

Affirmed as Modified and Opinion filed October 12, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00931-CV

WILLIAM F. O'ROURKE, Appellant

V.

WHISPERING WINDS APARTMENTS, Appellee

**On Appeal from the County Court at Law No. 3
Brazoria County, Texas
Trial Court Cause No. 24,277B**

OPINION

The dispositive issues of the this case turn on the lack of the trial court's findings of fact and conclusions of law and the lack of evidence to support a judgment for attorney's fees. William F. O'Rourke appeals an adverse judgment in county-court-at-law in favor of his former landlord, Whispering Winds Apartments. We are not favored with a brief from the latter, appellee. Although the trial court was requested to make findings of fact and conclusions of law and appellant filed notice of past-due findings, none were forthcoming. Therefore, because there is no finding or evidence to support the complained of judgment for attorneys fees, we modify the judgment to reverse the portion of the judgment awarding attorney's fees in the amount of \$750.00. As so modified, we affirm.

Appellant was a tenant for over four years at Whispering Winds. In February of 1998, the apartment complex sent appellant a notice of intent to increase rents. Appellant testified he did not receive the notice and consequently continued to pay the older rates. Appellee refused the tender of rents and evicted appellant through justice court, even though appellant later tendered the new rental amounts without late fees. On appeal from justice court, the county court entered judgment in favor of appellee for rents, awarded \$750 attorney's fees, but did not award late fees to appellee.

Appellant timely filed a motion for new trial, a request for findings of fact and conclusions of law on May 24, 1999, as well as a notice of past-due findings on June 21, 1999. Neither findings of fact, nor conclusions of law were filed according to appellant and the record before us.

Appellant does not complain of the rents award found in the judgment, only the award of attorney's fees. He also notes the trial courts failure to make appropriate findings. When findings of fact and conclusions of law are properly requested and the trial court fails to prepare such findings, harm is presumed. *See Randall v. Jennings*, 788 S.W.2d. 931, 932. (Tex. App.–Houston [14th Dist.] 1990, no writ). While the presumption of harm may be overcome, when there are two or more possible grounds for recovery or defense, or there are disputed facts to be resolved, the harm inference cannot be defeated. *See Joseph v. Joseph*, 731 S.W.2d. 597, 598 (Tex. App.–Houston [14th Dist.] 1987, no writ). Here appellant presented evidence he was not in breach of the landlord-tenant contract, yet the trial court awarded attorney fees and at the same time refused to award late fees, partially corroborating appellant's contention. Accordingly, not only is harm presumed, the harm is facially apparent from the record.

We also view appellant's issues to include legal and factually sufficiency challenges to the judgment. Although appellant properly requested findings from the fact finder, none were forthcoming. Findings were necessary both to support the judgment and necessary to understanding the trial court's judgment. Accordingly we cannot presume that there are facts, or that the court found facts necessary to support and uphold the judgment below. *See National Commerce Bank v. Stiehl*, 866 S.W.2d 706, 707 (Tex. App.–Houston [1st Dist.] 1993, no writ). To the contrary, the trial judge stated in open court that the presumption under the law that appellant received the notice of increase rent was rebutted. The trial court then denied appellee's requested relief of late fees. The undisputed evidence showed the rents had been

tendered by appellant and the only true contest was the late fees. The lease contract allows attorney's fees only to one who "prevails." There being no evidence (or finding) that appellee prevailed, it is not entitled to attorney's fees. *See American Apparel Products, Inc., v. Brabs, Inc.*, 880 S.W.2d 267, 279 (Tex. App.–Houston. [14th Dist.] 1994, no writ).

We modify the judgment to reverse the portion of the judgment awarding attorney's fees in the amount of \$750.00. As so modified, we affirm the judgment of the trial court .

PER CURIAM

Judgment rendered and Opinion filed October 12, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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