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MEMORANDUM OPINION
Court of Appeals of Texas, Houston (14th Dist.).

George K. **SHEFFIELD** and Creed Corporation, Appellants
v.
John **GIBSON**, Appellee.

No. 14-06-00483-CV.
|
Jan. 22, 2008.

On Appeal from the 190th District Court, Harris County, Texas, Trial Court Cause No.2002-26522.

Attorneys and Law Firms

Richard A. Fulton, for George K. **Sheffield** and Creed Corporation.

Frederick T. Dietrich and Scott Williams, for John **Gibson**.

Panel consists of Justices ANDERSON, FOWLER, and FROST.

MEMORANDUM OPINION

WANDA McKEE FOWLER, Justice.

***1** Appellant George **Sheffield**, officer and owner of Creed Corporation ("Creed"), and appellee, John **Gibson**, negotiated the purchase of a home in Beach City from Creed. After **Gibson** bought the home, he filed this suit against **Sheffield**, Creed, and others, alleging, among other things, common-law fraud, statutory real estate fraud, and DTPA violations based on alleged misrepresentations regarding the home's foundation. After a bench trial, the trial court found in favor of **Gibson** and awarded him damages. **Sheffield** and Creed brought this appeal.

Factual and Procedural Background

Gibson is a CPA who has lived in the Houston area since 1965. In April of 2000, Gibson informed one of his clients, Linda Miller, who was a real estate broker, that he was looking to purchase a house in Beach City. Miller knew that **Sheffield** had a house in Beach City that he wanted to sell, so she contacted **Sheffield** for **Gibson**, and **Sheffield** made the key to the home available so **Gibson** could go look at the property.

Gibson decided to purchase the home, and on May 26, 2000, the earnest money contract was signed. The earnest money contract-a standard "Texas Real Estate Commission One To Four

Family Residential Contract"-contained a provision dealing with acceptance of the property condition. The contract provided that in exchange for $100, Gibson would have ten days after the effective date of the contract to give notice of termination of the contract. If Gibson did not give notice in the time allowed, he would be deemed to have accepted the property in its "current condition."

After signing the earnest money contract, but before closing, **Gibson** discovered a crack in the foundation of the home, and informed **Sheffield** that he would not close with the foundation of the home in such a condition. **Sheffield** informed **Gibson** that he had already consulted a foundation repair company to look at the problem, and that he was considering having the foundation repaired. Rather than terminate the contract, as **Gibson** had a right to do under the property acceptance provision of the earnest money contract, **Sheffield** and **Gibson** orally agreed that, instead, **Sheffield** would pay to have the foundation fully repaired by Continental Foundation Repair ("Continental") after closing. Relying on this modification, **Gibson** closed on the house on June 22, 2000.

Sheffield testified at trial that he paid Continental $4,150 for the necessary foundation repairs in the form of forgiveness of debt owed to **Sheffield**. However, the repair work was never performed, and as a result, **Gibson** sued **Sheffield**, Creed, Continental, Ogden, and Tesha Ann McClanahan, apparent wife and co-owner of Continental.[1] His pleadings claimed breach of contract, fraud,[2] conspiracy, and Deceptive Trade Practices-Consumer Protection Act ("DTPA") violations. Sheffield and Creed filed a cross-claim against James Ogden, individually, and d/b/a Continental Foundation Repair, seeking (1) in-kind contribution for any liability **Sheffield** and Creed might owe to **Gibson**; (2) the determination of proportionate responsibility as to the various defendants, and particularly amongst themselves, Ogden and Continental; and (3) actual damages for breach of contract. With respect to their breach of contract claim, **Sheffield** and Creed alleged that they had contracted with Ogden and Continental to perform foundation repairs on **Gibson's** residence, and that Ogden and Continental failed to perform after receiving "adequate remuneration." **Sheffield** and Creed therefore sought to recover the greater of $4,150 or the contribution amount, plus attorney's fees, from Ogden and Continental.

1 Service was never accomplished on McClanahan, and Ogden indicated that she was in prison at the time of trial. At any rate, the claims against her were nonsuited at the beginning of trial. Because Ogden and Continental did not appear at trial, **Gibson** and **Sheffield** and Creed moved for default judgment against them. Only defendants **Sheffield** and Creed appeal from the judgment of the trial court.

2 In his original and first amended petitions, **Gibson** alleged a cause of action for "fraud" against all defendants. However, in his brief, Gibson characterizes his fraud claim as one for statutory real estate fraud under section 27.01 of the Texas Business and Commerce Code. Although this issue is not contested on appeal,

we note that Gibson's pleadings support causes of action for common-law fraud and statutory real estate fraud under Texas Business and Commerce Code § 27.01.

***2** Ogden and Continental failed to appear at trial, and **Gibson**, **Sheffield** and Creed tried the case to the bench. In support of their defense and their cross-claim, **Sheffield** and Creed presented, among other things, a letter from Ogden, on behalf of Continental, to **Gibson**, informing him that **Sheffield** had "paid the amount of $4150.00 to complete the work" at **Gibson's** home. **Sheffield** testified that this payment was in the form of forgiveness of debt owed to him by Ogden and Continental. The trial court found in favor of Gibson, and awarded him actual damages, exemplary damages, attorney's fees, pre- and post-judgment interest, and costs from all defendants, jointly and severally. The trial court further found in favor of Sheffield and Creed on their cross-claim, and awarded them actual damages, attorney's fees, and pre- and post-judgment interest from Ogden and Continental, jointly and severally. The trial court did not file any findings of fact and conclusions of law. This appeal followed.

Analysis of Sheffield's and Creed's Issues

On appeal, Sheffield and Creed raise four issues: 1) whether the agreement to pay for the foundation repair was barred by the statute of frauds or the parol evidence rule; 2) whether the court erred in holding Sheffield individually liable; 3) whether the court erred in awarding exemplary damages; and 4) whether reversal is required because the trial court waited eleven months to issue a final judgment.

I. Consideration of agreement not barred by the statute of frauds or the parol evidence rule.

Whether the statute of frauds applies is a question of law, which we review de novo. *See Bratcher v. Dozier,* 162 Tex. 319, 346 S.W.2d 795, 796 (1961). Since the parol evidence rule is a rule of substantive law, its application also is reviewed de novo. *Baroid Equip., Inc. v. Odeco Drilling, Inc.,* 184 S.W.3d 1, 13 (Tex.App.-Houston [1st Dist.] 2005, pet. denied).

A. Assuming the statute of frauds applies, an exception allowed the trial court to consider the agreement.

The statute of frauds requires that certain types of promises or agreements, or memorandums of those promises or agreements, be in writing and signed by the party to be charged. *See* TEX. BUS. & COM.CODE § 26.01. However, this is not to say that subsequent oral modifications of contracts required by the statute of frauds to be in writing must themselves be in writing. *See Garcia v. Karam,* 276 S.W.2d 255, 257 (Tex.1955). If neither the portion of the written contract affected by the subsequent modification nor the matter encompassed by the modification itself is required by the statute of frauds to be in writing, then courts will allow oral modification of a contract required by the statute of frauds to be in writing. *See id.*

The parties correctly state that the statute of frauds applies to contracts for the sale of real estate. *See* TEX. BUS. & COM.CODE § 26.01(b)(4). Sheffield and Creed contend that subsequent oral modifications to a contract for the sale of real estate are barred by the statute of frauds when that contract covers the entire agreement between the parties. However, we find that our resolution of the present appeal does not require us to address this issue. Even assuming the statute of frauds would apply to bar evidence of the oral modification of the sales agreement, an exception precludes its operation in this case. When one party fully performs a contract, the statute of frauds may be unavailable to the second party if he knowingly accepts the benefits and partly performs. *Callahan v. Walsh,* 49 S.W.2d 945, 948 (Tex.Civ.App.-San Antonio 1932, writ ref'd) (citing *Texas Co. v. Burkett,* 117 Tex. 16, 296 S.W. 273, 278 (1927); *Matthewson v. Fluhman,* 41 S.W.2d 204, 206 (Tex. Comm'n App.1931)); *see also Estate of Kaiser v. Gifford,* 692 S.W.2d 525, 526 (Tex.App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Carmack v. Beltway Development Co.,* 701 S.W.2d 37 (Tex.App.-Dallas 1985, no writ); *Le Sage v. Dunaway,* 195 S.W.2d 729, 731 (Tex.Civ.App.-Waco 1946, no writ). The second party's effectual repudiation of the contract and refusal to complete performance thereunder would amount to a fraud, which the courts will not sanction. *Callahan,* 49 S.W. at 948.

***3** There is sufficient evidence from which the trial court could have found that Gibson fully performed his end of the agreement by closing before any of the repair work had been completed, and that Sheffield and Creed accepted that benefit and partially performed by tendering the forgiveness of debt in the amount of $4,150 in order to have foundation work performed. However, it is undisputed that Sheffield and Creed never fully performed their end of the bargain, i.e., paid to have the foundation fully repaired by Continental. Therefore, it would be a fraud to allow Sheffield and Creed to raise the statute of frauds as a defense now.

B. The parol evidence rule does not bar evidence of modification.

Sheffield and Creed also argue that the parol evidence rule bars evidence of the oral modification. However, "[t]he parol evidence rule excludes only prior and contemporaneous negotiations. It does not apply to subsequent agreements entered into by the parties." *Garcia,* 276 S.W.2d at 258; *see also Mortgage Co. of Am. v. McCord,* 466 S.W.2d 868, 871 (Tex.Civ.App.-Houston [14th Dist.] 1971, writ ref'd n.r.e.) ("Extrinsic evidence may always be offered to show a new agreement or that an existing written contract has been changed, waived, or abrogated in whole or in part.").

The agreement to repair the foundation was made after the original earnest money contract was signed, during the period before closing. The modification was therefore subsequent to the written

agreement, and is not barred by the parol evidence rule.

Thus, we hold that the court did not err under either the statute of frauds or the parol evidence rule in considering the oral modification. We therefore overrule Sheffield's and Creed's first issue.

II. No error in holding Sheffield individually liable.

In their second issue, Sheffield and Creed argue that the trial court erred in holding Sheffield individually liable, because there was no evidence to support a finding of "actual fraud" necessary to pierce the corporate veil. They argue that because the trial court "found" that Sheffield and Creed should be reimbursed for the money paid to Continental for the foundation repair, a finding that payment was actually made is implied, and there can be no finding of fraud on the part of Sheffield. We disagree.

Although Sheffield and Creed argue repeatedly that the trial court found that they were entitled to reimbursement for the $4,150 forgiveness of debt that was made to Ogden and Continental, the trial court made no findings of fact or conclusions of law. However, the trial court did award Sheffield and Creed actual damages in the amount of $4,150, attorney's fees, and pre- and post-judgment interest against Ogden and Continental. Our examination of the record leads us to conclude that there is sufficient evidence to support an implied finding by the trial court that Sheffield and Creed tendered forgiveness of the $4,150 debt owed to them as payment for the foundation repair work to be done by Continental. With this in mind, we now turn to our analysis of this issue.

***4** Contrary to Sheffield's and Creed's arguments, piercing the corporate veil is not the only theory under which Sheffield could be held individually liable. In Texas, agents are personally liable for their own torts. *Miller v. Keyser,* 90 S.W.3d 712, 718 (Tex.2002); *see also Holberg v. Teal Constr. Co.,* 879 S.W.2d 358, 360 (Tex.App.-Houston [14th Dist.] 1994, no writ) ("It has long been the rule in Texas that corporate agents are individually liable for fraudulent or tortious acts committed while in the service of their corporation."). Therefore, Sheffield can be held liable in his individual capacity without corporate veil piercing if he is personally liable for any fraudulent or tortious acts-even those committed while acting for Creed. *See Holberg,* 879 S.W.2d at 359-60.

Gibson's pleadings support causes of action for common-law and statutory real estate fraud against **Sheffield** in his individual capacity. A cause of action for common-law fraud requires (1) a material misrepresentation; (2) which was false; and (3) which was either known to be false when made or was asserted without knowledge of its truth; (4) which was intended to be acted upon; (5) which was relied upon; and (6) which caused injury. *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.,* 960 S.W.2d

41, 47 (Tex .1998). Similarly, under the Business and Commerce Code, a cause of action for statutory real estate fraud requires a false promise to do an act, when the false promise is (1) material; (2) made with the intention of not fulfilling it; (3) made to a person for the purpose of inducing that person to enter into a contract; and (4) relied on by that person in entering into the contract. TEX. BUS. & COM.CODE § 27.01(a)(2).

Here, every element of **Gibson's** fraud causes of action is met. First, there was evidence that **Sheffield** represented that he would pay to have the foundation *fully* repaired, when, in fact, he only intended to pay for the cheaper, inadequate $4,150 repair. Ogden's deposition testimony indicates that before Sheffield entered into the modification agreement, Ogden had completed two proposals for foundation repairs on the Beach City home-one involving 25 exterior piers and 12 interior piers to support the home's foundation, and the second, involving only 20 exterior piers. Ogden's deposition testimony further indicates that Sheffield opted for the second, less-expensive proposal, as he was interested in doing the job "as cheaply as possible."

Second, evidence in the record shows that before he entered into the modification agreement, Sheffield knew this second proposal would not fully repair the foundation of the home. Ogden's deposition testimony reveals that first proposal constituted the appropriate way to repair the problems with the foundation of the home, that he recommended only the first proposal to Sheffield, that he did not recommend the second proposal. In fact, Ogden testified that attempting foundation repairs on the home without the inclusion of interior piers would actually result in the foundation problems worsening over time. Ogden's deposition testimony further suggests that Sheffield knew about both proposals before the agreement was modified, and that he chose the second approach simply because it was the cheaper one.

***5** Finally, the record demonstrates that **Gibson** relied on **Sheffield's** representation when he purchased the home, and this representation damaged **Gibson** by causing him to purchase a home with foundation problems that will cost, by one estimate, $13,813 to repair. At trial, **Gibson** testified that he relied upon **Sheffield** to pay to have the foundation fully repaired by Continental, and that he would not have purchased the home had **Sheffield** not made this representation. Therefore, **Gibson** sufficiently alleged and proved causes of action for common-law and statutory real estate fraud against **Sheffield** in his individual capacity. *See Formosa,* 960 S.W.2d at 47; TEX. BUS. & COM.CODE § 27.01(a)(2). Thus, the trial court did not err in holding **Sheffield** individually liable.

Moreover, **Gibson** also asserted claims for DTPA violations for which **Sheffield** could be held individually liable. *See Miller,* 90 S.W.3d at 715-16. While it is true that Sheffield could be held

individually liable under the DTPA even if he did not know that his representations were false or if he did not intend to deceive **Gibson**, to support the award of exemplary damages under the DTPA, **Gibson** was required to prove that **Sheffield** "knowingly" violated the statute. *See id.;* TEX. BUS. & COM.CODE § 17.50(b)(1). The same evidence in support of **Gibson's** fraud claims also supports the award of exemplary damages under the DTPA.

We therefore overrule **Sheffield's** and Creed's second issue.

III. No error in awarding exemplary damages.

In their third issue, Sheffield and Creed argue that the trial court "found" that Creed and Sheffield paid Continental $4,150 to repair the foundation, and therefore there can be no finding against them of intentional fraud or a knowing DTPA violation justifying the award of exemplary damages because there could have been no intentional act or knowing violation given that the court also awarded damages to Sheffield and Creed from Continental, and that this case is merely a breach of contract action. Stated another way, Sheffield and Creed argue that the award of damages to them against Continental shows that the court decided the case as a breach of contract, rather than a tort case, and therefore exemplary damages are unavailable. This argument is similar to the one made in the second issue, and similarly lacks merit.

The award of damages to Sheffield and Creed from Continental does not preclude a finding of fraud. *See* TEX. CIV. PRAC. & REM.CODE § 41.003(a). Sheffield's and Creed's argument presupposes that the only viable fraud claim would be one claiming that it was fraudulent for Sheffield and Creed to fail to have the foundation fully repaired. However, this is not true. As discussed above, the trial court did not find that Sheffield or Creed paid $4,150 to Continental to repair the foundation. Rather, there is sufficient evidence to support an implied finding by the trial court that Sheffield and Creed tendered forgiveness of debt owed to Sheffield in the amount of $4,150 as payment for the foundation repair, and that Sheffield still committed fraud by representing that he would pay to have the foundation fully repaired, when he intended all along to pay only for an inadequate repair. In no way does the award of the $4,150 suggest that the trial court did not find that fraud was committed. When there are no findings of fact and conclusions of law filed by the trial court, we imply all findings supported by the evidence that support the trial court's judgment, and we do not imply findings contrary to the trial court's judgment. *See Holt Atherton Indus., Inc. v. Heine,* 835 S.W.2d 80, 83 (Tex .1992).

***6** Sheffield and Creed cite two cases to support their position. They cite *Dubow v. Dragon,* 746 S.W.2d 857 (Tex.App.-Dallas 1988, no writ), for the proposition that when a buyer discovers a property condition before

closing, and accepts the property "as is," he cannot claim reliance upon the seller's misrepresentations regarding the condition of the property in support of a DTPA cause of action. However, because we find that the trial court could have based its award of exemplary damages on either common-law or statutory real estate fraud, we need not consider whether this case would avail Sheffield and Creed if the court relied on violations of the DTPA for its decision.

Sheffield and Creed also cite *Formosa* for the proposition that tort damages and DTPA claims based on the failure to perform the stated terms of a contract are not valid in Texas. While it is true that a pure breach of contract cannot be pleaded as a fraud just to obtain more favorable treatment under the law, *Formosa* makes clear that fraudulent inducement claims allow the recovery of tort damages, irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract. *Formosa,* 960 S.W.2d at 47. Therefore, *Formosa,* contrary to Sheffield and Creed's purposes, actually makes clear that a fraud in the inducement claim is valid under the facts in this case. *See id.*

Because the return of money to Sheffield and Creed did not preclude a finding of fraud, we hold that a cause of action existed on which the trial court could predicate the award of exemplary damages. We therefore overrule Sheffield and Creed's third issue.

IV. No error in waiting eleven months to issue final judgment.

In their final issue, Sheffield and Creed complain that the trial court reversibly erred in waiting eleven months to issue its final judgment. They complain that the Amended Judgment contained multiple errors, although they do not identify these alleged errors. Without citing any authority, Sheffield and Creed argue that public policy should dictate that eleven months is too long to wait between a bench trial and a final judgment. In addition, they have not shown that they preserved error, what errors were committed, or how they were harmed by the delay. *See* TEX.R.APP. P. 38.1(h) (requiring appropriate citations to authority to accompany argument). We therefore overrule Sheffield's and Creed's final issue.

Conclusion

Having overruled each of Sheffield's and Creed's issues, we affirm the judgment of the trial court.

All Citations

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