Affirmed and Memorandum Opinion filed June 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00519-CV

MOH MOHEB AND LLOYD AUTO, Appellants

V.

MATT DIZAJIYAN, HARRY MOMENI, AND PRUDENTIAL AUTO, LLC, Appellees

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2015-48741

MEMORANDUM OPINION

Appellant Moh Moheb appeals the trial court's take nothing judgment on appellant's claims asserted against appellee Matt Dizajiyan.[1] In issues one through four, appellant contests the legal and factual sufficiency of the evidence on

[1] Both Moheb and Lloyd Auto filed a notice of appeal from the trial court's judgment. The brief on appeal only raises issues on behalf of Moheb.

appellant's claims for breach of contract and breach of fiduciary duty.[2] In issue five, appellant challenges the trial court's award of damages against him on appellee Harry Momeni's counterclaim for breach of contract. We affirm.

I. LEGAL AND FACTUAL SUFFICIENCY

In issues one through four, appellant contends that the evidence presented conclusively established his breach of contract and breach of fiduciary duty claims against Dizajiyan. Appellant also asserts that the trial court's findings on these claims are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

A. Applicable Law

In a bench trial in which the trial court does not file findings of fact or conclusions of law, we imply all findings and conclusions necessary to support the judgment. *AMPD Holdings, Inc. v. Praesidium Med. Prof'l Liab. Ins. Co.*, 555 S.W.3d 697, 706 (Tex. App.—Houston [1st Dist.] 2018, no pet.). Implied findings of fact have the same weight as a jury's verdict. *Id*. The judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence. *Wood v. Kennedy*, 473 S.W.3d 329, 334 (Tex. App.—Houston [14th Dist.] 2014, no pet.). When the appellate record includes the reporter and clerk's records, implied findings are not conclusive and may be challenged for legal and factual sufficiency. *Id*.

We review the trial court's decision for legal sufficiency of the evidence by the same standards applied in reviewing the evidence supporting a jury's finding. *Id*. A party attacking legal sufficiency relative to an adverse finding on which it had the burden of proof must demonstrate that the

[2] Appellant also asserted claims against appellees Harry Momeni and Prudential Auto, LLC but do not appeal the trial court's judgment on those claims.

evidence conclusively establishes all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). We review the entire record to determine if the contrary proposition is established as a matter of law only if there is no evidence to support the judgment. *See id.* Anything more than a scintilla of evidence is legally sufficient to support the judgment. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). The final test for legal sufficiency is whether the evidence would enable reasonable and fair-minded people to reach the verdict under review. *Id.* at 827. The factfinder is the sole judge of witness credibility and the weight to give witnesses' testimony. *Id.* at 819.

In reviewing factual sufficiency, we examine the entire record, considering both the evidence in favor of and contrary to the challenged findings. *2900 Smith, Ltd. v. Constellation NewEnergy, Inc.*, 301 S.W.3d 741, 746 (Tex. App.—Houston [14th Dist.] 2009, no pet.). When a party attacks the factual sufficiency of an adverse finding on which he bore the burden of proof, he must establish that the finding is against the great weight and preponderance of the evidence. *Burton v. Prince*, 577 S.W.3d 280, 285 (Tex. App.—Houston [14th Dist.] 2019, no pet.). We may not pass judgment upon the witnesses' credibility or substitute our judgment for that of the factfinder, even if the evidence would support a different result. *2900 Smith*, 301 S.W.3d at 746. If we determine the evidence is factually insufficient, we must detail the evidence relevant to the issue and state in what regard the contrary evidence greatly outweighs the evidence supporting the trial court's judgment; we need not do so when affirming the judgment. *Id.*

The elements of a breach of contract claim are: (1) a valid contract existed between the plaintiff and the defendant; (2) the plaintiff tendered performance or was excused from doing so; (3) the defendant breached the terms of the contract; and (4) the plaintiff sustained damages as a result of the defendant's breach.

Mission Grove, L.P. v. Hall, 503 S.W.3d 546, 551 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

The elements of a claim for breach of fiduciary duty are (1) a fiduciary relationship existed between the plaintiff and the defendant, (2) the defendant breached its fiduciary duty, and (3) the breach resulted in injury to the plaintiff or benefit to the defendant. *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 650 (Tex. App.—Houston [14th Dist.] 2013, no pet.). Fiduciary duties arise as a matter of law in certain formal relationships, including partnerships. *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998). Where a fiduciary relationship exists, the burden is upon the fiduciary to show he acted fairly and informed the beneficiary of all material facts relating to the challenged transaction. *Brazosport Bank of Tex. v. Oak Park Townhouses*, 889 S.W.2d 676, 684 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

B. Background

The parties agree that they formed a partnership to own and operate Lloyd Auto. Dizajiyan testified that the partnership was fifty-fifty after the first year of the partnership but there was no agreement to contribute equal funds. The partners put in money at different times over the years. Dizajiyan stated the partners agreed that Dizajiyan could take a monthly salary of $2,500 while he was running the business. This amount was approximately the same amount that Dizajiyan was earning while he was employed by appellant's gate business. The agreement was to split the profits from the business equally at the end of each year. Dizajiyan could not always take his guaranteed payments because the company did not always have the money to pay him. He indicated that the company's accountant classified the salary as a "guaranteed payment" for tax purposes but that appellant

was aware and agreed to him taking a salary. Appellant's expert testified that in a partnership a salary to a partner is referred to as a guaranteed payment.

Dizajiyan testified that he signed all of Lloyd Auto's tax returns but both partners dealt with the company's accountant. He stated that appellant also used the same accountant for his gate business. Dizajiyan provided the accountant with the bank records and check stubs from the Lloyd Auto bank account. From that, the accountant would prepare and file the tax returns.

Dizajiyan testified that he and appellant discussed everything that was going on with the company and that appellant was "aware of it all." There was no written agreement that Dizajiyan could withdraw capital, but he told appellant that he was doing so. Dizajiyan stated that he withdrew capital for the purpose of buying real estate, which was a side business between appellant and Dizajiyan. For most of the partnership, Dizajiyan and appellant shared an office and were about five feet away from one another every day. Dizajiyan also testified that appellant was returned at least some of his capital. The 2012 tax return reflected a payment to appellant in the amount of $28,500. The December 31, 2013 balance sheet for Lloyd Auto reflected assets worth more than $126,000. Dizajiyan testified that these assets still exist.

In 2013, Lloyd Auto moved from the shared space with appellant's gate business to Prudential Auto LLC's car lot. Dizajiyan stated that appellant was excited and encouraged the move because it would be good for the business. Dizajiyan complained to appellant that as part of the move, Lloyd Auto now had to pay more overhead costs, such as rent, electricity, and a mechanic which the business was not previously paying.

Dizajiyan and Momeni testified that in 2014, appellant and Momeni met at a coffee shop to discuss Lloyd Auto. Appellant explained to Momeni that he had

invested and lost a lot of money in Lloyd Auto and he was trying to get some of it back. Momeni suggested that appellant could come and take some of the Lloyd Auto cars for himself. After the meeting, appellant came to the lot and took a Mercedes, a Honda Civic, and a minivan. Dizajiyan testified that these transactions were not reflected on the tax returns, but the tax returns introduced at trial only went through 2013.

C. Analysis

Appellant argues that he established his claims for breach of contract and breach of fiduciary duty as a matter of law. Appellant's main contention is that appellant's expert witness is the only evidence of damages, and his testimony was clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been controverted. Appellant argues that the expert witness's testimony established that Dizajiyan took appellant's $118,500.00 portion of the partnership assets. Appellant contends that the only possible testimony that the trial court could have relied upon to refute the expert's testimony was that of Dizajiyan when he testified that the tax returns were not accurate. Appellant argues that Dizajiyan's testimony regarding the tax returns being inaccurate is incompetent evidence as a matter of law and Dizajiyan should be judicially estopped from taking an inconsistent position now. Because appellant established that there was a partnership agreement, that appellant performed by contributing capital, Dizajiyan breached by not returning appellant's proportionate share of the partnership assets after expenses, and the amount of appellant's proportionate share is appellant's measure of damages, appellant contends this Court should reverse and render judgment in his favor.

It is undisputed that appellant and Dizajiyan entered into a partnership to form Lloyd Auto. The partners also agreed that they were to share profits and

losses in equal shares. There is no written agreement and the partners otherwise dispute the partnership terms.

Dizajiyan testified that he and appellant agreed that Dizajiyan could take a salary of $2,500 a month. Dizajiyan did not always take his payments each month due to cash flow issues. Dizajiyan also attested that he and appellant discussed Dizajiyan's withdrawal of capital from the partnership and that appellant was aware that he was doing so. Each withdrawal that Dizajiyan made was reflected on the partnership tax returns. Appellant and Dizajiyan shared an office space between 2008 and 2013. They sat in the same office daily and discussed all the business decisions that Dizajiyan was making.

There is some evidence to support the trial court's judgment of no liability on appellant's breach of contract and breach of fiduciary duty claims. From this evidence, the trial court could have concluded that appellant was fully informed of all material facts and decisions of the company, including that Dizajiyan would withdraw capital, and agreed to them. None of this testimony contradicts the tax returns or the testimony of appellant's expert witness.[3] From this record, we cannot say that appellant demonstrated that there is no evidence to support the adverse findings on his breach of contract and breach of fiduciary duty claims.

Having also considered the entire record for evidence in favor of and contrary to the challenged findings, we conclude that the findings against appellant are not against the great weight and preponderance of the evidence. *See Burton*, 577 S.W.3d at 285. The evidence of the agreements between the partners consisted entirely of the conflicting testimony of appellant and Dizajiyan. Appellant testified that he did not know of or agree to the withdrawals. Dizajiyan

[3] We do not need to address the propriety of the trial court's reliance on Dizajiyan's testimony regarding the tax returns because our conclusion is not based on any such testimony.

testified that there were agreements and appellant was fully informed. We may not pass judgment upon the witnesses' credibility or substitute our judgment for that of the factfinder, even if the evidence would support a different result. *See 2900 Smith*, 301 S.W.3d at 746.

We overrule appellant's issues one through four.

II. TRIAL BY CONSENT

In his next issue, appellant contends that the trial court erred by granting a judgment for affirmative relief in favor of appellees Momeni and Prudential Auto, LLC on their breach of lease counterclaim because they did not have any pleading on file asserting an affirmative claim and the issue was not tried by consent.

A. Applicable Law

Under Rule 63 of the Texas Rules of Civil Procedure:

> Parties may amend their pleadings . . . provided, that any pleadings . . . offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave . . . is obtained, which leave shall be granted . . . unless there is a showing that such filing will operate as a surprise to the opposite party.

Tex. R. Civ. P. 63. A pleading amendment sought after such time as may be ordered under Rule 166 are to be granted unless there has been a showing of surprise by the opposite party. *See Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988). In the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading. *Id.* (leave of court was presumed where the record did not reflect whether leave was requested, granted, or refused, record did not reflect any motion to strike the

amended petition, judgment stated that all pleadings on file were considered, and no prejudice shown in the record).

"A trial court cannot grant relief to a party in the absence of pleadings supporting that relief, unless the issue has been tried by consent." *In re Park Mem'l Condo. Ass'n., Inc.*, 322 S.W.3d 447, 450–51 (Tex. App.—Houston [14th Dist.] 2016, not pet.). Unpled claims and defenses that are tried by express or implied consent are treated as if they had been raised in the pleadings. *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 480 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). An issue not pled may be deemed tried by consent if evidence on the issue was developed under circumstances indicating that the parties understood the issue was part of the case and the other party failed to properly complain." *Id*. In determining whether the issue was tried by consent, we examine the record for evidence of trial of the issue, not for evidence of the issue. *Id*.

B. Background

Appellant states in his brief that the trial court's docket control order set a deadline of December 16, 2016, to amend pleadings. Appellant further indicates that Momeni and Prudential filed a motion for leave to file a counterclaim but that the trial court never granted the motion. Neither the docket control order nor the motion for leave are part of the record on appeal. However, we will accept these facts as true because they have not been contradicted. *See* Tex. R. App. P. 38.1(g).

In appellant's opening statement, he stated that "briefly with regard to the counterclaim filed by defendant Momeni." During trial, appellant called Momeni as part of his case in chief and asked the following:

> [Appellant's trial counsel]. And -- okay. Now, in this lawsuit, you have sued Mr. Moheb for rent under a lease agreement signed between you and your brother-in-law, correct?
>
> [Momeni]. Yes.
>
> . . .
>
> Q. In this lawsuit you sued for about $25,000 in -- in that regard?
>
> A. If that's what it says on that paper.

In closing argument, appellant made the following argument: "But because [Momeni] was sued, he apparently changes his mind and decide (sic), yes, now I'm going to sue [appellant] on a lease [Dizajiyan] signed. And clearly in that case . . . the Counter-Plaintiff should take nothing."

The final judgment indicates that the trial court found Momeni was entitled to the money damages against appellant on his "counterclaim for unpaid rent." The record does not reflect that appellant filed a motion to strike, a request for findings of fact or conclusions of law, or a motion for new trial.

C. Analysis

Appellant asserts that Momeni did not have an affirmative claim for relief on file and, therefore, cannot be awarded damages. It is unclear from the record on appeal when Momeni filed the motion for leave to file his counterclaim, but under Rule 63, absent a sufficient showing of surprise by appellant, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading. *See Goswami*, 751 S.W.2d at 490. The final judgment reflects that the trial court awarded Momeni damages on his "counterclaim" and awarded him money damages. At the trial court level, appellant has failed to show surprise due to the amendment, filed a motion to strike the pleading, or otherwise show prejudice. *See id.*

Even if the issue was not properly pled, the record supports trial by consent on Momeni's counterclaim. Appellant's trial counsel clearly acknowledged in his opening statement the "counterclaim" on file with the court requesting affirmative relief for breach of the lease agreement. In his closing, appellant noted that the "Counter-Plaintiff" should take nothing on his claims. At trial, while questioning Momeni, appellant noted that Momeni had "sued" appellant under the lease agreement for $25,000. *See Anglo-Dutch Petroleum Int'l, Inc.*, 522 S.W.3d at 481 (where party affirmatively requested that the trial court resolve how much money it was to pay to the opposing party despite opposing party's lack of pleading for affirmative relief, issue was tried by consent). These remarks and the circumstances indicate that the parties understood the issue was part of the case and the issue was tried. There is also no indication that appellant properly complained to the trial court about a lack of pleading of Momeni's counterclaim. *See id*.

We overrule appellant's fifth issue.

III. CONCLUSION

Having overruled all of appellant's issues on appeal, we affirm the judgment of the trial court.

/s/ Ken Wise
Justice

Panel consists of Justices Wise, Jewell, and Hassan.