Affirmed and Opinion filed January 3, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00102-CV

LISTO EQUIPMENT COMPANY, INC., Appellant

V.

OKLAHOMA METAL PROCESSING COMPANY, INC.
d/b/a PRO-METAL PROCESSING COMPANY, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 1999-03236

O P I N I O N

In this commercial contract dispute, Listo Equipment Company, Inc. ("Listo") appeals a take-nothing judgment in favor of Oklahoma Metal Processing Company, Inc. d/b/a Pro-Metal Processing Company ("Pro-Metal") on the grounds that: (1) the trial court incorrectly applied Texas law on sworn accounts; (2) the evidence does not support the trial court's conclusion of law regarding Pro-Metal's entitlement to an offset; (3) the trial court erred in admitting the testimony of Pro-Metal's expert witness; and (4) the evidence does not support three of the trial court's findings of fact. We affirm.

Background

Listo entered into an oral contract (the "contract") with Pro-Metal whereby Listo provided "burners," *i.e.*, workers who processed scrap metal with gas/oxygen torches, at Pro-Metal's facilities. Pro-Metal weighed the scrap processed by the burners, faxed Listo copies of weight tickets reflecting the amount of scrap processed on a weekly basis, and was invoiced by Listo for the tonnage of scrap reflected on the weight tickets.

After approximately a year, Pro-Metal terminated the contract. Listo subsequently filed this lawsuit seeking to recover the unpaid balance on six invoices plus an estimated amount for the scrap processed during the final week of the contract. Pro-Metal filed a counterclaim alleging breach of contract, unjust enrichment, and fraud.

After a bench trial, the court rendered a take-nothing judgment against both parties and entered findings of fact ("findings") which included the following:

> (8) Listo's burners conspired with Pro-Metal's employees to inflate the amount of scrap claimed to be processed;
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> (9) given the type of scrap to be processed, one burner could not process in a one-week period some of the amounts reported on the weight tickets; and
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> (10) the amount of scrap actually processed was not as reflected on some of the weight tickets.

The court also entered the following conclusions of law ("conclusions"):

> (1) while Pro-Metal argues that [it] overpaid Listo, and there is some evidence that some of the amounts on the weight tickets may be inflated, there is insufficient evidence to support a reasonably certain figure and, therefore, insufficient evidence to support Pro-Metal's claim of unjust enrichment;
>
> (2) there is insufficient evidence that Listo breached its oral contract with Pro-Metal by accepting Pro-Metal's payment of $216,596.36; and
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> (3) considering the evidence that some of the payments were more than they should have been due to inflated weight tickets, as well as considering all offsets and credits, there is insufficient evidence that Pro-Metal breached its

contract with Listo, therefore, Pro-Metal owes nothing further to Listo for any burner service made the basis of this lawsuit.

Sufficiency of Evidence

Listo's first issue argues that the trial court erred by failing to require Pro-Metal to prove the amount of the alleged offsets or credits to which Pro-Metal claimed to be entitled. Listo's second issue argues that the evidence does not support the trial court's conclusion that Pro-Metal was entitled to an offset because Pro-Metal failed to produce any evidence of the amount of its alleged offsets or credits. Listo thus challenges the legal and factual sufficiency of the evidence to prove what it perceives as the trial court's implicit finding that Pro-Metal was entitled to an offset of $34,373.12. Listo's fourth issue similarly argues that the evidence does not support the trial court's findings of fact numbers 8, 9, and 10 because there was no evidence of: (1) conspiracy; (2) an upper limit regarding the amount of scrap a burner could process in a week; or (3) any incorrect weight ticket.

Standard of Review

A trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards as are applied in reviewing the evidence supporting a jury's answer. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). In conducting a no evidence review, we view the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001). If more than a scintilla of evidence exists, the evidence is legally sufficient to support the finding. *Id.*

However, a party attacking the legal sufficiency of an adverse finding on an issue on which he had the burden of proof must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001). In reviewing such a "matter of law" challenge, the reviewing court must first examine the record for evidence that supports the finding, while ignoring all

evidence to the contrary. *Id.* If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id.* The legal sufficiency challenge should then be sustained only if the contrary proposition is conclusively established. *Id.*

We review factual sufficiency by weighing all of the evidence, not just the evidence which supports the verdict. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998). We can set aside the judgment only if it is so contrary to the overwhelming weight of the evidence that the judgment is clearly wrong and unjust. *Id.* at 407.[1] However, because we are not a fact finder, we may not pass upon the witnesses' credibility or substitute our judgment for that of the trier of fact, even if the evidence would clearly support a different result. *Id.*

The standard of review for conclusions of law is whether they are correct. *Dickerson v. DeBarbieris*, 964 S.W.2d 680, 683 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Id.* Thus, incorrect conclusions of law do not require reversal if the controlling findings of fact will support a correct legal theory. *Id.*

Sufficiency Review

Contrary to Listo's assertion in its first two issues, the trial court did not find, either expressly, impliedly, or even arguably, that Pro-Metal was entitled to any particular amount of offset. On the contrary, the trial court essentially found that: (1) the amount of scrap processed was not as reflected on the weight tickets; (2) there was insufficient evidence to support a reasonably certain finding on the correct amount of charges or offsets; and

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[1] Similarly, where a party attacks the factual sufficiency of the evidence to support a finding on an issue on which that party had the burden of proof, the party must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chemical,* 46 S.W. 3d at 242. We consider all the evidence and set aside the verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.*

accordingly, (3) liability could not be found in favor of either party. Thus, rather than making any affirmative finding concerning amounts due or offsets, the trial court made a non-finding of liability because the evidence was too unreliable to conclude that any amounts were owed by either side. Accordingly, Listo's first two issues fail to show error and are overruled.

With regard to Listo's fourth issue, the undisputed evidence supporting the challenged findings of conspiracy and overstating of weight tickets includes the following: (1) Roberto Morales, a Pro-Metal crane operator, testified that Listo's burners would sometimes have scrap they processed weighed and credited twice; (2) Sergio Diaz, a Listo burner, testified that he was aware of a scheme to inflate the tonnage that he processed by taking credit for scrap previously weighed; (3) Eugenio Perez, a Pro-Metal operator, testified that scrap was being weighed and credited twice to Listo's burners; (4) Philippe Leonard, general manager of Pro-Metal, testified that Pro-Metal weighed the scrap processed by Listo's burners during the final week of the contract and it weighed 400 to 420 tons, rather than the 1,118.30 tons claimed by Listo for that week; and (5) G. H. Hart, Listo's manager, testified that he paid his burners based on the burners' estimated tonnage for the final week of the contract, which was 540 tons.

This evidence is legally sufficient to support challenged findings 8 and 10. Although it is not apparent specifically how the trial court made the calculations leading to finding 9, at least one witness testified regarding the amount of scrap a burner could process in a week and three others testified as to the amount a burner could process in a day,[2] which, by inference is some evidence of the amount that could be processed in a week. In any event, finding 9 is not essential to the trial court's ultimate determination of no liability, which is adequately supported by findings 8 and10. Accordingly, point of error four is overruled.

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[2] See *infra* discussion of Admissibility of Expert Testimony and accompanying note 3.

Admissibility of Expert Testimony

Listo's third issue argues that the trial court erred in admitting the expert testimony of Leonard because it was unreliable for reasons outlined below. However, before reaching them, we note that Listo has not shown that Leonard was ever offered as an expert witness, and the record is ambiguous regarding whether Listo objected to Leonard's testimony as only lay opinion testimony or also as expert testimony. Moreover, although Listo did object at trial to Leonard's testimony as lay opinion testimony, it does not re-urge that complaint on appeal.

In addition, Listo claims on appeal that Leonard's testimony was unreliable because: (1) there is an analytical gap between the data offered and his opinion regarding the amount of scrap the burners could have processed; and (2) it fails to address the variables that affect the amount of scrap that can be processed such as the thickness and shape of the scrap metal, the burner's experience, and the torch used. However, because Listo's objection at trial was simply that Leonard's testimony was unreliable and without foundation, no such specific grounds were preserved for review.

In any event, the record reflects that Leonard had: (1) worked in the scrap business for about 20 years; (2) hired burners in France, Mexico City, and Oklahoma for 15 or 18 years who processed scrap using the same type of equipment as the Listo burners; and (3) observed these burners process scrap. Based on this experience, Leonard testified that a burner could process 15 to 18 tons in an 8-hour day; and, accordingly, that it is impossible for a human to process as much scrap as Listo invoiced in weeks 1, 2, 3, 4, and 7.

We conclude that an adequate foundation was laid for Leonard's opinion and that his opinion was sufficiently reliable, whether as an expert or lay witness, based on his experience in observing how much scrap burners could process in a day. Moreover, other witnesses

provided similar testimony without objection.[3] Accordingly, point of error three is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 3, 2002.

Panel consists of Justices Yates, Edelman, and Draughn.[4]

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

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[3] *See Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984) (noting generally that error in admission of testimony is harmless if the objecting party allows similar evidence to be admitted without objection). In addition to Leonard, (1) Larry Kelley, a Pro-Metal supervisor, testified that in his experience during a five day week, a good burner could process 120 tons of scrap, *i.e.*, 24 tons per day, and an average burner could process 90 tons of scrap, *i.e.*, 18 tons per day; (2) Morales testified that the maximum tonnage he ever observed being processed by a burner was about 10 tons per day; and (3) Perez testified that the most scrap he could process in a day was 20 to 25 tons.

[4] Senior Justice Joe L. Draughn sitting by assignment.