COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CASA PALMIRA, LP,	§	
		No. 08-18-00009-CV
Appellant,	§	
		Appeal from the
v.	§	
		171st District Court
TAYLOR CHILD CARE, LP, a/k/a TAYLOR CHILD CARE, LTD., & MICHAEL W. HICKS,	§	of El Paso County, Texas
		(TC# 2015DCV1729)
Appellees.	§	

O P I N I O N

Appellant, Casa Palmira, LP ("Casa"), sued Appellees, Taylor Child Care, L.P. a/k/a Taylor Child Care Limited ("TCC") and Michael W. Hicks, ("Hicks") for breach of contract, quantum meruit, and unjust enrichment, in relation to a commercial lease. Casa sought monetary damages in the amount of $159,000 for unpaid rental fees plus attorney's fees in the amount of $195,227.70, expenses and costs. After a bench trial, the trial court determined that Casa prevailed only with respect to its unjust enrichment claim, for which attorney's fees are unavailable under Texas law. The trial court entered judgment awarding Casa actual damages in the amount of $16,413.46 plus interest, and denied relief as to the rest of Casa's claims.

In five issues, Casa contends (1) the trial court erred when it denied Casa's Fourth Motion

for Traditional Partial Summary Judgment and Motion for No-Evidence Summary Judgment; there was legally and factually insufficient evidence to support the trial court's determinations that (2) Casa fraudulently induced Appellees into the lease, and (3) Appellees did not ratify the lease; the trial court erred when it concluded (4) Casa did not establish its breach-of-contract claim; and (5) Casa was not entitled to damages or attorney's fees related to the breach-of-contract claim. Finding no error, we affirm.

BACKGROUND

Carlos Eduardo Veytia ("Veytia") is the owner of Vey Finance, LLC ("Vey"), which is a "hard money, high interest, mortgage lender." Beginning in 2003, Vey's business model consists of borrowing money from banks, including Compass Bank, and using that money to make mortgage loans at high interest rates to individual homeowners and businesses. In 2008, during the financial crisis, many of Vey's borrowers defaulted on their loans. As a result, Vey unexpectedly acquired through foreclosure several real estate properties. For liability and operational purposes and because Vey was a lender not an investment company, Veytia created Casa Palmira, LP ("Casa") in September 2009 to "absorb the real estate" and manage the properties. Veytia was Casa's limited partner and President. Other than the partners, Casa had no employees. One of the properties that Vey eventually acquired in early 2009, and that Casa eventually managed, was a property located at 4841 Salem in El Paso, Texas ("the property") where Jaime Sandoval was operating a children's daycare center.

Between 2009-2011, Veytia was experiencing financial difficulties of his own. According to Veytia, Compass Bank sued him and threatened to have him and his wife arrested after Vey's main contact at the bank, David Peterson, was caught embezzling funds. Moreover, the litigation

had caused "problems with [Vey's] bank relationships." Consequently, Veytia was experiencing difficulty keeping his business "a float." Eventually, Vey filed for bankruptcy protection sometime in 2010, and Casa filed for bankruptcy in 2011. Before the bankruptcies, but while the Compass Bank litigation was pending, Veytia contacted David Bingham, a long-time friend and real estate broker, to see if Bingham could "hunt down a tenant" for the Salem property.

Bingham agreed to serve as the real estate broker, and Veytia authorized Bingham to negotiate the terms of a lease on behalf of both Vey initially, and then Casa later. Bingham reached out to Mike Hicks, who Bingham believed would be a "good fit" since Bingham was aware Hicks had previously operated a daycare center that Bingham helped Hicks build. After making contact with Hicks, Bingham discovered that Sandoval was Hicks' brother-in-law and that Hicks was aware of the daycare center located on the Salem property. According to Hicks, Bingham first approached him with the lease opportunity in early 2009 by saying: "I got this deal for you. It is a great deal. Turnkey operation. It's goes [with] equipment. It's got kids, over a hundred kids . . . in northeast El Paso."

On February 27, 2009, Bingham presented Hicks a Standard Lease. In that unsigned lease, the landlord is originally identified as "Vey Finance LLC" which is typed into the lease but then crossed-out, and in hand-writing, "Casa Palmira" is substituted. There was no testimony indicating when the hand-writing was made. Hicks did not sign that lease, in part because he was reluctant to engage in "a family battle with [his] brother-in-law." So, instead, Hicks told Bingham "when all the smoke is cleared from whatever [they were] doing with [Sandoval]" Hicks would be interested in discussing a deal.

In April 2009, Bingham contacted Hicks again to say there were others interested in the

property and that if Hicks was interested, he should put down a security deposit. Hicks gave Bingham a $5,000 security deposit on April 29, 2009. Despite the successful foreclosure in early 2009, Sandoval remained on the property and continued to operate the daycare center for the remainder of the year. Veytia initially believed Vey was obligated to honor a pre-existing lease, but when the parties later discovered that the lease was not binding, they entered into a temporary occupancy agreement that was set to expire on December 31, 2009.

In anticipation of Sandoval's ouster in December, Bingham contacted Hicks, but Hicks insisted he needed to see the property first. According to Hicks, it was important that he confirm the accuracy of Bingham's "turnkey" representation and to solidify his understanding of what would be included in the deal because he was aware that starting a new daycare center from scratch was costly.

In late November 2009, to accommodate Hicks' request, Bingham made arrangements to allow Hicks to inspect the property "while the [daycare] operation was still in full swing." Hicks said that he, Bingham, Veytia, and a police officer entered the daycare center after it closed for the evening. At that time, Hicks saw "a complete daycare . . . [with] every amount of equipment that you need for a daycare center," including a fully-equipped commercial kitchen and two "big, beautiful Playscapes and two shade structures." According to Hicks, he was aware that installation of new playscape equipment equal in size would be very expensive. Hicks also believed that the presence of big playscapes is extremely important to the daycare business for several reasons including for the children's development and for attracting new business. While the group was touring the daycare center, Bingham again told Hicks that "everything came with this center" and that liens were attached to the equipment. Satisfied, Hicks began negotiating the lease terms with

Bingham in December 2009.

By this time Casa was managing the property pursuant to the property management agreement between Vey and Casa.[1] So, on December 28, 2009, Hicks and Veytia signed a lease on behalf of TCC and Casa respectively, which contained both standard commercial lease provisions and an attachment labeled "Exhibit B" containing additional terms and conditions that were specifically negotiated between Hicks and Bingham. Paragraphs 3 and 4 in Exhibit B provided:

> 3. Upon gaining possession, [TCC] and [Casa] will inspect the premises and [Casa] agrees to diligently perform all reasonable improvements in order to comply with the state licensing department for Day Care, which will also inspect for compliance issues. [Casa] will repair any HVAC problems and provided it is determined the HVAC units have a remaining economic life of at least five (5) years, [TCC] will assume financial responsibility of these units, subject to [Casa's] obligations as described in the lease.
>
> 4. It is the intent of [Casa] to convey to [TCC] all of its rights in the outside playground equipment, kitchen equipment, tables, chairs and any other business property. If said items are left in the space upon existing occupant's vacating property. In the event, current occupant later makes a claim and is successful in obtaining rights to said equipment, [Casa] will replace missing or damaged items (not including tables or chairs) with items which are reasonably similar and usable as compared to existing equipment currently in the facility. [Casa] will strongly consider assisting [TCC] in the purchase of part of the tables and chairs, depending on price.

The lease term was for 120 months (10 years) and required TCC to pay a monthly base rent of $7,950 for the first year, after which the base rent would increase by 2.5 percent each year.

[1] We note that the property management contract between Vey and Casa is dated December 14, 2006. We also note that the contract references "Exhibit A" which contains a list of properties that were to be managed by Casa, and that the Salem property, which was acquired in 2009 is included last on that list. Finally, we observe that during Veytia's testimony on direct examination, his attorney corrected Veytia's initial testimony that Casa was formed in 2006, by suggesting the correct date of formation was September 2009, to which Veytia agreed under oath. Later in Veytia's testimony, when the management agreement itself is referenced, no explanation was offered to resolve the discrepancy between the date of Casa's formation and the date of the property management contract. We draw no conclusions from this evidence, we only note the discrepancy.

However, Paragraph 5 of Exhibit B, modified the base rent obligation for the first nine months, and instead required TCC to pay 29 percent of its gross income from "tuition, private or state funding," which TCC guaranteed would not be less than $3,000 for the first month, $4,000 for months two through five, and $6,000 for months six through nine. In addition, Paragraph 5 stated that TCC would receive credit for a previous payment of $5,000 pursuant to the following schedule: $1,500 for the first month, $2,500 for the second month, and $2,000 for the third month. Finally, Paragraph 1 of Exhibit B provided that the "actual date of lease commencement will be when [TCC] has possession and opens for business with a childcare license . . . . This lease is contingent upon [TCC] obtaining license to operate by lease commencement."

According to Hicks, at the time the lease was signed, he was not informed of Casa's financial troubles or that there was a possibility that it would be unable to meet its obligations under the lease. He also said if he had known these facts, he would not have entered into the lease. Veytia, on the other hand, claimed he had informed Hicks of Casa's financial situation before the lease was signed. Specifically, Veytia testified that he asked Hicks whether they could "slow it down" so Casa could get into a financial position to make repairs and purchase equipment. Veytia also admitted, however, that the lease did not reflect his desire to "slow down" or make accommodation for Casa's financial circumstances. Bingham testified that he was aware that Casa/Veytia were having financial difficulty, but he could not remember when he found out. Bingham claimed to have disclosed Casa's financial situation to Hicks, but he could not remember specifically what he told him. Bingham remembered Hicks was not "real concerned" as long as they honored their obligations.

During the first week of January 2010, after the lease was signed but before Hicks took

possession of the property, Sandoval returned to the property and removed the existing daycare equipment, including the two playscapes, shade structures, and commercial kitchen equipment. On the day that Sandoval removed the equipment from the property, Hicks notified Veytia, who replied he would "take care of it." Hicks also verbally notified Bingham who responded by saying "don't worry. You're protected by Exhibit B." Neither Veytia nor Hicks took action to retrieve the equipment from Sandoval.

The next day or two, Hicks took possession of the property with an eye toward obtaining the daycare license as soon as possible so he could maximize his chance of retaining the children who had been enrolled in the daycare center operated by Sandoval. On January 7, 2010, at Hicks' request, a representative from the City of El Paso Department of Public Health inspected the property and submitted a list of nineteen items that needed to be addressed before a food service permit would issue, including:

> [E]quipment and utensils must be of proper design construction and fabrication as required by state regs be commercial, and be certified for sanitation by an American National Standards Institute (ANSI) accredited cert. program UL Commercial and National Sanitation Foundation (NSF). Includes stoves, hoods, refrigerators, freezers, and sinks. Refrigeration units must maintain internal temps of 41ºF, freezers 0ºF or below. Must have temperature measuring daily affixed to units or placed where its easy to view . . . .

Hicks testified that in order to obtain the daycare license, compliance with the requirements of the public health department as well as those of other regulatory agencies, like the fire department, was necessary. Hicks repeatedly attempted to schedule the property inspection specified in Paragraph 3 of Exhibit B so that Casa, who was responsible for diligently performing the repairs under the lease, could get started. Hicks called Veytia several times to set up inspection, but Veytia "pushed" Hicks off to Bingham. After several failed attempts to get Bingham to the center for the

inspection, Hicks performed most of the necessary license repairs himself so he could open for business quickly. Before doing so, Bingham told Hicks to "go ahead and do what it [takes] to get the daycare open" and assured him that Hicks would be "covered." Hicks stayed in touch with Bingham "on an almost continuous basis" during the licensing process and Bingham continued to reassure him that Casa would reimburse him for any expenditures on repairs related to licensing.

At trial, Veytia admitted that during the time Hicks was attempting to schedule the inspection and get Casa to make repairs and replace the equipment, Casa did not have the money to perform its obligations. Specifically, Veytia testified that during that time, "Casa was strapped and we were barely starting to fund—get Casa funded." Veytia explained that Casa's poor financial condition was due in part to ongoing litigation with Compass Bank. Veytia also testified that because he was "entrenched" [sic] in the litigation, he relied on Bingham to deal with Hicks.

While the majority of repairs were performed by Hicks, Casa did perform some repairs. Invoices sent to Veytia by two companies owned by Bingham, Modern Realty and Bingham Investments, indicated some repair work was performed in January, including minor roof repairs. According to Bingham, Veytia compensated him for this work by giving Bingham Veytia's share of an RV they had purchased together. When Bingham's company performed the roof repairs, it did not consult a roofing expert to determine the extent of the damage or how to repair it. In addition, Veytia helped pay for the installation of a fire alarm system in three payments made between March and April 2010 totaling $3,891.59, after Hicks paid the $2,000 deposit to get the work started.

Ultimately, Hicks spent $16,500 for repairs and kitchen equipment related to licensing, plus $2,000 for the fire alarm system deposit. But, he could not purchase playscapes and shade

structures comparable to the ones that were removed, which Hicks estimated would cost approximately $180,000. And while the kitchen equipment Hicks purchased was sufficient to obtain the license, it was not comparable to the kitchen equipment that was removed. Moreover, as a temporary substitute for the playscapes that he expected Casa to eventually install, Hicks purchased two "Little Tikes" playgrounds for $600. While the missing playscapes and shade covers were not necessary for licensing, Hicks believed they were critical to the center's business success.

Hicks eventually obtained the daycare license and opened the Flying Colors Learning Center on February 15, 2010. After opening for business, however, TCC was only able to initially enroll thirteen children. This number was far fewer than the 100 children Bingham had originally indicated were enrolled in the daycare center run by Sandoval, and also far fewer than the 70-75 children necessary for the business to break even. Consequently, TCC immediately started losing money. Hicks also believed that due to Casa's failure to replace the missing kitchen and playground equipment with reasonably similar equipment as promised, he experienced difficulty reenrolling the Sandoval kids and attracting new kids, which adversely impacted his bottom line.

In March 2010, the roof failed during a rainstorm and caused the daycare center to flood. Hicks contacted both Veytia and Bingham by phone to notify them of the roof's failure. They told Hicks to "do what you can. We'll get it figured out." Casa did not repair the roof and Hicks was hesitant to front any more expenses. The roof continued to leak for several days every time it rained through May 2010 and mold became a concern for the ongoing business and jeopardized the license. Due to Casa's failure to meet its obligations under the lease and failure to reimburse Hicks for his expenditures, Hicks did not submit any rental payments as required by the lease. Even

though Hicks was not paying rent, Veytia did not take steps to evict because "[w]e had him in" and a replacement tenant was not available.

In May 2010, Hicks, Veytia, and Bingham had a meeting. For Hicks, the purpose of the meeting was to induce Casa to perform its obligations under the lease, including to repair the roof, replace the playscapes with reasonable similar equipment, and compensate him for money expended on repairs and equipment that were Casa's responsibility under the lease. For Veytia, the purpose of the meeting was to "work out an agreement" in which Casa would give Hicks rent credits in exchange for Hicks "kick starting the rent." A list of topics discussed at the meeting was produced at trial.

The document suggests that Casa anticipated that Hicks would begin paying rent in June and included references to $16,500 worth of rent credits through month four (June) to reimburse Hicks for his expenditures, a $3,000 rent credit for each month until June 17 for missing playscapes, and a promise to "Roof-inspect now for small leaks—pursuing replacement." However, Bingham testified that Veytia was offering only a one-time $3,000 credit for the missing playscapes to compensate Hicks for lost income, but promised to install a playscape in the future.

Dissatisfied with the discussions, Hicks left the meeting without agreeing to any modified terms and began to search for a new location. He was unable to find a suitable building immediately due to a lack of inventory, but he kept searching. In the meantime, in July 2010 pursuant to Casa's request, as a possible compromise to the playscape issue, Hicks submitted to Casa price information for two playscapes called "Bells and Whistles" and "Doodle Bug" by BYO Playground. Even though they were still only half the size of the original playscapes, Hicks would have been satisfied. The quote for both playscapes was $43,724.50, which included two 10-foot

shade structures and shipping costs, plus $15,513 for installation, for a total cost of $59,237.50.

In August 2010, despite still not receiving rental payments, Veytia used a credit card to purchase one playscape called the "Playworld Challenger" through the The Playwell Group. The playscape cost $15,411.34 plus $4,575 for installation for a total cost of $19,986.34. According to Veytia, the playscape was installed to "try to get [Hicks] to start producing" rent. But, according to Hicks, the playscape did not comply with the lease terms because it was too small, it lacked the shade structures, it was not reasonably similar to the playscapes that had been removed, and a playscape was still missing, so he continued to withhold rent.

By September 2010, Hicks hired an attorney to help him induce Casa into performing under the contract. On September 28, 2010, Hicks' attorney sent a letter to Veytia demanding that Casa: (1) reimburse tenant expenses related to Casa's breach totaling $27,316.54; (2) repair roof; (3) repair damage caused by leaking roof; (4) remediate mold; (5) repair or replace HVAC units; (6) replace missing playscape and shade structures; (7) purchase commercial refrigerator and kitchen appliances; (8) reimburse tenant for expenses related to roof leaks in the amount of $3,270. Alternatively, in the event that Casa was unable to meet Hicks demand, Hicks offered to purchase the property. After hearing no response, Hicks filed suit against Casa, Vey, and Veytia in November 2010 and alleged claims for breach of contract, deceptive trade practices, and fraud. According to Veytia's trial attorney, the suit was never formally served on the defendants.

Between November 1, 2010 and December 6, 2010 emails discussing possible solutions to the dispute were exchanged between the parties' attorneys. On December 6, 2010, the final emails exchanged between the attorneys provided:

> [Hicks' attorney]: Mike would like to stay in the property until he has secured a replacement location that meets the needs of his children. This means he needs

> approximately 10 months. Mike would like to pay $5,000.00 a month rentals to Carlos during that ten month period, which we believe is reasonable based on the expenses incurred by Taylor Child care repairing the property and installing the fire alarm, as well as the continued expenses that will be incurred the next time (and every time) inclement weather occurs in north-east El Paso.
>
> . . .
>
> [Casa's attorney]: So what of the repair items are being fixed? Your pleadings make a judicial admission of a mold problem leaving both your client and Mr Veytia's entity exposed for premises liability claims to employees and invitees. Is your client prepared to remediate those items as a part of the negotiated rental reduction? The prior discussions of the rental reduction presumed that the remainder of the rents were being invested to improve the building through repair of punch list items. What about the other punch list items that were discussed in our meeting and those alleged in the pleadings? Are they to be fixed and by whom?
>
> . . .
>
> [Hicks' attorney]: We will remediate the mold as set forth in the report. We have already incurred expenses to repair walls, ceiling, doors, tile and fire alarm. We cannot fix the roof or the other punch list items, we do not have the money to install playscapes or shade coverings, which were required of Carlos. We will keep the property in the state of repair it is now, with the exception of the immediate items that arise due to weather in order to keep the property open for business, other than the roof. The rest of the punch list items were all items Carlos was supposed to repair, but we offered to incur the expenses of during occupation. Without occupation for long term return, we cannot incur those expenses. Of course, we will dismiss the lawsuit too.

No agreement was reached so rent was withheld. On April 30, 2011, on advice of counsel, TCC paid the property taxes in the amount of $18,247.66. At some point in 2010, Vey filed for Chapter 11 Bankruptcy protection, and by July 2011, Casa filed for bankruptcy protection too.

On September 27, 2011, having found no suitable building to relocate his daycare center, Hicks authorized Jacob Quinn, a commercial real estate broker, to email a sales contract to Veytia's bankruptcy attorney with an offer to purchase the property for $225,000. Quinn wrote in the email:

> Attached is a sales contract for the property located 4841 Salem, which is owned by Vey Finance LLC, also attached is a contractor's quote for the deferred

> maintenance. As I stated on the phone, we are not trying to insult Mr. Veytia with this offer, but the property is in need of major repair. I can provide detailed photos of the mold in the building and the other problems, but I think a quick walkthrough of the space with Mr. Veytia should suffice. After looking at comps in the market, we have concluded the property to be worth $50/psf in good condition. Please let me know your thoughts.

On October 7, 2011 Casa's bankruptcy attorney, who was also Casa's trial counsel, responded to the offer in a certified letter addressed directly to Hicks that read in part:

> Whatever delusion you have been under which you think exempts [TCC] and you from paying the rent under the Standard Lease dated December 15, 2009 should [c]ome to an end. As stated clearly in paragraph 4 of the Lease, the Tenant's obligation to pay rent under this Lease is an independent covenant and no act or circumstances, regardless of whether such act or circumstance constitutes a breach of this Lease by Landlord, shall release Tenant of its obligation to pay rent as required by this Lease.

The letter demanded payment of $140,903.60 in unpaid rent and $1,200 in attorney's fees within ten days, and if not received, a lawsuit would be filed to collect payment.

On November 7, 2011, a nonsuit was entered in the civil suit filed by TCC. Hicks eventually persuaded a church to permit him to operate the daycare in its facility. Hicks vacated the property in February 2012, eight years before the lease term expired, without ever submitting a single rental payment. According to Veytia, he subsequently sold the property nine months later in the bankruptcy proceeding to an unnamed buyer in November 2012 for $450,000. According to Hicks, the subsequent owner of the property flattened the building. The record makes reference to ongoing bankruptcy proceedings involving the parties thereafter, but it is unclear what the nature of those proceedings were and when or if they ended.

Casa filed its original petition in this case on May 27, 2015 raising claims for breach of contract, quantum meruit, and unjust enrichment and seeking payment of unpaid rental payments

pursuant to the original terms of the lease from February 2010 through November 2012, when Vey sold the property. Appellees raised the affirmative defense of fraudulent inducement, among others, in their answer.

A bench trial began on November 13, 2017. The trial court entered findings of fact and conclusions of law that Casa fraudulently induced Appellees into the lease and that they did not ratify the lease by occupying the property until Hicks could find a suitable location to relocate the center. The trial court also determined, however, that Hicks was unjustly enriched by the twenty-four-month rent-free occupancy in the amount $16,413.26. The trial court arrived at this amount by multiplying the fair market rental value, which it assessed at $3,000 per month by twenty-four months and subtracting credits for: (1) the licensing repairs Hicks made during the occupancy ($16,500); (2) the deposit for the fire alarm ($2,000); and (3) the missing playscape equipment ($37,086.54). After the credit deductions, the trial court found that Casa was entitled to judgment in the amount of $16,413.26, and denied relief as to all other claims. This appeal followed.

DISCUSSION

I. Denial of Summary Judgment Motions

In its first issue, Casa contends the trial court erred when it denied its Fourth Motion for Traditional Partial/No-Evidence Summary Judgment in which it argued that Appellees could not establish each element of their fraudulent-inducement affirmative defense to Casa's breach-of-contract claim because insufficient evidence existed establishing: (1) Casa made a false representation; (2) Casa knew the representation was false when made, or that Casa made it recklessly as a positive assertion without knowledge of the truth; (3) Appellees relied on the false representation; or (4) Appellees suffered injury as a result of the false representation.

We are without authority to review Casa's first issue. It is well established an appellate court may not review a trial court's denial of summary judgment where a trial on the merits was later held, and a judgment was entered on the same issues. *Gem Homes, Inc. v. Contreras*, 861 S.W.2d 449, 453 (Tex.App.—El Paso 1993, writ denied)(citing *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966)); *see also General Life and Accident Ins. Co. v. Lightfoot*, 737 S.W.2d 953, 955 (Tex.App.—El Paso 1987, writ denied). Here, a bench trial was held on all of Casa's claims. The trial court subsequently entered a judgment denying relief as to Casa's breach-of-contract claim after determining Casa had fraudulently induced Appellees into the lease. Accordingly, we are now precluded from reviewing the trial court's summary judgment determinations of these same issues. Casa concedes as much in its reply brief. We overrule Casa's first issue.

II. Legal and Factual Sufficiency of Fraudulent Inducement

In Issue Two, Casa challenges the sufficiency of evidence supporting the trial court's findings that Bingham made three statements on which Hicks relied and which induced him into signing the lease. Those findings are set out below in relevant part:

> 5. Mr. Bingham represented to Mr. Hicks that he would walk into a fully functioning daycare with more than 75 children enrolled.
>
> 6. Mr. Bingham also represented to Mr. Hicks that the kitchen and playground equipment that was on the Property when they inspected it, would remain and if removed, would be replaced with reasonably similar equipment.
>
> 7. This statement was false when it was made.
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> 8. Mr. Bingham made this statement to induce Mr. Hicks into signing the lease.
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> 9. Mr. Bingham told Mr. Hicks that Mr. Veytia would make all necessary repairs to the Property.

10. This statement was false when it was made.

11. Mr. Bingham made this statement to induce Mr. Hicks into signing the lease.

12. Acting in reliance upon the statements, Mr. Hicks, on or about December 15, 2009, executed on behalf of [TCC] a Standard Lease . . . with [Casa].

A. Standard of Review for Legal and Factual Sufficiency Challenges

A trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing evidence supporting a jury's verdict. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Howe v. Howe*, 551 S.W.3d 236, 249 (Tex.App.—El Paso 2018, no pet.). When the party without the burden of proof suffers an unfavorable finding and challenges the legal sufficiency of the evidence in support of that finding, the issue is one of "no evidence" to support the finding. *Wheeling v. Wheeling*, 546 S.W.3d 216, 223 (Tex.App.—El Paso 2017, no pet.). We will sustain a no-evidence challenge to the legal sufficiency of evidence if the record shows: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Id.* at 223. More than a scintilla of evidence exists when the evidence enables reasonable and fair-minded people to reach different conclusions, and we will not substitute our judgment for that of the fact finder. *See City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)("A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within [the] zone of reasonable disagreement"); *Wheeling*, 546 S.W.3d at 223.

When conducting our legal-sufficiency-of-evidence analysis, we consider all of the

evidence by viewing it in a light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *City of Keller,* 168 S.W.3d at 807. Moreover, as here, when the trial court is the sole judge of the credibility of the witnesses and the weight to be given to their testimony, to the extent that conflicting evidence exists in this record, we presume the trial court, as the sole trier of fact, resolved such conflicts in favor of the prevailing party. *Id.* at 819-820; *Wheeling*, 546 S.W.3d at 223.

Factual insufficiency of evidence involves a finding that is so against the great weight and preponderance of the evidence as to be manifestly wrong. *Wheeling*, 546 S.W.3d at 223. When the party having the burden of proof complains of an unfavorable finding, the challenge to the evidence should allege that the findings "are against the great weight and preponderance of the evidence." *Id.* at 223-224. The "insufficient evidence" challenge to the evidence is appropriate only when the party without the burden of proof on an issue complains of the court's findings. *Id* at 224.

B. Fraudulent Inducement Elements

"Fraudulent inducement is a species of common-law fraud that shares the same basic elements: (1) a material misrepresentation, (2) made with knowledge of its falsity or asserted without knowledge of its truth, (3) made with the intention that it should be acted on by the other party, (4) which the other party relied on and (5) which caused injury." *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018)(*citing Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) and *Formosa Plastics Corp., USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998). Moreover, "[f]raudulent inducement is actionable when the misrepresentation is a false promise of future performance made with a present intent not to perform." *Anderson*, 550 S.W.3d at 614. "Because fraudulent inducement arises only in the context of a contract, the

existence of a contract is an essential part of its proof." *Id.* Here, Appellees raised fraudulent inducement as an affirmative defense to Casa's breach of contract claim. Consequently, the burden of proof was on Appellees to demonstrate Casa fraudulently induced them into the lease.

1. Sufficiency of evidence regarding statement that Hicks would walk into a fully functioning daycare with more than 75 children enrolled.

First, Casa contends that the words "fully functioning daycare with more than 75 children enrolled" appear nowhere in the record and the finding, therefore, is legally and factually insufficiently supported by the evidence. We disagree. While the exact wording was not used by the witnesses, the concept is fully supported by Hicks' testimony that Bingham initially approached Hicks with a lease opportunity that would allow Hicks to enter into a "turnkey [daycare] operation," with "over a hundred kids" enrolled. In addition, the record reflects Hicks' intent when he toured Sandoval's daycare with Bingham in November 2009, while it was in "full swing," was to confirm Bingham's "turnkey" representation and to satisfy himself he could open the center without having to make a substantial investment. After confirming the building was in fact being operated as a day care and was fully-equipped with kitchen and playground equipment, he signed the lease. The fact that Hicks subsequently entered into the lease establishes he relied on Bingham's turnkey representation.

Moreover, the record also establishes Hicks believed if he opened his daycare center quickly, there existed a good probability he would be able to enroll the necessary 70-75 children to "break even" because there were already a large number of children attending Sandoval's center. This evidence demonstrates Hicks also relied on Bingham's estimate 100 children were enrolled in the existing center and opening the center quickly was critical to maximizing the chances of retaining those children. Accordingly, we believe the finding is supported by more than a scintilla

of evidence.

In its Reply Brief, Casa also contends even if the evidence about the "turnkey operation" could be used to justify the trial court's finding, the finding was still made in error because the representation was made ten months before the lease was signed, and when it was made, it was true. Casa argues further due to a change in circumstance, of which Hicks was aware before the lease was signed, namely "the parties dropped their plan to lockout Sandoval's business and have Taylor begin operations the next business day," this statement cannot form the basis for the fraudulent inducement claim because the language in the signed lease was changed to reflect that change in circumstance.

While we agree there is some evidence supporting Casa's rendition of the sequence of events, we do not find the trial court erred in making the finding. As explained above, the fact the representation was made and it was relied upon by Hicks and used by Bingham to induce him into the lease *is* supported by the evidence. It is also clear the trial court did not rely on this finding to form the basis of its determination *false* representations were made. Indeed, as Casa observes in its reply brief, unlike the other two representations discussed below, the trial court did *not* find this statement was false when made. Rather, the finding merely explains what drew Hicks' interest to the property and helps to establish the mindset of the parties at the time the lease was signed and beyond.

2. Sufficiency of evidence that Appellees relied on representation that the kitchen and playground equipment would remain and if removed would be replaced with reasonably similar equipment.

Next, Casa contends the evidence was legally insufficient to support the trial court's finding Appellees relied on Bingham's false representation the kitchen and playground equipment

would remain, and if removed, would be replaced with reasonably similar equipment, because such reliance was unjustified as a matter of law. "To prevail on a fraud claim, a 'plaintiff [must] show actual and justifiable reliance'" on the false representation. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 558 (Tex. 2019). "Whether a party's actual reliance is also justifiable is ordinarily a fact question, but the element may be negated as a matter of law when circumstances exist under which reliance cannot be justified." *Id*. Casa argues any reliance on Bingham's false representation is unjustified as a matter of law because the "misrepresentation that directly conflicts with the terms of the signed contract." the representation. *See id.* at 599 ("[R]eliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law.").

The relevant portion of the signed lease to which Casa directs us is not a model of clarity, but is contained in Paragraph 4 of "Exhibit B" which provides:

> It is the intent of [Casa] to convey to [Taylor Childcare, L.P.] all of its rights in the outside playground equipment, kitchen equipment, tables, chairs and any other business property. If said items are left in the space upon existing occupant's vacating property. In the event, current occupant later makes a claim and is successful in obtaining rights to said equipment, [Casa] will replace missing or damaged items (not including tables or chairs) with items which are reasonably similar and usable as compared to existing equipment currently in the facility. [Casa] will strongly consider assisting [Taylor Childcare, L.P.] in the purchase of part of the tables and chairs, depending on price.

In support of Casa's contention that this provision directly contradicts Bingham's false representation, it points to a portion of the trial court's findings supporting its conclusions related to Casa's breach-of-contract of claim. Specifically, when interpreting the lease provisions, the trial court entered the following alternative factual findings and conclusions of law:

> 35. The Court finds and concludes that the Lease contract is not ambiguous. The only reasonable interpretation of the Lease contract language at issue is that the

> parties to this lease intended that Landlord would transfer all equipment at the property to Taylor Child Care and if equipment was removed, the Landlord would replace the equipment with reasonably similar equipment. Further, the Landlord would make all reasonable improvements and repairs required for day care licensing.
>
> 36. The Court finds and concludes that if the contract was ambiguous and any extraneous evidence of the parties' intent were required to ascertain the true meaning of the instrument, then the credible extraneous evidence proved that the intent of the parties was that the equipment would remain in the daycare and if it was removed, would be replaced with similar equipment by the Landlord. Further, any repairs, improvements or replacements made by Taylor Child Care, necessary for day care licensing, would be made by the Landlord or reimbursed by the Landlord.

Casa urges us to accept only the first sentence of the trial court's conclusion contained in Paragraph 35 concluding that the lease is unambiguous and reject the trial court's interpretation that follows its unambiguity determination.[2] Instead, Casa asks us to interpret the language to mean Casa's obligation to replace the kitchen and playground equipment was triggered "*only*" in the event the equipment "was left on the Property after Sandoval vacated" *and* if "Sandoval later made a claim and was successful in obtaining rights to [it]"—which, Casa claims, never happened. If we agree with its interpretation, Casa's argument goes, then the lease does not actually require the equipment replacement under the circumstances that occurred here, and Appellees cannot prove they were justified in relying on an earlier representation that promised something different.

We need not determine whether the equipment-replacement provision is unambiguous to decide if the trial court's finding with respect to reliance is sufficiently supported by the evidence because either way, we believe the provision does not directly or expressly contradict the false

[2] We note that Casa's position at trial was different from the one it asserts here. At trial, Casa argued that the equipment-replacement provision was *ambiguous* and that any interpretation of the lease that would require Casa to spend $180,000 to replace the original playground equipment with similar equipment was unreasonable and one to which Casa simply would not have agreed.

representation. *See Zorrilla*, 469 S.W.3d at 152 ("[W]e do not agree that the court of appeals was required to consider [] evidence-sufficiency challenges to the breach-of-contract findings to uphold the fraud judgment.").

Our conclusion is based in part on the testimony establishing the parties intended, and in fact attempted to, memorialize in the lease their mutual understanding that Casa would replace the equipment if and when the original equipment was removed. Indeed, with respect to the specific equipment-replacement provision, Bingham repeatedly testified when he and Hicks were drafting it, they were both attempting to account for any circumstance in which the equipment was removed from the property. Specifically, Bingham testified as follows:

> A: Well, we said—the way we worded it is, in the event current occupant later makes a claim, and [is] successful obtaining rights to said equipment. So we said we don't know if it's going to be there, but if it is there, and you start using it Mike, and then the old owner comes back and tried to made a legal claim—we're just trying to think of everything.
>
> Q: Well, but the old owner, in fact, came and removed the property; isn't that correct?
>
> A.: Yes.
>
> Q: What was to happen in that event?
>
> A: I don't think that's dealt with in here.
>
> Q: So why isn't it dealt with?
>
> A: I don't know. Mike and I tried to word this as good as we could. We tried to word every potential –I guess, we just didn't—missed one potential possibility.
>
> Q: What's the difference between what happened and what's in this Paragraph 4?
>
> A. There probably isn't any real—I'm not an attorney, but there may not be any real difference between whether the tenant—the old owner sues to get

his stuff back, or took it out of the front end.

. . .

A. I think Mike and I were just trying to think of every possible thing that could happen . . .

. . .

A. Well, we were trying to anticipate whether the owner would take the items, or not, and deal with it.

In addition, after Sandoval removed the original equipment and Hicks notified Bingham about the removal, Bingham continued to assure Hicks that such a contingency was covered by the lease. In fact, Bingham told Hicks: "don't worry. You're protected by Exhibit B," which contained the equipment-replacement provision. Moreover, Casa did attempt to replace the original equipment, albeit with equipment that was not reasonably similar. This evidence clearly establishes Hicks conditioned his acceptance of the lease terms on the promise the center came with playground equipment and if it was removed Casa, not Hicks, would be responsible for replacing it. The lease provision on which Casa relies here supports, rather than negates, that condition of acceptance.

Moreover, we do not believe *Mercedes-Benz USA* compels a different result. In *Mercedes-Benz USA*, Carduco, Inc. ("Carduco") claimed it was fraudulently induced into signing a Dealer Agreement with Mercedes-Benz USA, LLC ("MBUSA") because it was misled into believing Carduco would be permitted to relocate its car dealership from Harlingen to McAllen where it would be the exclusive Mercedes dealership. The agreement that was signed later, however, expressly and directly contradicted each and every representation made by the oral representation. Specifically, the contract: expressly identified Harlingen, not McAllen, as Carduco's sole dealership location; expressly prohibited Carduco from changing locations without MBUSA's written consent, instead of permitting Carduco to change locations; expressly stated that Carduco

did *not* possess *exclusive* right to sell Mercedes products; and expressly permitted MBUSA to add new dealers to Carduco's location.

When the Court compared the alleged false representation to the signed agreement, it approvingly cited the reasoning in *JP Morgan Chase Bank, NA v. Orca Assets G.P., LLC*, 546 S.W.3d 648 (Tex. 2018) and *DRC Parts & Accessories, LLC v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858-59 (Tex.App.—Houston [14th Dist.] 2003, pet. denied)(en banc)(majority op. on reh'g), in which fraudulent inducement claims were rejected on the basis that:

> '[R]eliance upon an oral representation that is *directly contradicted by the express, unambiguous terms of a written agreemen*t between the parties is not justified as a matter of law.' To hold otherwise . . . would be to reward a party for signing a contract under false pretenses, promising to abide by the written terms while secretly intending to enforce the conflicting terms of an unwritten bargain . . . 'Because such an approach would defeat the ability of written contracts to provide certainty and avoid dispute, the prevailing rule, recited above, is instead that a party who enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement when the other party seeks to invoke its rights under the contract.' [Emphasis added].

Mercedes-Benz USA, 583 S.W.3d at 559. Unlike the facts in *Mercedes-Benz US*, the oral representation in this case--that *Casa* would replace the equipment with reasonably similar equipment, was not directly contradicted by the express, unambiguous terms of the lease. In other words, there is no provision in the lease that directly and expressly states *Appellees* were responsible for replacing the equipment if the original equipment was removed or the missing equipment would *not* be replaced at all. Indeed, the *only* lease reference to missing playground and kitchen equipment expressly makes *Casa* responsible for its replacement, which is consistent with, not contrary to, Bingham's earlier representation.

Consequently, we do not believe the lease terms negate Appellees justifiable reliance on the earlier misrepresentation as a matter of law *even if* the lease ultimately failed to cover every

possible scenario in which the equipment might be removed. To the contrary, the inclusion of this provision in the lease solidified Hicks' expectation that the oral promise could, and would be fulfilled.

3. Sufficiency of evidence supporting finding that Appellees relied on representation that Veytia would make all necessary repairs to the property

Casa similarly argues the trial court's finding that Appellees relied on Bingham's representation that "Mr. Veytia would make all necessary repairs to the property" is negated as a matter of law by the plain language of the lease. The relevant portion of the signed lease to which Casa directs us is contained in Paragraph 3 of "Exhibit B" and provides:

> Upon gaining possession, [TCC] and [Casa] will inspect the premises and [Casa] agrees to diligently perform all reasonable improvements in order to comply with the state licensing department for Day Care, which will also inspect for compliance issues. [Casa] will repair any HVAC problems and provided it is determined the HVAC units have a remaining economic life of at least five (5) years, [Casa] will assume financial responsibility of these units, subject to [Casa's] obligations as described in the lease.

Casa argues the trial court ignored the fact the lease limited Casa's obligation to perform only repairs necessary to comply with state licensing requirements and to the extent Casa was required to perform such repairs, the lease required Appellees to first provide Casa with written notice of the necessary repairs, which was not provided. Casa further directs us to Section 9.1 of the form lease which provides in relevant part:

> 9.1 Maintenance by Landlord. Landlord shall keep or cause to be kept the foundation, roof . . . in good order, repair and condition . . . . Landlord shall commence required repairs as soon as reasonably practicable after receiving written notice from Tenant thereof.

Section 28 of the form lease further provides in relevant part:

> 28. Notices. All notices required to be given hereunder shall be in writing, and shall be served in person upon the party to be notified or upon its agent, or shall be

> mailed by certified or registered mail or deposited with a nationally recognized overnight carrier, postage prepaid, to the address shown on the signature page of this Lease.[3]
>
> The trial court entered the following findings of fact with respect to repairs:
>
> 15. Paragraph 3 of Exhibit B to the Lease provided, among other things, that Mr. Veytia would inspect the premises when Mr. Hicks had possession of the Property and would diligently perform all reasonable improvements necessary for Mr. Hicks to be in compliance with the State of Texas's licensing requirements for a day care facility.
>
> . . .
>
> 18. When Mr. Hicks took possession . . . the premises was in need of repair. Mr. Hicks made several requests to . . . make repairs. Only one piece of playground equipment was replaced by Mr. Veytia and it was inferior to the equipment that was originally there. As a result of the false statements made by Mr. Bingham, Mr. Hicks . . . expended money on repairs. *The. . . repairs were necessary for licensing and operating a child care facility and were not the responsibility of Mr. Hicks*. The Plaintiff did not perform improvements and repairs or reimburse Defendants for the repairs . . . made. [Emphasis added].

These findings make clear that the trial court did not ignore the limitation imposed by Paragraph 3 of Exhibit B that Casa was required to perform only those repairs necessary for licensing and operating a child care facility.

Moreover, the plain language of Paragraph 3 of Exhibit B did not require written notice of repairs necessary for state licensing compliance. While written notice of general *roof repairs* was required under the *form* lease, we believe the evidence supports a finding that the roof repairs at issue were covered by Paragraph 3 of Exhibit B, which excluded the requirement of written notice. Hicks testified that if the roof's defective condition had been apparent at the time he sought the licensure, the license would have been conditioned on its repair. Moreover, Paragraph 3

[3] The signature pages of both the form lease and Exhibit B omit an address for Casa Palmira.

contemplated each party would conduct an inspection of the property to identify repairs necessary for state licensing compliance and Casa was responsible for diligently performing those repairs after Hicks took possession of the property. The record reflects that Casa chose not to conduct an inspection after Hicks took possession and instead relied on Hicks' verbal notification of licensing repairs needed.

Indeed, after being notified of minor roof defects in January, Bingham undertook to perform the roof repairs at that time without requiring written notice from Hicks, which indicates Bingham believed those roof repairs were necessary for licensing. That the roof was not *adequately* repaired in January due to the failure to consult with a roof expert is a reasonable inference to be drawn from the fact that the roof failed in March. Both Bingham and Casa were aware roof repairs were attempted in January and both were verbally notified of the roof's failure in March. Thus, the evidence at trial clearly established the roof defects at issue fell into the state licensing category and Casa was well aware of the roof's defects but failed to make the repairs.

The fact the daycare license was obtained in February despite the insufficient January repair does not negate Appellees' justifiable reliance Casa would diligently perform the roof repairs at issue. Moreover, even if written notice was required under the standard lease provision, written notice was sent by Hicks' attorney to Casa in September 2010 and Casa still failed to make the necessary repairs.

When viewing this evidence in the light most favorable to the verdict, we hold there is both legally and factually sufficient evidence to support the trial court's findings the representations discussed above were made and they were justifiably relied upon by Appellees. For these reasons, we overrule Casa's second issue.

III. Legal and Factual Sufficiency of Waiver by Ratification

In its third issue, Casa contends the trial court's findings and conclusions supporting its determination that the lease was not ratified by Appellees after discovering Casa's fraud are against the great weight of the evidence. Casa argues the evidence conclusively establishes Appellees waived their right to rescind because instead of immediately vacating the property after learning of the fraud, they continued to occupy the property for two years. *See Webb Materials, Inc. v. Lacey*, 364 S.W.2d 473, 475-76 (Tex.Civ.App.—San Antonio 1963, writ ref'd n.r.e.)(holding that defrauded party who was aware of the misrepresentation within sixty days of contract execution but who accepted lease payments for approximately two years before seeking rescission, waived fraudulent inducement claim).

Appellees respond by arguing the issue of lease ratification in this case turns, not on the duration of occupancy, but on the evidence of intent and whether the time it took to vacate the property after learning of the fraud was reasonable. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America,* 341 S.W.3d 323, 344 (Tex. 2011)("Texas law requires only that one rescind within a reasonable time from discovering the grounds for rescission"); *Fortune Prod. Co v. Conoco, Inc*. 52 S.W.3d 671, 677 (Tex. 2000)("The question of [fraud] waiver, however, is largely one of intent.")(*citing Kennedy v. Bender,* 135 S.W. 524, 525 (Tex. 1911)); *Wise v. Pena,* 552 S.W.2d 196, 200 (Tex.Civ.App.–Corpus Christi 1977, writ dism'd)("Ratification occurs when one, induced by fraud to enter into a contract . . . conducts himself in such a manner as to recognize the contract as binding.").

A. Affirmative Defense

Before reaching the merits of Casa's arguments, we note Rule 94 of the Texas Rules of

Civil Procedure requires that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or affirmative defense." TEX.R.CIV.P. 94. This is true regardless of the alignment of the parties. *Securitycomm Group, Inc. v. Brocail*, No. 14-09-00295-CV, 2010 WL 5514333 (Tex.App.—Houston [14th Dist.] Dec. 28, 2010, pet. denied)(mem. op.). Thus, "in order for a plaintiff to rely on an affirmative defense, or 'matter of avoidance,' to defeat a defendant's affirmative defense, the plaintiff must allege it in a petition or supplemental petition." *Id*. at *11 (*citing Simmons v. Compania Financiera Libano, S.A.*, 830 S.W.2d 789, 792-93 (Tex.App.—Houston [1st Dist.] 1992, writ denied).

"Ratification by failure to act with reasonable promptness is an affirmative defense, with the burden upon the party asserting it." *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 344 (*citing Crown Eng'g v. Grissom*, 343 S.W.2d 330, 332 (Tex.Civ.App.—Waco 1961, writ dism'd)("'The fact that the party seeking rescission failed to act with reasonable promptness after discovery of the facts, constitutes a waiver of his right to a rescission, and is an affirmative defense which must be pleaded and proven by the party asserting same.'"). Here, the record reflects Appellees raised their fraudulent-inducement defense in their original answer on June 30, 2015. But, the record here is devoid of any subsequent or supplemental petition affirmatively raising the ratification affirmative defense by Casa. Normally, such a failure would prevent Casa from prevailing on appeal. Here, however, because Appellees did not object at trial, we believe the issue was tried by consent and is properly before us.

B. Ratification

On the merits, we agree with Appellees "Texas law requires only that one rescind within a reasonable time from discovering the grounds of rescission." *Italian Cowboy Partners, Ltd.*, 341

S.W.3d at 344. Moreover, under Texas law, what constitutes "a reasonable time" depends on the circumstances of each fraudulent inducement case:

> What is a reasonable time within which a defrauded person must evidence an intent to rescind because of fraudulent representations inducing a contract depends upon the circumstances of each case. Time is material so far only as, when associated with other circumstances, it may produce injury or unjust consequences to the defendant or third persons. The value of decisions as precedents, especially so far as they regard periods of time, lies largely in similarity of circumstances.

Vandervoort v. Sansom, 293 S.W.2d 271, 275 (Tex.App.—Fort Worth 1956, writ ref'd n.r.e.).

"Ratification occurs when one, induced by fraud to enter into a contract, continues to accept benefits under the contract after he becomes aware of the fraud or if he conducts himself in such a manner as to recognize the contract is binding . . . . Once a contract has been ratified by the defrauded party. . . the defrauded party waives any right of rescission or damages." *Fortune Prod. Co.,* 52 S.W.3d at 678.

Casa relies on *Webb Materials, Inc. v. Lacey* to support its position a two-year delay in rescinding a lease after discovering the fraud will mandate a finding of ratification. *See Webb,* 364 S.W.2d at 475 (holding "[o]ne who enters into a contract that is induced by fraud, and who after knowledge of the fraud accepts the benefits of the contract, waives the right of rescission."). In *Webb*, the defrauded landowner owned an eight-acre tract of land on the Rio Grande River that he leased out for five years, with options to renew for two like terms, to a gravel business that was using the land to haul gravel. *Id.* at 475. According to the landowner, before entering the lease, the gravel company represented that it would not mine gravel from a nearby island the landowner also claimed to own. *Id.* Contrary to the representation, however, the gravel company did mine gravel from the island and had been doing so since the inception of the lease. *Id.* In year three of the five-year lease, after collecting four-years-worth of advanced rentals, the landowner claimed he had

been fraudulently induced into the lease and sought rescission. *Id.*

In determining the landowner had waived his right to rescind, the court emphasized the fact that the landlord clearly knew what the gravel company was doing because (1) the company's operations were open and obvious, (2) the landowner could see a bridge was built from the mainland to the island, and (3) scores of trucks were hauling thousands of load of gravel from the island on a regular basis. The court found that:

> Within sixty days after he signed the lease, [the landowner] knew the facts upon which he grounds his fraud. At that time he had collected the first and last years' rentals in advance, and did not tender them back nor take any steps to disaffirm.

Id. at 475. Thus, in *Webb*, critical to the court's analysis were two points in time: (1) when the defrauded party became aware of the fraud, and (2) when the defrauded party manifested his intent to rescind the lease.

Here, as explained below, we believe the evidence conclusively establishes Hicks became aware of Casa's fraud in November 2010 when he filed suit alleging Casa committed fraud. We also believe the evidence conclusively established Appellees manifested their intent to rescind the lease in December 2010, when Hicks' attorney gave Casa notice of intent to vacate as soon as Hicks could find a suitable location, which he estimated would take ten months.

1. Knowledge of Fraud

Unlike the fraud in *Webb,* Casa's fraud was not open and obvious or immediately ascertainable. The crux of the fraud in this case is Casa made a promise to perform repairs necessary to licensure and to replace expensive equipment while *failing to disclose* its poor financial condition and the unlikelihood it could perform its lease obligations. At trial, Casa elicited no direct or conclusive testimonial evidence from Hicks about when he became aware of

Casa's fraud. For example, Casa presented no uncontroverted evidence Hicks was aware of Veytia's pending litigation with Compass Bank, or that Veytia and his companies were in financial trouble and could not honor its commitments, such as a lease provision expressly referencing such facts, or a letter or email. While both Veytia or Bingham testified they had *verbally* disclosed some of these facts to Hicks, the trial court did not credit that testimony, opting instead to credit Hicks' testimony that Veytia had kept these facts hidden.

Indeed, in its briefing here, Casa does not point us to a single instant in which all the evidence conclusively establishes the exact time Hicks became aware of the fraud. Instead Casa relies on circumstantial evidence and offers several alternative dates or events that *might* establish when Hicks became aware of Casa's fraud. Specifically, Casa points to March 2010, when Appellees discovered they were "not walking into a fully functioning day care;" or May 2010 when "it was clear" no repairs, replacements, or reimbursements would take place; or November 2010 when Hicks sued Casa for fraud. But Casa's burden on appeal is to demonstrate by *conclusive* evidence when Hicks became aware of Casa's fraud.

We note at trial, Casa strenuously argued Hicks was aware of the fraud by December 2010:

> I'm back to ratification. At some point you've got to start paying rent, under Texas law. Under a reasonable construction of these facts, [Hicks] should have had to start paying rent. I think [Hicks] should have been paying rent for the entire year of 2011. I think that's reasonable construction. I think [Hicks] should have had to pay rent the first two months in February—January and February 2012. That's all.

After reviewing the evidence, we believe the evidence conclusively establishes Hicks was clearly aware of the fraud in November 2010 when he filed suit against Casa alleging fraud because such a filing was arguably a judicial admission to which Hicks was inextricably tied. *See Andrews v. Diamond, Rash, Leslie & Smith*, 959 S.W.2d 646, 649 (Tex.App.—El Paso 1997, writ

denied)(”Judicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation.”).

We do not believe the evidence conclusively establishes an earlier date for several reasons. While it is true Hicks was aware most of the repairs were not diligently performed and the equipment was not replaced shortly after the lease commenced, the evidence clearly establishes throughout 2010, Casa made repeated representations that it *would* perform and even took steps suggesting to Hicks it might do so. For example, in January, Casa performed some repairs, including minor roof repairs, and made three payments between February and April to pay for costs associated with a fire alarm system. In May, in lieu of cash, Casa attempted to reimburse Hicks with rental credits and promised to install the playscape in the near future and to fix the roof. In July, Veytia encouraged Hicks to submit price information for a playscape Hicks believed was suitable. In August, Veytia installed a playscape, albeit half the size the one Hicks had identified.

The evidence here suggests Casa attempted to keep hidden as long as possible its poor financial condition by falsely representing throughout 2010 it had the ability to, and eventually would, fulfill its promise to install the reasonably similar playground equipment and fix the roof, both of which Casa ultimately failed to do. Such circumstances have been held to reasonably justify latent recognition of ongoing fraud and create a fact issue regarding waiver. *See e.g. Vandervoort*, 293 S.W.2d at 275 (“[I]n view of the evidence generally, particularly since the defendants kept promising help or cooperation with the plaintiff . . . we are of the opinion that the matter of foreclosure from the remedy of rescission depended upon jury findings and was not resolved as a matter of law.”).

In any event, after Hicks grew tired of Veytia's empty promises, Hicks hired an attorney, and in September sent a demand seeking lease enforcement, not rescission, and waited for a response. When he did not hear back, Hicks sued for fraud in November. The reasonable inference to be drawn from these facts is that over time Hicks came to realize Casa's failure to perform was not a function of disagreement about lease terms. Indeed, a mere failure to perform under the lease terms does not alone establish fraud. *See Formosa Plastics Corp., USA*, 960 S.W.2d at 48 ("the mere failure to perform a contract is not evidence of fraud"). But rather, only through the passage of time could Casa's failure to perform be clearly attributed to lack of financial ability which was known to Casa at the time the lease was signed but was undisclosed to Hicks.

Given the hidden nature of the fraud and Veytia's continuing misrepresentations, the facts here conclusively establish Hicks became aware of the fraud not sooner than November 2010.

2. Unreasonable Delay of Rescission

Next, we must determine when rescission occurred and whether it was unreasonably delayed. In its reply brief, Casa concedes the evidence did not conclusively establish rescission occurred when Hicks refused to pay rent after opening for business in February 2010. Casa admits, as it must, that until November 2010, the evidence established "continued promises" or negotiations prevents a finding that rescission occurred before then. Casa argues, instead, that rescission occurred when Appellees actually vacated the property in February 2012. However, we believe when Appellees *manifested their intent to rescind* is controlling here. And the evidence demonstrates that Appellee's intent to rescind manifested in December 2010 when Hicks' attorney notified Casa that Hicks intended to vacate the property as soon as he could find a suitable location, which Hicks estimated would take ten months. Although Hicks offered to pay rent during those

ten months in exchange for certain concessions by Casa, no deal was ever reached.

Thereafter Hicks continued to occupy the property withholding rent for fourteen months. Thus, the evidence establishes Casa was aware Hicks intended to vacate as soon as he could find a suitable location and that Hicks was not only withholding rent for the time he had actually occupied the property in the past, but would also be extinguishing any future obligations under the lease to occupy the property or pay rent for the full ten-year lease term. In other words, this time, the withholding of rent was conditioned not on Casa's future performance of its obligations under the lease, but rather on Hicks' belief that the lease was nonbinding because he had been fraudulently induced in signing it.

Because Casa was aware of Hicks' decision to vacate, but did nothing before October 2011 to communicate to Hicks his continued rent-free occupancy was unacceptable, we do not believe the time it took for Hicks to actually vacate was unreasonable. Casa introduced no evidence that it was injured by Appellees' continued occupancy. *See Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 344 (when conducting reasonableness inquiry, finding that Prudential had not established ratification in part because "it points to no way in which it was injured or suffered unjust consequences" by continued occupancy). Casa did not demonstrate, for example, that it had identified a viable replacement tenant from whom Casa could collect rent. Nor did Casa offer any evidence Appellees had available to them a viable alternative location to where they could have moved sooner but did not. Appellees, on the other hand, who had employees and families who depended on their business services would have suffered injury if they had vacated before locating a viable alternative. Given these facts we believe rescission was not unreasonably delayed.

Finally, we find unpersuasive Casa's argument Hicks ratified the lease by allegedly

accepting other benefits of the lease after November 2010 when Hicks became aware of Casa's fraud. *See Verizon Corporate Services Corp. v. Kan-Pak Sys., Inc.*, 290 S.W.3d 899, 906 (Tex.App.—Amarillo 2009, no pet.). Casa argues apart from occupancy, the lease offered additional ongoing benefits, including retention of "at least some" of the kids from the prior daycare and the opportunity to take over "an ongoing daycare business that had little competition" that Appellees continued to receive. The evidence does not support Casa's contention. These so-called benefits of the lease were not expressly provided for in the lease, but rather, were based on oral promises that were never fulfilled.

To the extent Hicks was able to enroll children, Casa offered no evidence to establish those children were actually kids Sandoval had been servicing. Moreover, the evidence conclusively established when Hicks took possession of the property, the building was an empty shell and far from the "established" fully-equipped condition that had been promised. To the contrary, Hicks expended time and resources building up a business that Casa *falsely* represented was "turnkey." After spending a year investing in the property, hiring employees, and building a clientele, Casa's arguments that Hicks should have immediately shut the business down regardless of whether a new viable location could be found, is simply unreasonable and not required by Texas law. *See Vandervoort,* 293 S.W.2d at 275 ("Time is material so far only as, when associated with other circumstances, [rescission] may produce injury or unjust consequences to the defendant or third persons.").

Accordingly, we hold the evidence in this case did not conclusively establish Appellees unreasonably delayed rescinding the lease, and therefore, the trial court's findings and conclusions of law that ratification did not occur, were not against the great weight of the evidence.

We overrule Casa's third issue.

IV. Breach of Contract, Damages and Attorney's Fees

In Issue Four, Casa contends that the trial court erred in concluding that Appellees did not breach the lease and in failing to award contract damages. Because we agree with Appellees the evidence sufficiently supports the trial court's findings and conclusions that Casa fraudulently induced Appellees into the lease and Appellees did not ratify the lease induced by fraud, any alleged breach by Appellees was excused. It is therefor, not necessary for us to reach Casa's arguments regarding the alleged breach or alleged damages attributed to it. We overrule Issue Four as moot.

Likewise, with respect to attorney's fees, Casa asks that we reverse the trial court's failure to award attorney's fees only if we sustain Issues One or Four. Having overruled both issues, it is not necessary to reach the attorney's fees issue. We overrule Issue Five as moot.

CONCLUSION

Finding no error, we affirm the trial court's judgment.

May 22, 2020

YVONNE T. RODRIGUEZ, Justice

Before Alley, C.J., Rodriguez, and Palafox, JJ.