

Affirmed and Memorandum Opinion filed May 29, 2020.



In The

Fourteenth Court of Appeals

NO. 14-17-00157-CV

JOSE DOMINGUEZ, Appellant

V.

AMERICAN EXPRESS BANK, FSB, Appellee

**On Appeal from the 434th Judicial District Court
Fort Bend County, Texas
Trial Court Cause No. 12-DCV-202842**

MEMORANDUM OPINION

Appellant/defendant Jose Dominguez appeals a final judgment in favor of appellee/plaintiff American Express Bank, FSB on its breach-of-contract claims based on Dominguez's failure to comply with agreements pertaining to credit cards that Dominguez obtained for his two businesses. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

American Express sued Dominguez individually, asserting breach-of-contract claims against him based on his alleged breach of two Cardmember

Agreements Dominguez allegedly entered into pertaining to credit cards Dominguez obtained for two of his businesses. The case proceeded to a bench trial, after which the trial court rendered judgment in favor of Dominguez. After the trial court granted American Express's timely motion for new trial and vacated the judgment, the case proceeded to a jury trial. The jury found in favor of American Express on its breach-of-contract claims. The trial court rendered judgment on the jury verdict ordering that American Express recover \$87,512.10, plus costs of court against Dominguez.

II. ISSUES AND ANALYSIS

A. Subject-Matter Jurisdiction

On appeal, Dominguez, representing himself, asserts under his first issue that the trial court lacked subject-matter jurisdiction over this case because (1) a federal district court would have diversity jurisdiction over the claims by American Express (a Utah citizen) against Dominguez (a Texas citizen) under title 28, section 1332(a) of the United States Code; and (2) one of Dominguez's lawyers in the trial court and American Express's lawyer "appear to have acted in bad faith" to prevent Dominguez from timely removing this case to federal court. *See* 28 U.S.C. §§ 1332(a), 1446(c). Under his second issue, Dominguez claims American Express filed a frivolous response in this court to a motion in which Dominguez challenged the trial court's subject-matter jurisdiction, and Dominguez asserts that this court should reconsider its denial of this motion.

We presume, without deciding and for argument's sake, that a federal district court would have diversity jurisdiction over this case and that the lawyers for both parties acted in bad faith to prevent Dominguez from trying to remove this case to federal court. Dominguez has cited no statute giving federal courts exclusive jurisdiction over the subject matter of this case. In this context, the

ability of federal courts to exercise diversity jurisdiction over this case or any bad-faith action by these lawyers would not show that the trial court lacked subject-matter jurisdiction over this case. *See* Tex. Const. art. V, §8; Tex. Gov't Code Ann. §24.007. Dominguez does not claim that he ever attempted to remove this case to federal court. If, as Dominguez asserts, a federal district court would have jurisdiction over this case solely based on diversity jurisdiction, then regardless of any bad faith by the lawyers, Dominguez would not have been able to remove this case to federal court because Dominguez is citizen of the state in which American Express brought this suit. *See* 28 U.S.C. § 1441(b)(2). We conclude that the trial court had subject-matter jurisdiction, and we overrule Dominguez's first and second issues.

B. Third Issue

Under the third issue, Dominguez asserts that by not suing his two companies American Express “effectively held [Dominguez] as the surety of the businesses” and thus under Texas Rule of Civil Procedure 31, American Express may not sue Dominguez (the surety) unless American Express joins the principals (the two companies) in the suit or already had a judgment against the principals before suing Dominguez. *See* Tex. R. Civ. P. 31 (stating that “[n]o surety shall be sued unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in cases otherwise provided for in the law and these rules”). Under the unambiguous language of each of the Cardmember Agreements admitted into evidence at trial, “You” is defined to mean both Dominguez and his respective company, and in each agreement Dominguez and the company “agree[d], jointly and severally, to be bound by the terms of this Agreement.” In this context, presuming, without deciding, that Dominguez served as a surety for each company under the contract, Dominguez bore the burden of

pleading his rights as a surety under Rule 31 and of bringing the companies into this case as parties. *See Reed v. Buck*, 370 S.W.2d 867, 872 (Tex. 1963); *Smith v. West Texas Hosp., Inc.*, 487 S.W.2d 143, 145 (Tex. Civ. App.—Amarillo 1972, no writ). Dominguez did not do so.

Dominguez also asserts that one business was a corporation that he owned, and the other business was a limited liability company in which Dominguez was the sole member. Dominguez appears to assert that the trial court ignored the separate existence of each entity from him individually and improperly held Dominguez liable for the debts of each entity. The pleadings, jury charge, jury verdict, and judgment reflect that the trial court held Dominguez liable for his own breach of two contracts to which he was a party. The record does not reflect that the trial court held him liable for a corporate entity's debt because Dominguez was the owner or member of that entity.

Under his third issue, Dominguez appears to assert that (1) the trial court erred in granting American Express's motion for new trial; (2) American Express improperly based its jury argument on inapplicable laws; (3) American Express misled the jury during opening statement; and (4) American Express did not offer into evidence any credit reports on Dominguez. Dominguez does not discuss the standard of review for any of these challenges, nor does Dominguez discuss the grounds American Express asserted in its motion for new trial. Dominguez has not provided any argument, analysis, or citations to legal authority in support of any of these four assertions. Even construing Dominguez's opening brief liberally, we cannot conclude that Dominguez adequately briefed any of these points and so we find briefing waiver. *See Tex. R. App. P. 38.1(i); Marathon Petroleum Co. v. Cherry Moving Co.*, 550 S.W.3d 791, 798 (Tex. App.—Houston [14th Dist.] 2018, no pet.). We overrule the third issue.

C. Failure to Prove Dominguez’s Credit-Card Applications

Under his fourth and fifth issues, Dominguez appears to assert that the trial evidence is legally insufficient to support the jury’s verdict because American Express did not submit any evidence of either of Dominguez’s original, signed credit-card applications (the “Applications”) or the actual document containing the contract terms that Dominguez received when he obtained each credit card (the “Original Documents”). Each of the Cardmember Agreements contains a provision stating that “[w]hen you . . . use the Account (or sign or keep a card), you . . . agree to the terms of the [Cardmember Agreement].” American Express relied on Dominguez’s use of each credit-card account to prove Dominguez’s agreement to the terms of each Cardmember Agreement. *See Arshad v. Am. Express Bank, FSB*, 580 S.W.3d 798, 804–05 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *Ghia v. Am. Express Travel Related Services*, No. 14-06-00653-CV, 2007 WL 2990295, at *2–3 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, no pet.) (mem. op.). Proof of the Applications or the Original Documents is not an essential element of American Express’s breach-of-contract claim, and American Express had no obligation to submit proof of the Applications or the Original Documents to prove its case. *See Arshad*, 580 S.W.3d at 804–05; *Ghia*, 2007 WL 2990295, at *2–3. The trial evidence is not legally insufficient due to a lack of proof of the Applications or the Original Documents. *See Arshad*, 580 S.W.3d at 804–05; *Ghia*, 2007 WL 2990295, at *2–3.

In the *Barajas* case on which Dominguez relies, the plaintiff did not submit any evidence that established the terms to which the parties agreed. *See Barajas v. Harvest Credit Management, VI-B, LLC*, No. 14-07—00048-CV, 2008 WL 4308334, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 2008, no pet.) (mem. op.). In today’s case, American Express did so. In *Barajas*, an appeal based on the

granting of a motion for summary judgment, the plaintiff submitted no summary-judgment evidence about any transactions or cash advances associated with the credit-card account or any statements issued to the defendant. *See id.* The plaintiff's summary-judgment motion and evidence also presented conflicting statements regarding the basis for the alleged indebtedness. *See id.* The *Barajas* case is not on point.

Dominguez also makes several statements in which he appears to challenge the propriety of the jury charge. At the charge conference, Dominguez stated that he had no objections to the jury charge, and Dominguez did not preserve error as to any complaints as to the wording of the charge. *See Shell Oil Co. v. Chapman*, 682 S.W.2d 257, 259 (Tex. 1984). When a party fails to preserve this type of error in the trial court, the party waives that point. *See id.*

Dominguez further asserts that American Express's arguments and evidence at trial were inconsistent with its Original Petition and First Amended Original Petition. American Express went to trial on its Second Amended Original Petition, which superseded and supplanted all of American Express's prior pleadings. *See Amerigroup Texas, Inc. v. True View Surgery Ctr., L.P.*, 490 S.W.3d 562, 570 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Dominguez has not shown that the law required American Express's arguments and evidence at trial to be consistent with prior pleadings that had been superseded before trial.

Dominguez also appears to complain that American Express did not sue either of his companies and that the evidence is insufficient to hold him liable in his individual capacity. Dominguez has not provided any argument or analysis in support of either of these points. Even construing Dominguez's opening brief liberally, we cannot conclude that he adequately briefed either proposition, and so we find briefing waiver. *See Tex. R. App. P. 38.1(i); Marathon Petroleum Co.*,

550 S.W.3d at 798. We overrule the fourth and fifth issues.

D. Sixth Issue

Under his sixth issue Dominguez asserts that the trial court erred as a matter of law in holding him liable for the debts of his two companies, which are separate legal entities. As discussed above, the trial court held Dominguez liable for his own breach of two contracts to which he was a party, not for a breach by either company. Under the sixth issue Dominguez also asserts that (1) although the agreements had Utah choice-of-law provisions, American Express did not plead or prove Utah law; (2) American Express “hoodwinked” the jury into thinking that Dominguez was liable for the debts of his companies based on the Utah law governing consumer credit cards; (3) the monthly credit-card statements American Express submitted fail to comply with the Truth in Lending Act, such as the interest disclosures; and (4) the statute of frauds bars enforcement of the contracts on which American Express recovered judgment. Dominguez has not provided argument or analysis in support of any of these assertions, and even after giving Dominguez’s opening brief a liberal construction, we cannot conclude that he adequately briefed any of these points. So, we find briefing waiver. *See* Tex. R. App. P. 38.1(i); *Marathon Petroleum*, 550 S.W.3d at 798. We overrule the sixth issue.

E. Preservation of Error as to the Seventh and Eighth Issues

Under his seventh issue, Dominguez asserts that the venire members were sworn on January 31, 2017, and told to return the following day. Dominguez complains that the trial court failed to give an instruction under Texas Rule of Civil Procedure 226a to the venire members before dismissing them on this date. According to Dominguez, the trial court gave the instruction to the venire members on the following day, but the trial court should have given the instruction the day

before. In his eighth issue, appellant complains that American Express's use of its peremptory challenges during jury selection violated Dominguez's constitutional rights. The record shows that Dominguez waived these complaints by failing to preserve error in the trial court as to either complaint. *See In re D.G.*, No. 06-15-00025-CV, 2015 WL 6520251, at *10–11 (Tex. App.—Texarkana Oct. 28, 2015, no pet.) (waiver of a Rule 226a complaint by failing to preserve error in the trial court) (mem. op.); *Pierson v. Noon*, 814 S.W.2d 506, 507–08 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (waiver of *Batson* complaint by failure to timely assert it in the trial court); *see also Williams v. State*, 301 S.W.3d 675, 687–88 (Tex. Crim. App. 2009) (waiver of *Batson* complaint by failure to obtain ruling on *Batson* objection). Dominguez suggests that the trial court did not allow him to preserve error as to any challenge he had to American Express's use of its peremptory challenges, but the record does not support this proposition. We overrule the seventh and eighth issues.

F. Remaining Issues

Under his ninth issue, Dominguez states in a conclusory manner that the record contains no evidence of his personal liability. Though he cites one case, Dominguez does not discuss the trial evidence or provide any argument or analysis in support of this proposition. Dominguez also lists issues ten through twenty-seven. In his opening brief, Dominguez does not provide any argument, analysis, or citations to the record or legal authority in support of these issues. Even construing Dominguez's opening brief liberally, we cannot conclude that Dominguez adequately briefed the ninth through twenty-seventh issues. *See Tex. R. App. P. 38.1(i); Marathon Petroleum Co.*, 550 S.W.3d at 798; *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 337 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Based on this briefing waiver, we overrule each of these issues. *See*

Marathon Petroleum Co., 550 S.W.3d at 798; *San Saba Energy, L.P.*, 171 S.W.3d at 337.

Having overruled all of Dominguez’s issues, we affirm the trial court’s judgment.

/s/ Kem Thompson Frost

Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant.