Affirmed and Opinion filed September 9, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00889-CV

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HAMIDA KHATOON, INC. D/B/A ELEGANCE JEWELRY & DIAMONDS AND ASHRAF RAIYYANI, Appellants

V.

GOLD & DIAMOND MERCHANTS GROUP, INC., Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 97-43361

O P I N I O N

Appellants, Hamida Khatoon, Inc. d/b/a Elegance Jewelry & Diamonds ("EJD") and Ashraf Raiyyani, appeal a judgment in favor of appellee, Gold & Diamond Merchants Group, Inc. ("GDM") in a suit on a sworn account. On an unspecified date, appellants executed a credit application with GDM, a wholesale seller and distributor of jewelry, for the purpose of purchasing a set amount of jewelry each month. The application listed Hamida, Inc. d/b/a Elegance Jewelry & Diamond as the entity applying for credit. The form

also contained terms and conditions by which the parties agreed to be bound. Included within the terms of the application was a "Guaranty of Payment" provision, which appellant Ashraf Raiyyani, president of Hamida Khatoon, Inc., executed. The provision provided:

> For value received and in consideration of the extension of credit to _____ ("Obligor"), the undersigned hereby guarantees to [GDM] . . . the full performance and observance of all covenants, conditions, and agreements to be performed and observed by the Obligor, including the obligation to make full payment of any and all monies owed by the Obligor to GDM . . . .

Simultaneous to this transaction, GDM introduced Raiyyani to Avondale Savings Bank; Avondale contracted with appellants to provide a retail credit program for appellants' customers. This program facilitated appellants' jewelry sales. However, in 1997 Avondale canceled the credit program. Appellants experienced a drop in demand and were unable to sell the jewelry it had contracted to purchase with GDM; meanwhile, GDM continued to ship appellants jewelry pursuant to their agreement.

In August 1997, GDM brought a suit on a sworn account in the amount of $173,859.19 for the price of the jewelry it sold and delivered to EJD, and sought to enforce a security interest in EJD's inventory. In October, the trial court granted GDM's application for writ of sequestration, and the writ was served by the Sheriff of Galveston County. Subsequently, GDM purchased the jewelry for a price of $135,000 in a private foreclosure sale. After a bench trial, the trial court rendered judgment against appellants and awarded appellees the remaining balance of the account of $38,859.19, prejudgment interest totaling $25,378, and reasonable attorneys' fees of $20,000.

In ten points of error, appellants contend that the trial court erred in making findings regarding (1) the existence of a contract, (2) Ashraf Raiyyani's individual liability as a guarantor, (3) GDM's promise to provide a credit program, and (4) the reasonableness of

GDM's private foreclosure sale. Moreover, appellants argue that the trial court erred in ruling that appellants waived their affirmative defense regarding appellee's "lack of capacity" to maintain suit in Texas, and in refusing to permit appellant's trial amendment. Furthermore, appellants contend the trial court erred in concluding that all offsets and credits had been made to appellant's sworn account. We affirm the trial court's judgment.

LACK OF CAPACITY

In their first two points of error, appellants argue that GDM cannot maintain suit in Texas because it does not have a certificate of authority to conduct business in Texas. According to appellants, because appellee's petition showed that the transaction complained of was intrastate by nature, appellant was not required to affirmatively plead lack of capacity as a defense. Thus, appellant contends that the trial court erred in ruling that appellants waived their affirmative defense of lack of capacity by failing to affirmatively plead it. Furthermore, according to appellants, the trial court erred in refusing to allow appellants to amend its pleading.

No foreign corporation shall have the right to transact business in the state of Texas until it shall have procured a certificate of authority from the Secretary of State. *See* TEX. BUS. CORP. ACT ANN. art. 8.01(A) (Vernon Supp. 1999). A foreign corporation that transacts business in Texas without a certificate of authority cannot maintain any action, suit, or proceeding in any court of this state on any cause of action arising out of the transaction of business until such corporation shall have obtained a certificate of authority. *See* TEX. BUS. CORP. ACT ANN. art. 8.18A (Vernon 1980). However, no certificate of authority is required for a foreign corporation to transact *interstate* business. *See* TEX. BUS. CORP. ACT ANN. art. 8.01B(9) (Vernon Supp. 1999); *Killian v. Trans Union Leasing Corp.*, 657 S.W.2d 189, 192 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

Appellants contend that GDM's petition affirmatively shows that the transaction upon which it sues is intrastate; accordingly, appellants need not affirmatively plead lack of capacity as a defense. We disagree. GDM's pleadings disclose that its claim arose out of an interstate sale of jewelry. GDM is a foreign corporation, chartered in Michigan, with its offices located in New York, New York. EJD and Ashraf Raiyyani have their principal place of business and residence, respectively, in Harris County, Texas. The terms of the contract provided that all amounts due for the goods were payable to GDM at their New York City office. The invoices attached to GDM's petition reveals that all the goods appellants purchased were shipped from GDM's location in Secaucus, New Jersey to appellants' stores in Texas. Thus, the transactions upon which the sworn account is based involved sales in interstate commerce and GDM was not required to produce a permit to maintain an action against appellants. Consequently, the trial court did not err in refusing to allow appellants to amend their pleadings to affirmatively plead the defense of lack of capacity. We overrule appellants' first two points of error.

GUARANTY CONTRACT

In their third and fourth points of error, appellants contend that the trial court erred in finding that a contract existed and that Ashraf Raiyyani was liable as a guarantor. Appellants complain that the trial court erred because the guaranty sued upon failed to guarantee the debt of a specific obligor and failed to guarantee a specific obligation.

The construction and interpretation of the legal effect of a written contract is a question of law. *See City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968). In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. *See Coker v. Coker*, 650 S.W.2d 391, 393 (Tex.1983). This cardinal rule of construction applies to guaranty contracts as it does to other types of contracts. *See Preston Ridge Fin. Servs.*

Corp. v. Tyler, 796 S.W.2d 772, 775 (Tex. App.—Dallas 1990, writ denied). The intention of the parties is discovered primarily by reference to the words used in the contract. *See id.* Further, to determine the parties' actual intent, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *See Coker*, 650 S.W.2d at 393. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *See id.*

Appellant Raiyyani executed the guaranty provision in question simultaneously with the credit application, signing the credit application in her capacity as president of Hamida Khatoon, Inc. and the guaranty in her individual capacity. In fact, the guaranty provision is part of the latter form and is located on the reverse side of the application. Accordingly, we will construe the instrument as a whole. *See generally Walter E Heller & Co. v. Allen*, 412 S.W.2d 712, 717 (Tex. App.—Corpus Christi 1967, writ ref'd n.r.e.) (holding that a lease and agreement guaranteeing lessee's performance, which were executed in the same transaction, must be construed together). Under the terms of the guaranty, Raiyyani agreed to "make full payment of any and all monies owed by the Obligor to GDM." Raiyyani complains that because the guaranty fails to specify a particular obligor or obligation, the guaranty fails. However, the guaranty is located on the reverse side of the credit application executed by Hamida, Inc., d/b/a/ Elegance Jewelry & Diamonds. This application is signed "Ashraf Raiyyani, President." The evidence shows that Hamida Khatoon, Inc. is a Texas corporation, Ashraf Raiyyani is its President, and Elegance Jewelry & Diamonds is the registered assumed name of Hamida Khatoon, Inc. There is no ambiguity in this instrument. The plain meaning of the guaranty provides that Raiyyani will pay any and all monies owed to GDM by Hamida Khatoon, Inc. d/b/a Elegance Jewelry & Diamonds. Accordingly, the trial court did not err in finding that a contract existed between

the parties and Raiyyani was individually liable as a guarantor. We overrule appellants' third and fourth points of error.

SUFFICIENCY OF THE EVIDENCE

In their last five points of error, appellants challenge the sufficiency of the evidence to support the court's findings of fact. Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon jury questions; however, the findings are not conclusive when a complete reporter's record appears in the record. *See Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W2d 199 (Tex. 1985). 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 the legal or factual sufficiency of the evidence supporting jury findings. *See Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam).

In reviewing a legal sufficiency challenge, the appellate court will consider all of the record evidence in a light most favorable to the verdict, and every reasonable inference deducible from the evidence will be indulged in favor of the verdict. *See Merrell Dow Pharmas., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If there is any evidence of probative force to support the finding, the no evidence challenge fails. *See ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). In reviewing a factual sufficiency challenge, the appellate court must consider, weigh, and examine all of the evidence. *See Plas-Tex., Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). The court will set aside the verdict only if the evidence which supports the finding is so weak as to be clearly wrong and manifestly unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

In their fifth point of error, appellants contend the trial court mistakenly found that Syed Aly was her "wife" and that she and Syed owned and operated retail jewelry stores at several locations in Houston. However, appellants have failed to brief this point,

consequently, appellants present nothing for review and we overrule point of error five. *See* TEX. R. APP. P. 38.1(h).

In point of error six, appellants complain that the "trial court erred in finding that the preponderance of the evidence showed that the only party that ever promised to provide a credit program for appellants' customers was Avondale F.S.B." Appellants assert that they agreed to purchase jewelry from GDM in exchange for GDM's promise to provide a retail credit program for their customers. According to the appellants, when Avondale Bank's credit program failed, there was a complete failure of consideration on GDM's part, which should have entitled appellants to return the merchandise to GDM. We disagree.

The record reflects that the only evidence supporting appellants' argument is derived from Ashraf Raiyyani's testimony. Raiyyani testified that GDM's offer to provide a credit program was one of the reasons she agreed to purchase merchandise from GDM. However, Robert Spragins, a GDM employee who handled appellants' account, testified that GDM never promised to provide appellants a credit system. Rather, GDM had an exclusive contract with Avondale Savings Bank to bring the bank to independent retail jewelers. Pursuant to this agreement, GDM introduced appellants to Avondale, and Avondale contracted with appellants to provide a retail credit program. GDM never promised, either expressly or impliedly, to furnish appellants with a retail credit program. We find that this testimony constitutes evidence of probative force to support the finding, and is not so weak as to be clearly wrong and manifestly unjust. Accordingly, we overrule point of error six.

In points seven and nine, appellants contend that the trial court erred "in finding that a private sale was held, that appellee was the highest bidder, . . . that $135,000 was a commercially reasonable price," and "in failing to find the value of [the] jewelry sequestered [to be] $166,301.90." Appellants complain that the $135,000 figure was based on the testimony of an unqualified expert, who had failed to use any reliable technique or

principle in making his assessment. Furthermore, appellants assert that the court's findings are erroneous because there was evidence in the record to support a finding that the jewelry was worth $166,301.90.

Appellants' complaint regarding appellee's expert witness comes too late. Appellants did not object during trial and have, thus, failed to preserve error. *See* TEX. R. APP. P. 33.1; *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998), *cert. denied*, 119 S. Ct. 541 (1998). Consequently, appellee's "expert" witness testimony is properly before the court for review in appellants' sufficiency challenge.

The record shows that pursuant to the terms of the Inventory Security Agreement and the UCC-1 financing statement, GDM held a perfected security interest in all of appellant EJD's inventory. GDM foreclosed its security interest in the jewelry, and after reasonable notice to defendants, sold the jewelry by private sale. Spragins testified that GDM also notified several closeout buyers of the sale and received their bids. Subsequently, GDM submitted the highest bid, and purchased the jewelry at the foreclosure sale for $135,000.

On appeal, appellants argue that the evidence is insufficient to support a finding that $135,000 is commercially reasonable because GDM failed to produce conclusive evidence regarding the value of the jewelry seized. Spragins testified that he was present at the time the writ was levied. Raiyyani produced boxes and trays of jewelry, and written lists for each tray. The handwritten lists purported to list the contents of the boxes and trays and the value of each piece of jewelry. At that time, Spragins noticed that most of the jewelry had been re-tagged. Spragins then conducted a piece count by box, matching up the individual pieces of jewelry against the list; however, according to Spragins, because the jewelry had been re-tagged, he could not verify the values stated on the list. Consequently, Spragins gave an approximate value of the jewelry seized. Based on his 25 years experience in the

jewelry business, Spragins testified that the value of the sequestered jewelry was not greater than $135,000.

Appellants contend that this evidence is inconclusive because earlier in his testimony, Spragins stated that the value of the jewelry as listed in GDM's invoices was reasonable. According to appellants, this testimony contradicts Spragins's later testimony regarding the value of the jewelry sequestered. We disagree. Spragins's earlier testimony referred to the values listed in GDM's invoices at the time the jewelry was shipped to EJD. These figures represented wholesale values, which Spragins considered reasonable. Spragins later testified that the jewelry seized had been re-tagged, as such, he could not verify their true value to be the amounts Raiyyani stated in the handwritten lists. We do not find this testimony conflicting. Notwithstanding, appellants assert the true value of the jewelry seized was $166,301.90 because the sequestering officer added the amounts in the handwritten lists and produced that total. Moreover, appellants argue that there were no documents verifying the true value of gold or the market price of the seized jewelry. Thus, according to appellants, the evidence was insufficient to support the court's finding. However, we find that the record contains evidence of probative force to support the finding, and this evidence is not so weak as to be clearly wrong and manifestly unjust. Therefore, points seven and nine are overruled.

In point of error ten, appellants complain that the trial court erred in failing to find that a credit of $6,000 had not been properly posted to appellants' amount due.[1] Appellants contend that they presented clear and undisputed testimony that two solitaire diamond rings, worth $6,000, had been returned to and accepted by GDM. Because this evidence was

[1] In point of error eight, appellants contend that trial court erred in concluding that all offsets had been made. However, appellant did not brief this issue, and therefore has presented nothing for this court to review. *See* TEX. R. APP. P. 38.1(h).

uncontradicted, appellants argue that they were entitled to a credit of $6,000 on their account, and the court erred in failing to so find.

Spragins and Raiyyani testified that appellants did not attempt to return any jewelry until after Avondale canceled its retail credit program. Spragins stated that GDM did not accept any returns. Raiyyani, on the other hand, stated that she returned two solitaire diamond rings; the value of each ranged from $2,900 to $3,900. However, she failed to specify the exact time of the return, and produced no other evidence to support her contention. We find this evidence supports the trial court's failure to find that appellant's were entitled to a credit to their account. Consequently, we overrule appellants' tenth point of error.

The trial court's judgment is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed September 9, 1999.

Panel consists of Chief Justice Murphy and Justices Yates and Hudson.

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