id.* Pleadings are to be construed liberally, particularly when the party complaining of the petition has not filed special exceptions. *See Paramount Pipe & Supply Co. v. Muhr*, 749 S.W.2d 491, 496 (Tex. 1988); TEX. R. CIV. P. 91.

In this case, Acorn pled in its original petition a cause of action based upon a violation of the Deceptive Trade Practices Act (DTPA). The evidence adduced at trial and the remedy granted lead us to the conclusion that this is a breach of contract case and was tried as such. No evidence was elicited as to a violation of the DTPA[2]; rather, the evidence showed a breach

[2] The DTPA grants consumers a cause of action for damages caused by false, misleading, or deceptive acts or practices. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (a)(1) (Vernon Supp. 1999). A breach of contract is not actionable under the DTPA. *See La Sara Grain Co. v. First Nat'l bank of Mercedes*, 673 S.W.2d 558, 565 (Tex. 1984). Mere failure to perform under a contract does not constitute (continued...)

of contract. We have searched Acorn's original petition in a effort to find a sufficiently particular statement of any element of a breach of contract cause of action.[3] The petition contains no such elements, even when read as liberally as possible. We therefore find that the judgment is not supported by the pleadings.

Our analysis does not end with rule 301, however. Rule 67 of the Texas Rules of Civil Procedure provides in pertinent part that "[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." An issue is tried by consent when a party introduces evidence to support an issue that is not included in the written pleadings and no objection is made to the lack of pleadings. *See Bell v. Meeks,* 725 S.W.2d 179, 179-80 (Tex. 1987); *Duncan Land & Exploration, Inc., v. Little*, 984 S.W.2d 318, 327 (Tex. App.—Fort Worth 1998, pet. denied). Trial by consent is intended to cover the exceptional case where it clearly appears from the record as a whole that the parties tried the unpled issue. *See RE/MAX of Texas, Inc. v. Katar Corp.*, 961 S.W.2d 324, 328 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). 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. *See id.*

The record in this case supports a finding of trial by consent. Acorn introduced evidence to prove breach of contract and Gahunia made no objection to the lack of pleadings to support the claim. In particular, Acorn, without objection, introduced evidence of the real estate contract entered into by Gahunia and Gahunia's subsequent breach. Gahunia did not, before the submission of the case to the court, specially except to the pleadings, move for directed

---

[2] (...continued)
a misrepresentation within the meaning of the DTPA. *See Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 14 (Tex. 1996). If such were the case, it "would convert every breach of contract into a DTPA claim." *Id.*

[3] The elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. *See Wright v. Christian & Smith*, 950 S.W.2d 411, 412, (Tex. App.—Houston [1st Dist.] 1997, no writ).

verdict on the DTPA claims, or otherwise bring to the court's attention his complaint about the absence of proper pleadings.[4] It is also clear from the record that Gahunia understood the case was being tried as a breach of contract case. During trial, counsel for Gahunia stated, "[b]asically, judge, I think we're in agreement with the facts, it's just the outcome of the ruling and the decision we're asking from the court." This statement, coupled with the evidence of the existence and breach of the contract, evinces trial of the breach of contract issue. Accordingly, we find that Acorn's claim for breach of contract was tried by implied consent and we overrule Gahunia's first point of error.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE JUDGMENT

In his second and third points of error, Gahunia challenges the legal and factual sufficiency of the evidence. In particular, Gahunia complains there is no evidence to show he received money from Acorn under the contract. He further complains the evidence established that the $50,000 cashier's check was a payment made under a separate contract, to which Gahunia was not a party.

A trial court's findings are reviewed for legal and factual sufficiency by the same standards that are applied in reviewing a jury's verdict. *See Catalina v. Blasdel*, 881 S.W.2d 295 (Tex. 1994). In reviewing a "no evidence" or legal sufficiency challenge, we consider only the evidence and reasonable inferences that tend to support the verdict, and disregard all evidence and inferences to the contrary. *See Heldenfels Bros. Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992); *Responsive Terminal Sys. Inc. v. Boy Scouts of Am.*, 774 S.W.2d 666, 668 (Tex. 1989). The verdict must be upheld if there is more than a scintilla of

[4] Gahunia submitted a post-submission letter maintaining that his motion for new trial was sufficient to preserve his complaint, citing Rule 33.1 of the Texas Rules of Appellate Procedure. Rule 33.1 requires the complaint be made to the trial court by a *timely* request, objection, or motion . . . ." *See* TEX. R. APP. P. 33.1 (a)(1) (emphasis added). Gahunia filed his motion for new trial thirty days after the signing of the judgment. This was too late to preserve his complaint as to the deficiency of the pleadings. To properly preserve error, Gahunia must have either raised an objection to the lack of pleadings before the submission of the case to the trial court, or specially excepted to the pleadings before the signing of the judgment. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); TEX. R. CIV. P. 90.

evidence to support it. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992); *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987). Evidence is no more than a scintilla, and in legal effect "no evidence," if it is so weak as to create no more than a mere surmise or suspicion of the existence of the finding. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

If we find there is more than a scintilla of evidence to support the verdict, we will then review the claim of factual insufficiency of the evidence. *See International Piping Sys., Ltd. v. M.M. White & Assoc.*, 831 S.W.2d 444, 447 (Tex. App.—Houston [14th Dist.] 1992, writ denied). In reviewing a factual sufficiency challenge, we must consider all the evidence in the record, both supporting and contrary to the judgment. *See Plas-Tex Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). After considering and weighing all the evidence, we will set aside the verdict only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). A finding is against the great weight and preponderance of the evidence if it is "manifestly unjust," "shocks the conscience," or "clearly demonstrates bias." *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

In applying this standard to our review of the evidence, we find the following evidence supports the trial court's findings. Both parties produced the real estate contract at issue and neither disputed its existence, execution, or terms. Gahunia testified that he drafted the contract and it was signed by all parties. In the contract, Gahunia is listed as a "Seller" and as guarantor of the escrow deposit. Both parties agree that a cashier's check for $50,000 was given to Kuwait, who was also listed as a seller in the contract. The land transaction never occurred and Acorn demanded return of the escrow deposit. Gahunia refused.

Gahunia maintains that because he never received any part of the escrow deposit, there is no evidence to support the trial court's findings. Gahunia believes he is not liable absent any evidence that he exercised control over the funds. Both parties stipulated that Kuwait received

the $50,000 and that Gahunia did not receive any part of it. That fact, however, is not dispositive of this case. The express terms of the contract listed appellant as one of the "Seller[s]" and as "personal guarantor for Escrow Deposit in the event of a breach by the Seller." The contract states that "Purchaser has delivered to Seller, the sum of Fifty Thousand dollars ($50,000), the Escrow Deposit." The contract does not require that the "Seller[s]" be given payment collectively rather than individually. Therefore, a payment to one "Seller" is effectively payment to both "Seller[s]." Even if the contract explicitly stated that payment to "Seller" must be jointly made, Gahunia would still be liable under the provision making him a "personal guarantor" for the return of the "Escrow Deposit."

Gahunia next argues that the evidence is factually insufficient because he offered evidence that the $50,000 payment was made under a separate contract. In support of this argument, he points to (1) a letter from Kuwait to Acorn, dated three days before the contract, offering to sell a certain plot of land in India, and (2) the cashier's check was dated September 13,1996 - one day after the real estate contract in the instant case. For the following reasons, we do not find that this evidence renders the trial court's findings against the great weight and preponderance of the evidence.

First, this letter provides no evidence of the existence of another contract, only an offer to sell by Kuwait. In fact, the terms of the offer in the letter are so similar to those in the instant contract, it is reasonable to infer that the offer relates to the same land transaction. Both the letter and the contract contemplate the sale of 3.75 acres[5] of land in Faridabad, India, payment of a $50,000 down payment by cashier's check, and each contains the initials of the three parties to the contract. Second, while Gahunia points to the date on the cashier's check as evidence that the money was not tendered to Kuwait as payment under the instant contract,

[5] Appellant argues the letter indicates a different land deal because the letter lists the acreage as 3.5 acres, rather than 3.75 as stated in the contract. However, a hand drawn map at the top of the letter describes the property as 3.75 acres.

we find nothing about the lapse of one day from which to infer that the payment was not made in accordance with the terms of this contract.

Based on the foregoing evidence, we find the evidence both legally and factually sufficient to support the trial court's judgment. Gahunia's second and third points of error are overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Justices Yates, Fowler and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).