Affirmed as Modified and Opinion filed November 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00102-CV

DELI MANAGEMENT & DEVELOPMENT, INC. and WESTERN ALLIANCE INSURANCE COMPANY, Appellants

V.

DAMON BUILDERS & DEVELOPERS, INC., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 97-27463

O P I N I O N

In this construction liability case, Deli Management, Inc. and Western Alliance Insurance Company (collectively, "Deli") appeal their judgment against Wilson/Zetty/Associates, Inc., including a take nothing judgment in favor of Damon Builders & Developers, Inc. ("Damon"), on the grounds that: (1) the judgment should name a different entity as judgment debtor because Wilson/Zetty/Associates, Inc. changed its corporate name; (2) the take-nothing judgment in favor of Damon should be reversed and judgment should be rendered against Damon because the evidence conclusively proved its negligence; (3) the

trial court's directed verdict that Deli Management was not a third-party beneficiary of the construction contract should be reversed and judgment should be rendered against Damon for breach of the contract; (4) the case should be remanded to the trial court for an award of attorney's fees to Deli; and (5) the judgment should be modified to clarify that the award of 10% postjudgment interest accrues, and is compounded, annually. We affirm as modified.

Background

Deli contracted with Charles Shears for the lease of property owned by Shears and construction of a restaurant (the "restaurant") on it. Shears, in turn, contracted with Charles Davis Wilson, an architect, and his firm, Wilson/Zetty/Associates, Inc. (collectively, "Wilson"), to design the building shell and with Damon to construct the building shell.[1] Two days after the restaurant opened, its roof collapsed. The building was subsequently repaired, and the restaurant reopened nearly two months later.

Deli sued Damon and Wilson for negligence, breach of contract, and breach of express and implied warranties,[2] seeking to recover lost profits, repair costs, and damage to property in the restaurant. Deli moved for, and the trial court granted, a partial summary judgment that Deli was a third-party beneficiary of the construction contract between Shears and Damon (the "contract"). However, during the subsequent trial, the trial court entered a directed verdict that Deli was not a third-party beneficiary of the contract. The jury then found that only Wilson's negligence caused the collapse of the roof and awarded Deli $332,000 damages against Wilson.[3] On October 25, 1999, the trial court entered judgment accordingly, including a take-nothing judgment in favor of Damon.

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1 Deli employed its own subcontractor to construct the interior build-out.

2 Because Deli did not request a question or instruction in the court's charge on Damon's alleged breach of warranty, apart from its alleged breach of contract, we do not address that claim.

3 Although Wilson filed a notice of appeal, it has filed no brief. Therefore, Wilson's appeal has been dismissed for want of prosecution. *See* TEX. R. APP. P. 38.8(a)(1).

Corporate Name Change

Deli's first issue contends that the judgment should be rendered against Architects Associates, Inc., rather than Wilson/Zetty/Associates, Inc. to reflect that the latter changed its corporate name. This Court may modify a trial court's judgment and affirm it as modified.[4] Because Deli raised this complaint in the trial court, Wilson has not contested the change, and does not appear to be prejudiced by it, the issue is sustained and the judgment will be modified accordingly.

Damon's Negligence

Deli's second issue seeks to reverse the trial court's take-nothing judgment in favor of Damon and to render judgment against Damon because the evidence established that Damon was negligent as a matter of law. Deli contends that the testimony of Damon's president, Kurt Racca, shows that Damon knew that the construction plans prepared by Wilson (the "plans") were defective because they failed to show how the horizontal ledger beams on which the roof trusses rested were to be attached to the wall studs.[5] Deli thus argues that Damon was negligent in (1) failing to call attention to this defect so Wilson could correct it; and (2) proceeding to nail the ledger beams to the wall studs, contrary to the plans, which provided no method for attaching the ledger beams to the wall studs.[6]

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4 TEX. R. APP. P. 43.2(b); *see Arthur's Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 816-17 (Tex. App.—Dallas 1999, no pet.) (modifying trial court's judgment where complaint was preserved by a motion to modify judgment at trial court and no legal basis for expense award existed).

5 The wall studs consisted of two, two inch by six inch boards placed every sixteen inches in the wall. The ledger beams were single two inch by six inch boards spanning horizontally across the wall studs. The trusses supporting the roof were placed on top of the ledger beams.

6 Deli asserts that Damon was also negligent for not calling attention to the fact that the building should have been designed so that the roof trusses rested on top of the wall studs rather than on the ledger beams. However, Deli has acknowledged that the building was rebuilt with the roof trusses resting on the ledger beams. There is no evidence to suggest that the ledger beams could not hold the weight of the roof if properly attached to the wall studs.

Standard of Review

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 be sustained only if the contrary proposition is conclusively established. *Id.* Sufficiency of the evidence must be reviewed using the definitions and instructions contained in an unobjected-to jury charge.[7] *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985).

Sufficiency Review

We first examine the record for evidence and inferences supporting the challenged finding that Damon was not liable for negligence, ignoring all evidence to the contrary, to determine whether any evidence exists to support that finding. Among other things, to recover damages, a plaintiff must prove that the damages claimed resulted from the

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[7] In this case, the jury charge defined negligence as it related to Damon as: "[a] failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances." The jury charge defined proximate cause as it related to Damon as:

> [t]hat cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

Deli did not object, or assign error, to these definitions.

defendant's conduct. *Texarkana Mem'l Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). A plaintiff satisfies this causal link when it presents evidence that establishes a direct causal connection between the damages awarded, the defendant's actions, and the injury suffered. *Id*. Because it is dispositive of this issue, we will focus on this element of causation, as defined in the jury charge, *i.e.*, whether Damon's actions or inactions produced the roof collapse and without which the collapse would not have occurred.

The parties do not dispute that the roof collapsed, at least in part, because the way in which the ledger beams were connected to the wall studs was not strong enough to support the weight of the roof.[8] Because the plans did not indicate how the ledger beams were to be connected to the wall studs, other than to label the ledger beams as "nailers," Damon nailed the ledger beams to the wall studs.[9]

However, Wilson never intended the ledger beams to be nailed to the wall studs. During construction of the building shell, Wilson noticed that the plans omitted the ledger beam-wall stud connection, and that Damon had used nails. A Wilson engineer concluded that the nails would not be sufficient to hold up the roof, and issued a repair drawing which added one, or possibly two, lag bolts to each wall stud. However, there is evidence that no instruction was ever communicated to Damon to add any lag bolts, and it did not do so.

Importantly, Deli's and Damon's structural engineering experts at trial, Peter DeLamora and Robert Louis Wright, respectively, and John Millett, an unspecified type of engineer retained by Deli to investigate the roof collapse, all agreed that adding lag bolts to the wall studs would not have prevented the roof collapse because doing so would have

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[8] DeLamora and Wright further testified that the ledger beams themselves and the trusses which rested on them were also not strong enough to support the weight of the roof. However, Deli does not contend that Damon was negligent with regard to these aspects.

[9] John Millett, an engineer hired by Deli to investigate the collapse, agreed with Damon's interpretation that the term "nailer" implied that the ledger beams should be nailed to the wall stud. To that extent, the plans did indicate how the ledger beams were to be attached to the wall studs.

required more lag bolts per wall stud (six) to support the roof than the wall studs were big enough to hold without splitting.

The evidence was thus uncontroverted that the design of the wall studs was not capable of holding up the roof regardless of the manner in which Damon connected the ledger beams to them. Moreover, there is no evidence that Damon's failure to call attention to any deficiency in the plans regarding the connection method prevented Wilson from correcting it because it is undisputed that Wilson knew of the design issue well before the collapse but nevertheless failed to devise an adequate remedy. There is also evidence that Wilson failed to communicate to Damon even the inadequate remedy it did devise. Thus, no evidence shows that any potential action on Damon's part, such as refraining from nailing the ledger beams until Wilson revised the plan, would have prevented the roof collapse. Because more than a scintilla of probative evidence therefore supports a lack of causation and, in turn, the jury's non-finding of negligence by Damon, Deli's matter of law challenge to that finding fails, and issue two is overruled.

Third-Party Beneficiary

Deli's third issue contends that it was the third-party beneficiary of the contract and was therefore entitled to submission of the jury question it requested on Damon's breach of the contract[10] rather than a directed verdict that it was not a third-party beneficiary. Deli maintains that it is the third-party beneficiary because Shears incurred an obligation to Deli to build the building and then entered into the contract to fulfill that obligation. As with a claim for negligence, a plaintiff seeking to recover for breach of contract must prove, among other things, that it suffered damage caused by the defendant's alleged breach.[11]

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[10] The breach of contract questions that Deli requested to be submitted to the jury, and the trial court denied, stated, in part, "Did [Damon] fail to comply with the construction contract between [Damon] and [Shears] for the construction of the building shell . . . . What sum of money, if any, . . . would . . . compensate [Deli] for its damages . . . that resulted from such failure to comply or breach?"

[11] *See Boon Ins. Agency, Inc. v. American Airlines, Inc.*, 17 S.W.3d 52, 58 (Tex. App.—Austin 2000, pet. denied), *cert. denied*, 121 S. Ct. 858 (2001); *East Texas Med. Ctr. v. Anderson*, 991 S.W.2d 55,

In this case, the contract provided that "[t]he above work [will] be performed in accordance with the drawings and/or specifications submitted for above work and completed in a substantial workmanlike manner. . . . Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. Damon Builders is liable for material and workmanship only." Deli argues that Damon breached the contract because it did not construct the building shell in accordance with the plans and specifications or in a substantial workmanlike manner when it nailed the ledger beams to the wall studs despite the plans not calling for that to be done, and without bringing the defect in the plans to Wilson's attention. Deli acknowledges that this is the same conduct it relies on to show Damon's negligence. However, because there is no evidence that this conduct caused the roof collapse, as discussed in the preceding section, Deli has failed to prove that any breach of the contract by Damon caused Deli any damage for the roof collapse, even if Deli is a third party beneficiary of the contract (which we therefore need not address). Accordingly, Deli is not entitled to rendition of a judgment holding Damon liable for breach of the contract for damages resulting from the roof collapse,[12] and Deli's third issue is overruled.

Attorney's Fees

Deli's fourth issue argues that the Court should remand this case for consideration of attorney's fees for breach of the contract. Because Damon was not proved liable for breach of contract, no such remand is warranted, and Deli's fourth issue is overruled.

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62 (Tex. App.—Tyler 1998, pet. denied); *Ryan v. Superior Oil Co.*, 813 S.W.2d 594, 596 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

[12] Deli does not ask for a new trial for the omission of its requested jury charge question on breach of contract and would not be entitled to one in light of the lack of evidence of causation.

Postjudgment Interest

Deli's fifth issue contends that the final judgment should be modified to specify that postjudgment interest accrues not only at a rate of 10%, but at that rate per annum, compounded annually. *See* TEX. FIN. CODE ANN. § 304.003, .005-.006 (Vernon Supp. 2001). Although the lack of such specificity does not necessarily render the judgment erroneous, we will modify the judgment to leave no room for misinterpretation.

Settlement Credits

Damon's contingent cross-issue contends that, should this Court reverse the trial court's judgment and render judgement, $22,000 in settlement amounts should be credited against the damage award. Because we do not reverse the trial court's judgment, no consideration of this issue is necessary.

Accordingly, the judgment of the trial court is modified so as to be rendered against "Architects Associates, Inc." rather than "Wilson/Zetty/Associates, Inc." and to specify that postjudgment interest accrues not only at a rate of 10%, but at that rate per annum, compounded annually. As so modified, the judgment is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed November 15, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.[13]

Do not publish — TEX. R. APP. P. 47.3(b).

[13] Senior Justice Don Wittig sitting by assignment.