

Affirmed and Opinion filed January 3, 2002.



In The
Fourteenth Court of Appeals

NO. 14-00-00442-CV

SEZANNE A. TENER, Appellant

V.

BRADLEY F. BRACEWELL, Appellee

**On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 94-052391**

OPINION

Appellant Sezanne A. Tener presents thirty-one points of error regarding the trial court's sixty-five findings of fact and conclusions of law entered in her lawsuit against her former law partner, appellee Bradley F. Bracewell. Finding no error despite these prodigious efforts to uncover one, we affirm.

Tener and Bracewell were partners in the law firm of Bracewell and Zelluff. When the law firm suffered a downturn in business, Bracewell terminated the partnership. Various lawsuits and countersuits ensued among Tener, Bracewell, former clients, and others. On October 25, 1990, Tener and Bracewell signed a handwritten settlement

agreement, in which the parties agreed to:

- dissolve the partnership effective September 30, 1989;
- assign all partnership property and receivables to Tener;
- assign Bracewell's shares in the company that owned their building to Tener;
- allocate responsibility for malpractice claims according to which of them performed the work or supervised the legal staff that did; and
- release "all claims, demands, or liability of any kind" between them based on conduct occurring prior to the settlement, except for claims for contribution based on the performance of legal services.

One day short of four years later, Tener sued Bracewell alleging breach of the settlement agreement and other claims. Almost five years after that, the case went to trial without a jury, culminating in a take-nothing judgment against Tener. Tener challenges the legal and the factual sufficiency of most of the trial court's sixty-five findings, without troubling us with references to particular findings by number.

The Settlement Agreement

We begin with Tener's eleventh through thirteenth points of error, as they form the basis of numerous others. Because several of her claims are based on the parties' original partnership agreement, Tener challenges the trial court's finding that the settlement agreement released all claims thereunder. She argues the settlement agreement could not release future claims, and they should be governed by the original partnership agreement.

The settlement agreement provides:

[T]he parties to this agreement mutually release each other from all claims, demands, or liability of any kind based on conduct occurring prior to the date of this agreement, except as to claims for contribution based on the performance of legal services.

There is nothing unclear about this release. Claims relating to prior conduct (other than

those excepted in the settlement document itself) are released. Claims relating to subsequent conduct could not form the basis of partnership claims as the settlement recognized the dissolution of the partnership a year before.

There is no question parties can release unknown claims and those that may develop in the future. *Keck, Mahin & Cate v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 698 (Tex. 2000). Thus, the settlement agreement validly terminated any claims based on the original partnership agreement. We overrule Tener's eleventh through thirteenth points.¹

The Hatfield Litigation

In her first eight points of error, Tener complains of the trial court's failure to make Bracewell pay for damages she incurred in litigation with Ronald Hatfield. Bracewell agrees he was responsible for any legal malpractice alleged by Hatfield, but points out that he settled all those claims by paying Hatfield \$70,000.00 in 1992.

Nevertheless, Tener and Hatfield continued suing each other in Bracewell's absence, arguing over funds Hatfield had tendered to the former law firm. Hatfield claimed the funds should have been kept for him in trust; Tener claimed the funds were hers (as assignee of the firm) for legal work the firm performed for Hatfield. Tener does not challenge the trial court's finding that the firm's property and receivables were assigned to her on an "as is" basis. This negates any claim that Bracewell caused her injury. *See Prudential Ins. Co. of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) (holding "as is" agreement negates any reliance upon representations).

After Bracewell's settlement, the Hatfield litigation had nothing to do with the quality of legal services performed, so the indemnification provision of the settlement

¹ We disagree with Tener's claim that the settlement agreement was incomplete. It is true a suit against the former firm alleging negligence of someone other than Tener or Bracewell or the staff they supervised would not have been allocated by paragraph 2 providing for cross-indemnities. However, it would have been covered by paragraph 6, which provided for contribution, a claim Tener never asserted.

agreement was not applicable. Tener points to no other part of the settlement agreement that was. Instead, she relies for recovery on the original partnership agreement. For the reasons stated above, we hold that claims thereunder have been released.

Alternatively, the trial court found that Bracewell failed to mitigate her damages from the Hatfield litigation. In yet another mediation during November of 1991, Bracewell agreed to pay Tener \$35,000.00 in settlement of the Hatfield claims, but Tener refused tender of the settlement check. Tener argues the check was never directly tendered to her. Because the evidence on this issue is conflicting, we defer to the trial court as sole judge of the credibility of the witnesses and the weight to be given their testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). We find there is factually and legally sufficient evidence to support the trial court's findings as to the Hatfield litigation.

The Ronin Litigation

In her first four points of error, Tener also complains of the trial court's failure to award her indemnification against Bracewell for damages incurred in litigation with David Ronin. Her alleged damages were attorney's fees incurred by an insurance company that handled and settled the litigation for the firm. Although Tener states in her brief she personally paid the premiums for this insurance, her references to the trial record do not bear this out. Instead, the trial record supports Bracewell's claim that the premiums were paid by both parties out of the firm's operating account.²

Tener cites no authority to support her argument that the collateral source rule applies in these circumstances. As the trial court found Tener suffered no damages, we presume the trial court found that Bracewell paid all or part of the premiums, and thus the insurance payments were not collateral as to him. Further, even if we were to assume

² The insurance policy appearing in the clerk's record was a "claims made" policy. Ronin gave the firm notice of his claim by March of 1990 at the latest, during the policy year paid from Bracewell & Zeluff's operating account. Tener does not appear to have paid policy premiums until the following August.

Tener paid the premiums, then that would be her only damage. Allowing her (rather than the insurer) to recover attorney's fees from Bracewell would not be compensation but a windfall. Finding there is factually and legally sufficient evidence to support the trial court's findings as to the Ronin litigation, we overrule Tener's first eight points of error.

The Borrell and Lucci Litigation

In her ninth and tenth points of error, Tener brings legal and factual sufficiency challenges to the trial court's refusal to award her indemnification against Bracewell for damages allegedly incurred in litigation with Joseph Lucci and Leo Borrell. Both suits arose out of collection claims filed by Tener in the name of the former law firm.³ Bracewell testified and the trial court found that neither suit concerned legal services performed by Bracewell or anyone under his supervision.⁴ Tener seeks indemnification under the original partnership agreement, but for the reasons stated above, that agreement was superseded and any claims under it released by the settlement agreement. Tener's ninth and tenth points of error are overruled.

Claims for Breach of Fiduciary Duty and Fraud

In points of error sixteen through thirty-one, Tener challenges the trial court's findings against her fraud, misrepresentation, and breach of fiduciary duty claims against Bracewell regarding a stock transaction between the parties. In the settlement agreement, Bracewell agreed to endorse and deliver his shares of Parkway Land Company ("PLC") stock to Tener, and represented the stock was not subject to any transfer restrictions or right of first refusal. The record clearly shows he delivered the endorsed shares to Tener,

³ We agree with Bracewell that Tener's collection efforts appear to violate the settlement agreement, in which she promised to attempt collections only in her own name. But because the trial court made no findings or conclusions on this point, we do not address whether Tener's breach was the cause of the subsequent litigation.

⁴ Tener does not challenge this finding as to the Lucci litigation. She does challenge it as to the Borrell suit, but because the evidence was conflicting we find insufficient basis to reverse the trial court's finding.

and that they bore no transfer restrictions.

Tener complains Bracewell failed to register her as owner of the shares to insure her voting rights. Bracewell did not promise to do so in the settlement agreement. The record supports the trial court's findings that it was Tener's duty to see that the transfer of shares was registered on the corporate books of PLC; her failure to do so allowed Hatfield to issue more stock and dilute her 50% ownership.

Tener also argues Bracewell committed fraud by failing to disclose Hatfield's threat to sue Tener if Bracewell transferred the PLC shares to her. The record reflects, however, that Hatfield threatened to sue *Bracewell* for malpractice if he transferred the PLC stock, not Tener. Moreover, prior to the threat Tener had already sued Hatfield, and their relationship naturally deteriorated as a result of their own litigation. We agree with Tener that partners have a duty to disclose all important information about the value of interests transferred in dissolving their partnership. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 175 (Tex. 1997). But under the facts of this case, we do not believe the duty to disclose included Hatfield's threat as (1) it was a threat to sue Bracewell rather than Tener, and (2) Tener's pending litigation with Hatfield necessarily put her on notice of the possibility of a countersuit. Tener's points of error sixteen through thirty-one are overruled.

Remaining Points

In her fourteenth point, Tener challenges the trial court's alternative finding that her claims under the partnership agreement were barred by limitations. As we have found the settlement agreement superseded and released any claims under the original partnership agreement, we need not reach this point. *See Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994) (holding that a finding, even if erroneous, does not constitute reversible error if not essential to disposition of the case).

In her fifteenth point of error, Tener complains that the trial court erred in refusing

to award attorney's fees to her on her breach of contract and fraud claims. As we have affirmed the trial court's findings against Tener on those claims, her fifteenth point is overruled.

Conclusion

For twelve years Bracewell has been trying to extricate himself from his partnership with Tener. The fiduciary duty partners owe each other does not include a duty to remain partners forever. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546 (Tex. 1998). In compliance with their settlement agreement eleven years ago, Bracewell has given Tener all his interests in the firm's furniture, equipment, receivables, and even the building they were in. We believe it is time to let him go. Finding no error by the trial court, we affirm the judgment.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed January 3, 2002.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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