LEXSEE

S.M. WILSON & COMPANY, Appellant v. URBAN CONCRETE CONTRACTORS, Appellee

No. 04-06-00227-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

2007 Tex. App. LEXIS 3747

May 16, 2007, Delivered
May 16, 2007, Filed

PRIOR HISTORY: [*1] From the 45th Judicial District Court, Bexar County, Texas. Trial Court No. 2003-CI-17719. Honorable Barbara Nellermoe, Judge Presiding.

DISPOSITION: REVERSED AND RENDERED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant general contractor challenged a decision of the 45th Judicial District Court, Bexar County (Texas), which entered judgment against it in and in favor of appellee subcontractor on its claim of breach of an oral construction agreement.

OVERVIEW: The parties had entered into a subcontract agreement. A dispute ensued over certain site work and the general contractor refused to pay the subcontractor additional compensation under a verbal agreement. The trial court ruled in the subcontractor's favor, but the court reversed. The subcontractor was required to prove each of the elements of a valid and binding oral contract, including the element of consideration. The general contractor, therefore, was not required to plead lack of consideration as an affirmative defense under Tex. R. Civ. P. 94. The general contractor's argument involved the lack of an essential element of the contract, not a condition precedent to the underlying contract for purposes of Tex. R. Civ. P. 54. The subcontractor was contractually obligated to perform the disputed work at the time it entered the subsequent oral agreement to perform the same. Thus, the subcontractor's promise to fulfill its preexisting contractual obligation to the general contractor did not constitute consideration for the oral agreement. Because the record lacked evidence of consideration, the court sustained the general contractor's challenge to the sufficiency of the evidence.

OUTCOME: The court reversed and rendered judgment that the subcontractor take nothing.

CORE TERMS: site, concrete, package, building plans, subcontract, bid, affirmative defense, conditions precedent, oral agreement, site plans, disputed, breach of contract, failure of consideration, valid contract, binding, subcontractors, legally insufficient, evidence to support, contractor, obligated, sidewalks, pavements, vital, pole, curbs, pad, e-source, oral contract, agreement provides, evidence offered

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Affirmative Defenses
Contracts Law > Consideration > General Overview
[HN1]An affirmative defense will deny the plaintiff's right to judgment even if the plaintiff establishes every allegation in its pleadings. An affirmative defense allows the defendant to introduce evidence to establish an independent reason why the plaintiff should not prevail; it does not rebut the factual proposition of the plaintiff's pleading. Tex. R. Civ. P. 94 requires that affirmative defenses be pleaded and provides several examples of

matters constituting an affirmative defense, including "failure of consideration. Tex. R. Civ. P. 94. Lack of consideration is not specifically listed within Rule 94.

Contracts Law > Consideration > General Overview
Contracts Law > Consideration > Mutual Obligation
[HN2]The terms "failure of consideration" and "lack of consideration" are often used interchangeably, but they represent different defenses. Lack of consideration refers to a contract that lacks mutuality of obligation. By contrast, failure of consideration occurs when, due to a supervening cause after an agreement is reached, the promised performance fails. The distinction between the two is that lack of consideration exists, if at all, immediately after the execution of a contract while failure of consideration arises because of subsequent events.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Affirmative Defenses
Contracts Law > Consideration > General Overview
[HN3]Lack of consideration does not fall within the definition of affirmative defense because it does not provide an independent reason to find against the plaintiff--it goes directly to the plaintiff's cause of action.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview
Contracts Law > Contract Conditions & Provisions > Conditions Precedent
[HN4]Tex. R. Civ. P. 54 provides that, when a party pleads that all conditions precedent have been performed, it is required to prove only those matters which are specifically denied.

Contracts Law > Contract Conditions & Provisions > Conditions Precedent
[HN5]A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation.

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence
[HN6]In reviewing the legal sufficiency of the evidence, the appellate court views the evidence in the light most favorable to the verdict, crediting favorable evidence that a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. Evidence is legally insufficient when: (a) there is a complete absence of evidence of a vital fact; (b) the trial court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove that fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact.

Contracts Law > Breach > Causes of Action > Elements of Claims
[HN7]To establish a breach of contract claim, a party must show: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach.

Contracts Law > Formation > General Overview
Contracts Law > Types of Contracts > Express Contracts
Contracts Law > Types of Contracts > Oral Agreements
[HN8]The following elements are required for the formation of a valid and binding contract: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) each party's consent to the terms; (5) execution and delivery of the contract with the intent that it be mutual and binding; and (6) consideration. The elements of written and oral contracts are the same and must be present for a contract to be binding.

Contracts Law > Consideration > General Overview
Contracts Law > Consideration > Enforcement of Promises > Detriment to Promisee
Contracts Law > Consideration > Preexisting Duties
[HN9]Consideration is a present exchange bargained for in return for a promise. It can be either a benefit to the promisor or a detriment to the promisee. Consideration may consist of some right, interest, profit, or benefit that accrues to one party; or, alternatively, of some forbearance, loss, or responsibility that is undertaken or incurred by the other party. Notably, a promise to fulfill a preexisting obligation cannot serve as new consideration.

JUDGES: Opinion by: Catherine Stone, Justice. Sitting: Catherine Stone, Justice, Karen Angelini, Justice, Steven C. Hilbig, Justice.

OPINION BY: Catherine Stone

OPINION

MEMORANDUM OPINION

Urban Concrete Contractors, Ltd. ("Urban") sued S.M. Wilson & Co. ("Wilson") for damages resulting from Wilson's breach of an oral construction agreement. A jury returned a verdict in favor of Urban, and the trial court entered judgment against Wilson. Because there is legally insufficient evidence to support the jury's findings, we reverse the trial court's judgment and render judgment that Urban take nothing from Wilson.

BACKGROUND

Wilson, a general contractor, was awarded a contract by Target Corporation for the construction of a Target store in Austin, Texas. Upon being awarded the contract, Wilson began soliciting bids from subcontractors to complete various aspects of the Target project via an online bidding auction procedure known as e-bidding. Urban was one of the subcontractors that submitted an e-bid to Wilson to perform the concrete [*2] work for the project.

During the pre-bid stage, Wilson sent an e-source package to Urban containing the entire proposed contract, including Work Package 03300, which identified the scope of the concrete work for which Urban would be responsible if it were the successful bidder. Work Package 03300 provided "[t]his Work Package includes, but is not limited to, the following work: . . . [a]ll Site Concrete work including light pole bases, curbs, pad, sidewalks, and pavements." Work Package 03300 further referred to two separate and distinct sets of plans describing the concrete work to be completed: (1) the building plans of May 7, 2002; and (2) the site plans of April 11, 2002. Although the plans themselves were not included in the e-source package, Wilson made both the building plans and site plans available to Urban and the other subcontractors at no charge prior to bidding.

Urban's project manager, Thomas Fulks, reviewed all of the e-source information provided by Wilson, including Work Package 03300, before submitting a bid to Wilson. Even though Work Package 03300 referenced two different sets of construction plans, Urban secured a copy of only the building plans of May 7, 2002 prior [*3] to making its bid. According to Urban, the company was under the impression that the building plans of May 7, 2002 constituted a full set of construction plans for all of the concrete work to be completed because the plans "contained not only building information but site information" as well. [1] Urban, relying only upon the plans and specifications it had secured, prepared and submitted a bid for the Target project. Urban's bid proved to be the winning bid for the concrete work.

1 Fulks purportedly "interpreted [the] building plans dated May 7, 2002 . . . and site plans dated April 11, 2002, as the same thing."

Upon placing the winning bid, Urban and Wilson entered into a subcontract agreement. In accordance with the pre-bid documents furnished to Urban, the subcontract agreement provides: "The Subcontractor agrees that it will furnish and provide all labor, materials, services, tools, equipment and supplies necessary or required to fully do, perform and complete the work identified as follows: All work defined [*4] by Work Package 03300, Concrete, dated 6/27/02 which is attached." Work Package 03300 was attached to the subcontract agreement as Attachment D and provides as follows:

> WORK PACKAGE 03300
>
> Concrete
>
> ***
>
> 1) Furnish all labor, material, and equipment, inherent or incidental, required to satisfactorily complete all:
>
> a) Concrete Work
>
> b) Site Concrete Work
>
> 2) This Work Package includes all work defined by the following Bid Documents except as specifically excluded herein:
>
> a) Building Plans dated May 7, 2002
>
> b) Site Plans (formal submittal) dated April 11, 2002

> ***
>
> 4) This Work Package includes, but is not limited to, the following work: . . . All Site Concrete work including light pole bases, curbs, pads, sidewalks, and pavements.

After Urban began performance of the concrete work, an issue arose regarding the site work for the project. Specifically, Urban alleges that it learned for the first time that Wilson expected it to perform site work that Urban believed was outside the scope of the May 7, 2002 building plans as part of the parties' subcontract agreement. Fulks, on behalf of Urban, immediately informed Wilson's job superintendent, [*5] Steve Zick, and project executive, Steve Mast, that he did not believe the scope of Urban's performance under the subcontract agreement included any site work outside of that required by the May 7, 2002 building plans. Zick allegedly assured Fulks that Wilson would pay Urban additional compensation for its performance of all of the requested site work. Following this conversation, Urban proceeded to complete the requested site work.

Urban subsequently submitted to Wilson a request for additional compensation in accordance with the verbal agreement the parties had reached concerning the disputed site work. Wilson, however, refused to pay Urban the additional $ 115,350.35 it had requested for the site work. Urban then sued Wilson under theories of breach of contract, quantum meruit, and violations of the Texas Construction Trust Funds Statute and the Texas Prompt Pay Act. Wilson denied any liability, claiming it owed no additional compensation to Urban for the requested site work because Urban was obligated to complete all of the project's site work under the terms of the parties' original subcontract agreement. A jury ultimately determined that Wilson had breached its oral agreement [*6] with Urban and owed Urban $ 54,016.50 for completing the disputed site work. After the trial court entered judgment in favor of Urban in the amount of $ 130,248.34 (consisting of $ 54,016.50 actual damages, $ 8,970.28 prejudgment interest, $ 3,998.72 additional interest, $ 58,243.25 attorney's fees, and $ 5,019.59 costs of court) and denied all of Wilson's post verdict motions, this appeal followed.

DISCUSSION

Wilson complains there is legally insufficient evidence to support the jury's findings on Urban's breach of contract claim. Specifically, Wilson's sufficiency complaint alleges there is no evidence of consideration for its purported oral promise to pay Urban additional compensation for the completion of the disputed site work. Urban responds that Wilson cannot claim on appeal there is no consideration for the promise to pay Urban additional compensation because Wilson failed to plead lack of consideration for the oral agreement: (1) as an affirmative defense under Texas Rule of Civil Procedure 94; or (2) in response to Urban's assertion that all conditions precedent had been performed pursuant to Texas Rule of Civil Procedure 54 [*7] . We will first address the procedural issues raised by Urban and then turn to the merits of Wilson's sufficiency complaint.

With respect to Urban's first argument, [HN1]an affirmative defense will deny the plaintiff's right to judgment even if the plaintiff establishes every allegation in its pleadings. *Bracton Corp. v. Evans Constr. Co.*, 784 S.W.2d 708, 710 (Tex. App.--Houston [14th Dist.] 1990, no writ). "An affirmative defense allows the defendant to introduce evidence to establish an independent reason why the plaintiff should not prevail; it does not rebut the factual proposition of the plaintiff's pleading." *Belew v. Rector*, 202 S.W.3d 849, 854 (Tex. App.--Eastland 2006, no pet.); *see also Heggy v. Am. Trading Employee Ret. Account Plan*, 123 S.W.3d 770, 778 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). Texas Rule of Civil Procedure 94 requires that affirmative defenses be pleaded and provides several examples of matters constituting an affirmative defense, including "failure of consideration." *See* TEX. R. CIV. P. 94. Lack of consideration, which is at issue here, is not [*8] specifically listed within Rule 94. [2]

> 2 [HN2]The terms "failure of consideration" and "lack of consideration" are often used interchangeably, but they represent different defenses. Lack of consideration refers to a contract that lacks mutuality of obligation. *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997). By contrast, failure of consideration occurs when, due to a supervening cause after an agreement is reached, the promised performance fails. *US Bank, N.A. v. Prestige Ford Garland Ltd. P'ship*, 170 S.W.3d 272, 279 (Tex.

App.--Dallas 2005, no pet.). "The distinction between the two is that lack of consideration exists, if at all, immediately after the execution of a contract while failure of consideration arises because of subsequent events." *Belew*, 202 S.W.3d at 854 n.4.

[HN3]"Lack of consideration does not fall within the definition of affirmative defense because it does not provide an independent reason to find against the plaintiff--it goes directly [*9] to the plaintiff's cause of action." *Belew*, 202 S.W.3d at 854. Urban was necessarily required to prove each of the elements of a valid and binding oral contract in this case, including the element that valuable consideration had passed between the parties. *See id.* Wilson, therefore, was not required to plead lack of consideration as an affirmative defense. *See id.*

We are likewise unpersuaded that Wilson should be precluded from raising its sufficiency complaint because the company failed to specifically deny Urban's assertion that "all conditions precedent to recovery" had been performed pursuant to Texas Rule of Civil Procedure 54. *See* [HN4]TEX. R. CIV. P. 54 (providing that, when a party pleads that all conditions precedent have been performed, it is required to prove only those matters which are specifically denied). Urban cites no authority to support its contention that the consideration element of a valid contract is actually a condition precedent as referred to in Rule 54 that Wilson needed to specifically deny. *See* TEX. R. APP. P. 38.1(h); *see also In re D.S.*, 76 S.W.3d 512, 516-17 [*10] (Tex. App.--Houston [14th Dist.] 2002, no pet.) ("In order to avoid waiver of an issue on appeal, a party must discuss in his brief the facts and the authorities upon which he relies to maintain the issue."). Furthermore, the supreme court has indicated [HN5]"[a] condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation." *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992); *see also Beard Family P'ship v. Commercial Indem, Ins. Co.*, 116 S.W.3d 839, 844 (Tex. App.--Austin 2003, no pet.) ("A condition precedent that affects a party's obligation to perform is an act or event that must occur after the making of a contract before a right to immediate performance arises and before there may be a breach of contractual duty."). This case, however, does not concern whether a particular act or event occurred after the making of a contract; rather, it concerns whether a valid contract was even created by the parties. Because Wilson's argument involves the lack of an essential element of the contract, not a condition precedent to the underlying contract, we reject Urban's contention. We now turn to the [*11] merits of Wilson's sufficiency complaint.

[HN6]In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict, crediting favorable evidence that a reasonable fact finder could and disregarding contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). Evidence is legally insufficient when: (a) there is a complete absence of evidence of a vital fact; (b) the trial court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove that fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

[HN7]To establish a breach of contract claim, a party must show: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach. *Kay v. N. Tex. Rod & Custom*, 109 S.W.3d 924, 927 (Tex. App.--Dallas 2003, [*12] no pet.). [HN8]The following elements are required for the formation of a valid and binding contract: (1) an offer; (2) an acceptance; (3) a meeting of the minds; (4) each party's consent to the terms; (5) execution and delivery of the contract with the intent that it be mutual and binding; and (6) consideration. *Angelou v. African Overseas Union*, 33 S.W.3d 269, 278 (Tex. App.--Houston [14th Dist.] 2000, no pet.). "The elements of written and oral contracts are the same and must be present for a contract to be binding." *Critchfield v. Smith*, 151 S.W.3d 225, 233 (Tex. App.--Tyler 2004, pet. denied).

[HN9]"Consideration is a present exchange bargained for in return for a promise." *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991). It can be either a benefit to the promisor or a detriment to the promisee. *Id.* Consideration may consist of some right, interest, profit, or benefit that accrues to one party; or, alternatively, of some forbearance, loss, or responsibility that is undertaken or incurred by the other party. *Copeland v. Alsobrook*, 3 S.W.3d 598, 606 (Tex.

App.--San Antonio 1999, pet. denied). [*13] Notably, "[a] promise to fulfill a pre-existing obligation cannot serve as new consideration." *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 319 (Tex. App.--Houston [14th Dist.] 2003, pet. denied).

In this case, when Urban entered the alleged oral agreement with Wilson to complete the disputed site work, it promised to do what it was already bound to do under the terms of the parties' original subcontract agreement. Although Urban argues that it was not obligated to perform any site work outside of that required by the May 7, 2002 building plans, we cannot ignore the plain language of the original subcontract agreement. The parties' original agreement provides that Urban was to perform "[a]ll work defined by Work Package 03300," which defined Urban's performance as "[a]ll Site Concrete work including light pole bases, curbs, pad, sidewalks, and pavements" and "all work defined by the . . . Building Plans dated May 7, 2002 . . . [and] Site Plans (formal submittal) dated April 11, 2002." It is clear from the express terms of the original subcontract agreement that Urban was contractually obligated to perform all of the disputed site work at the [*14] time it entered the subsequent oral agreement with Wilson to perform the same. Consequently, Urban's promise to fulfill its pre-existing contractual obligation to Wilson cannot constitute consideration for the oral agreement in question. *See* *Stone v. Morrison & Powers*, 298 S.W. 538, 539 (Tex. Comm'n App. 1927, holding approved); *Okemah Constr. Inc. v. Barkley-Farmer, Inc.*, 583 S.W.2d 458, 460 (Tex. Civ. App.--Houston [1st Dist.] 1979, no writ); *see also* *Tower Contracting Co. v. Flores*, 294 S.W.2d 266, 271 (Tex. Civ. App.--Galveston), *aff'd as modified*, 157 Tex. 297, 302 S.W.2d 396 (1957) ("An agreement by a contractee to compensate a contractor for doing what he is already bound to do by a valid contract is without consideration."); *Pasadena Police Officers Ass'n v. City of Pasadena*, 497 S.W.2d 388, 392-93 (Tex. Civ. App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.) ("Where a party agrees to do what he is already bound to do by an original contract, there is not sufficient consideration to support a supplemental contract or modification."). Because the record is devoid of evidence of consideration for the parties' [*15] oral agreement, Wilson's challenge to the sufficiency of the evidence must be sustained.

CONCLUSION

Based on the foregoing, we reverse the trial court's judgment and render judgment that Urban take nothing from Wilson. Having concluded that there is legally insufficient evidence to support the jury's affirmative answer to whether Wilson committed a breach of contract, we need not address Wilson's remaining contentions. *See* *Natural Gas Pipeline Co. of Am. v. Pool*, 124 S.W.3d 188, 201-02 (Tex. 2003).

Catherine Stone, Justice