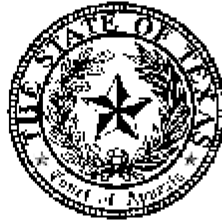
**Affirmed and Opinion filed May 17, 2001.**



**In The**

# Fourteenth Court of Appeals

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**NO. 14-99-00396-CV**

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**MARC IVAN BERENS AND THE BERENS CORPORATION, Appellants**

**V.**

**RESORT SUITES-SCOTTSDALE, INC., Appellee**

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**On Appeal from the 165th District Court**
**Harris County, Texas**
**Trial Court Cause No. 94-46884**

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## O P I N I O N

This appeal arises from a fraudulent inducement claim brought by appellee. In a bench trial, the court below found appellant made misrepresentations. The misrepresentations included representations by both appellants that Berens Corporation had a warehouse line of credit available to appellee. In reliance on the misrepresentations, appellee engaged the appellant corporation to procure or make a realty loan on specific terms. Although appellant was paid a refundable $100,000 commitment fee, the loan was never made. Appellee accordingly proceeded to procure more expensive financing, but the commitment fee was not

refunded. Appellee sued and prevailed under a fraudulent inducement claim. In this appeal, we determine whether (1) the Berens Corporation was obligated to make a loan to appellee; (2) appellant, Marc Ivan Berens, the president of the appellant corporation, is individually liable for his misrepresentations; and (3) the court used the proper measure of damages. We affirm.

## Background

In 1994, Resort Suites–Scottsdale, Inc. (RSSI) emerged from Chapter 11 bankruptcy. As part of its reorganization plan, the lender on its Scottsdale, Arizona resort hotel agreed that it would accept $10 million in full satisfaction of a $15 million loan, if RSSI paid the money by December 31, 1994.

At trial, the president of RSSI, Gordon Zuckerman, testified that RSSI began discussions in late 1993 with Marc Berens of Berens Corp.[1] regarding refinancing the loan to meet the deadline. Marc Berens represented to Zuckerman it was well-capitalized and fully capable of making the loan through its outside lenders or, failing that, from its own $20 million line of credit through its joint venture partner, The Mortgage Acquisition Group (TMAC).

Zuckerman testified that, based on Berens' representations, on January 7, 1994, RSSI entered into a conditional commitment agreement with Berens Corp to refinance the loan. In the summary of terms, Berens Corp. was identified as "Lender." RSSI paid Berens Corp. a $25,000 refundable "commitment fee" as part of the arrangement. Later, Berens Corp., via Marc Berens, demanded, and RSSI paid, an additional $75,000 refundable commitment fee for Berens Corp. to cover expenses in connection with procuring and closing the loan. On February 28, 1994, RSSI and Berens Corp. entered into another conditional commitment agreement to provide RSSI one of two loans, listed in an attached letter of intent as "Transaction A" and "Transaction B." In the agreement, Berens Corp. "represent[ed]" and

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[1] The Berens Corporation and Marc Ivan Berens are referred to collectively as "Berens" or "appellants" except under the section determining whether Marc Berens is individually liable. In that section only, he is referred to as "Marc Berens." Unless otherwise noted, the oral representations attributed to "Berens" were made by Marc Berens.

"warrant[ed]" to RSSI that it had available lines of credit sufficient to fund the loan and that such lines of credit are available to Berens Corp. to fund the loan should it not obtain other sources of capital. Berens Corp. further warranted that in the event it had not obtained other sources of capital to fund the loan by July 15, 1994, it "shall use its line of credit with its warehouse lender to fund the [loan]." The February 28 agreement stated that Berens Corp. committed to fund the loan "subject only" to certain conditions, which included matters such as RSSI providing verification it had reached a certain level of earnings and that it would provide an appraisal for the hotel for at least $22 million. The agreement also required that, upon five days' written notice, Berens Corp. would return the $100,000 commitment fee paid by RSSI in the event the loan was not timely funded.

On March 9, 1994, RSSI notified Berens Corp. it wished to pursue funding of Transaction B, which was a smaller loan than Transaction A, but at a lower interest rate. In April, however, RSSI began to doubt Berens Corp.'s ability to fund or secure the loan. One example of this which RSSI points to is a letter from Berens on May 9, 1994, notifying RSSI that it would not be able to procure financing on the terms listed in Transaction B. Relations between the parties further deteriorated. Before the end of the exclusivity period, RSSI began making inquiries to lenders on its own. However, it continued to acknowledge the exclusivity clause of the parties' agreement. Zuckerman testified that, because of his concerns, he made the inquiries as due diligence in case Berens Corp. was unable to fund the loan. Zuckerman testified that at no time before the end of the exclusivity period did RSSI seek back-up financing. The exclusivity period passed with no loan secured.

In late August, RSSI procured a loan from Greyhound Financial on less favorable terms than those outlined in Transaction B. On September 14, RSSI made demand that Berens Corp. return the $100,000 commitment fee. The fee was never returned.

RSSI sued for Marc Berens and Berens Corp. for fraud and Berens Corp. for breach of contract. Berens Corp. countersued for its fee, alleging RSSI violated the exclusivity

provision. At a bench trial, in addition to the above-stated facts, the court heard testimony of David Solomon, president of TMAC, Berens' supposed joint venture partner. Solomon testified that he had never even heard of Berens, much less that Berens Corp. had a line of credit through TMAC or that Berens Corp. was its joint venture partner. Zuckerman testified that had he known the line of credit was non-existent, he never would have entered into the agreement with Berens Corp. After hearing the evidence, the court found for RSSI and made detailed findings of fact and conclusions of law. It found, among other things, that Marc Berens, individually and as a representative of the corporation, had fraudulently misrepresented the existence of Berens Corp.'s warehouse line of credit, that TMAC was Berens Corp.'s joint venture partner, and that Berens Corp. would fund the loan if outside sources were not available. It also found that by the time RSSI found a replacement loan, rates had increased and the cost of a replacement loan was $767,231 and awarded that amount in damages with both appellants jointly and severally liable. It also awarded RSSI $317,822 prejudgment interest.

**Breach of the Commitment Agreement**

Berens Corp. first argues it was not liable under the contract to provide financing because RSSI breached the exclusivity provision of the commitment agreement. In the exclusivity provision, RSSI agreed not to seek financing from any source other than Berens Corp. until July 15, 1994. Berens Corp. asserts that the evidence was uncontroverted that prior to that date, RSSI made contact with numerous other potential lenders without Berens' knowledge. This, it argues, was a material breach as a matter of law, which, in turn, precluded Berens Corp. from discharging its duties under the contract. Thus, RSSI's breach precludes it from obtaining a judgment against Berens Corp.

RSSI responds that Berens' discussion of contract principles misses the point. Because it prevailed under a theory that Marc Berens and Berens Corp. fraudulently induced RSSI to enter into the contract, RSSI was not bound by the exclusivity provision of the contract. We agree. As RSSI correctly points out, a party is not bound by a contract procured by fraud. *See*

*Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998); *see also Cecil v. Zivley,* 683 S.W.2d 853, 857 (Tex. App.—Houston [14th Dist.] 1984, no writ) (fraudulent inducement is fatal to a contract and it is a valid defense against enforcement of such contract).

The issue, as stated by Berens, then, is improperly formulated. Since RSSI prevailed under a fraudulent inducement claim, Berens Corp.'s breach of contract issue is inconsequential if RSSI offered legally sufficient evidence it was fraudulently induced to enter the contract. As shown above, the trial court made numerous factual findings of fraudulent inducement that were well-supported by the record, primarily through the testimony of Zuckerman and Gary Zwillinger, RSSI's counsel during the loan negotiations.[2] Therefore, we overrule Berens' breach of contract issue because there was sufficient evidence to support the court's judgment that Marc Berens and Berens Corp. fraudulently induced RSSI to enter the contract.

**Individual Liability of Marc Berens**

Next, Marc Berens asserts the evidence is factually insufficient to show he was individually liable under the judgment. In reviewing a factual sufficiency point, the court of appeals must weigh all of the evidence in the record, both favorable and unfavorable to the judgment. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). A court may set aside judgment for factual insufficiency only if the evidence supporting it is so weak as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Berens argues the evidence is factually insufficient because all duties and obligations created under the contract were solely between RSSI and the Berens Corporation and because he was never a party to the

[2] Berens lists a number of factual findings by the trial court which they "challenge." However, there is nothing in their brief in support of the claim that the findings were not supported by evidence. Because of this, Berens has waived any further discussion of the issue as it pertains to the fraud issue. *See* TEX. R. APP. P. 38.1(h); *Wolfe v.C.S.P.H., Inc.*, 24 S.W.3d 641 (Tex. App.—Dallas 2000, no pet.) (holding issue waived where appellate brief did not contain clear and concise argument to explain reasons for assertion).

contract. He further claims that there was no proof he was personally liable under a "pierce the corporate shield" theory or that his ownership of all the stock in the Berens Corporation makes it his alter ego.

RSSI responds that this is not the basis under which the court found Berens' individually liable. Rather, Marc Berens was individually liable because he personally committed fraud. Again, we agree. *See Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 375 (Tex. 1984) (holding corporation's employee personally liable for tortious acts which he directed or participated in during employment).

As stated above, the trial court made explicit findings, well-supported by evidence at trial, that Marc Berens made numerous material misrepresentations to RSSI. Though we are to review all evidence in the record, including that which is favorable to Berens, he nonetheless fails to present any significant evidence indicating he did not make the misrepresentations. Our review indicates the record is replete with evidence that Marc Berens made the misrepresentation as alleged, and minimal evidence to the contrary. We thus find that there was factually sufficient evidence to support the judgment against Marc Berens individually. *See Cain*, 709 S.W.2d at 176. We overrule this issue.

**Damages**

Finally, Berens claims the trial court erred in its calculation of damages. It is not clear from Berens' brief whether Berens attacks the damage award based on legal or factual insufficiency. We will review the issue as a challenge to both.

*Legal Sufficiency*

We sustain such a legal sufficiency challenge only if, considering the evidence and reasonable inferences in the light most favorable to the findings, there is not more than a scintilla of evidence supporting it. *Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997). If a plaintiff presents legally sufficient evidence on each of the

elements of a fraudulent inducement claim, any damages suffered as a result of the fraud sound in tort. *Formosa Plastics*, 960 S.W.2d at 47. RSSI sought, and was entitled to recover, the actual amount of its loss resulting directly and proximately from Berens' fraud. *See Morriss-Buick Co. v. Pondrom,* 131 Tex. 98, 113 S.W.2d 889 (Tex. Comm'n App. 1938, opinion adopted); *Texas Commerce Bank Reagan v. Lebco Constructors, Inc.,* 865 S.W.2d 68, 74 n.2 (Tex. App.—Corpus Christi 1993, writ denied) (on fraud claim concerning breach of loan agreement, plaintiff is entitled to recover basic common law measure of damages for such a breach, which is the dollar difference between the loan at contractual rate of interest and the loan rate of interest that the borrower is required to pay to obtain the money from another source).

The trial court awarded RSSI the difference between the amount of interest it would have paid under Transaction B and the cost of the loan it finally obtained from Greyhound Financial. Berens contends the court erred in using Transaction B because the loan was contingent upon RSSI obtaining a "BBB/Baa" bond rating. More precisely, the term sheet for Transaction B stated, "It is anticipated that a rating of BBB/Baa shall be obtained from an acceptable rating agency." Berens claims that because RSSI could not obtain this rating, it was not obligated to find financing under those terms. As such, the damage calculations were based on "pure speculation premised on a set of fictitious ideal circumstances."

RSSI counters that the loan was not predicated upon it receiving any sort of bond rating because when Berens represented Berens Corp. would make the loan and executed the commitment agreement, it was bound to provide financing under the terms of Transaction B. Further, the damages sought by RSSI were not speculatively based consequential damages but were simply benefit-of-the-bargain damages arising from Berens' fraud. One recognized measure of damages for fraud is the benefit-of-the-bargain measure. *Formosa Plastics*, 960 S.W.2d at 49. Benefit-of-the-bargain damages are the difference between the value as represented and the value received. *Id.*

In view of our standard of review and the applicable law, then, it appears that Berens' issue boils down to the claim that there is no evidence that he represented Berens Corp. would fund or secure a loan under Transaction B without RSSI first obtaining a BBB/Baa rating. His primary evidence in support is the clause stating "[i]t is anticipated" that the bond rating would be obtained. Berens also cites his testimony that he was unable to obtain the desired rating for RSSI, thus a loan under Transaction B could not be obtained. Finally, he points to testimony of Zuckerman and others acknowledging the importance of getting a good bond rating in order to get a lower-interest rate loan from an outside lender.[3]

We disagree with Berens' position. First, the weak language that a certain bond rating was "anticipated" does not conclusively establish that obtaining the rating was a condition precedent or a dependent covenant for funding the loan through Berens Corp.'s line of credit, as Berens appears to suggest.[4] *See Criswell v. European Crossroads Shopping Ctr., Ltd.,* 792 S.W.2d 945, 948 (Tex. 1990) (stating that in order to make performance specifically conditional, a term such as "if," "provided that," "on condition that," or some similar phrase of conditional language must normally be included). Further, as noted in the factual summary, the February 28 conditional commitment agreement stated that Berens committed to fund the loan "subject only" to certain conditions, which included verification that RSSI reached a certain level of earnings and that the hotel would appraise for at least $22 million. Also, on page one of the term sheet of the February 28 agreement, under the "General Summary of Terms," there

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[3] Both Zuckerman and RSSI's counsel during the loan negotiations, Gary Zwillinger, testified, without objection, they had believed that achieving a certain bond rating was not a condition for obtaining the loan. The trial court implicitly found this testimony true. *See Smith v. Smith*, 22 S.W.3d 140, 149 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding it is presumed that all fact findings needed to support the judgment were made by the trial judge in addition to those made in explicit findings).

[4] Indeed, in the testimony Berens points out to the court, Berens only commented about the importance of the bond rating in reference to obtaining a loan through outside lenders. He did not testify how it would have any bearing on the loan Berens Corp. promised to make out of its line of credit. In that connection, since Berens Corp.'s commitment to loan money was unequivocal, the court could have believed that the parties intended the "anticipated" bond rating language applied only to what they anticipated would be needed to get a loan at a favorable rate from outside lenders.

is a section containing explicit "conditions." Similarly, these included requirements such as RSSI providing audited financial statements and obtaining an adequate appraisal on the hotel. Nowhere in these conditions is the requirement that any type of bond rating be obtained.[5] Finally, it is not even clear whose responsibility it was to apply for the bond rating.

On the other hand, assuming RSSI could not get a desirable bond rating to attract outside lenders for the Transaction B loan, there is still ample evidence supporting the court's findings of fact. The findings include that: (1) Berens Corp. was contractually obligated to loan RSSI the money itself; (2) the lack of a bond rating for RSSI was not an event or a condition excusing performance by Berens Corp. under the commitment agreement; and (3) the lack of a bond rating did not prevent Berens Corp. from performing its contractual obligation to fund the agreed-upon loan.[6] There is evidence in the record that, based on its contractual and oral representations, Berens Corp. had a two-fold obligation to RSSI: (1) it would get a loan from an outside lender, or (2) if it could not, then it would loan RSSI the money via its own line of credit. When Berens Corp. "represent[ed]" and "warrant[ed]" it would make the loan, it did not limit RSSI to which of the two types of loan it would make from its line of credit. With evidence of Berens Corp. having bound itself in this manner, the court did not err in concluding it was of no consequence what bond rating RSSI would have achieved (at least as far as RSSI's relationship with Berens was concerned). Thus, the evidence supported the court's implied finding that Berens Corp. represented it would make the loan under Transaction B, regardless of RSSI's bond rating. *See Smith*, 22 S.W.3d at 149. We therefore find there was legally sufficient evidence supporting the court's damage award because Transaction B provided a

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[5] We also note that RSSI pled that it performed all conditions precedent necessary to maintain its claim were performed or had occurred. Berens failed to deny any conditions precedent were not fulfilled; therefore, RSSI was not required to prove the fulfillment of any conditions precedent. TEX. R. CIV. P. 54.

[6] It is noteworthy that Berens did not specifically challenge these critical factual findings. Because of this, the issue is arguably conclusively determined in RSSI's favor. *See Mort Keshin & Co. v. Houston Chronicle Pub. Co.*, 992 S.W.2d 642, 645 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (holding that if the trial court makes findings of fact, they are binding unless challenged on appeal).

proper basis for the court to determine the benefit of the bargain.

*Factual Sufficiency*

In a factual sufficiency challenge to a damage award, we examine all the evidence in the record to determine whether sufficient evidence supports the damage award, remitting only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. *Maritime Overseas Corp. v. Ellis,* 971 S.W.2d 402, 406-07 (Tex. 1998) (citing *Pope v. Moore,* 711 S.W.2d 622, 624 (Tex. 1986)). In addition to the evidence on damages presented by RSSI, Berens offered the testimony of Dr. Kenneth Lehrer, a professor of finance. Lehrer testified that RSSI's damages were, if anything, no more than $109,333. However, Lehrer's damage model was based upon an assumption that RSSI would not qualify for the loan in Transaction B because it could not get a particular bond rating. As we have held, Berens Corp. was bound to make the loan in Transaction B regardless of RSSI's ability to obtain the BBB/Baa bond rating, thus the trial court correctly accorded little or no weight to Lehrer's testimony. Therefore, taking into account all evidence in the record on damages, we find that the trial court's damage award based on benefit of the bargain was not so against the great weight and preponderance of the evidence as to be manifestly unjust. We overrule appellants' final issue.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed May 17, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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