



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-21-00195-CV

KEVIN KONGVONGSAY AND WIYADA KONGVONGSAY, APPELLANTS

V.

PHOUPHET SAYASANE, APPELLEE

On Appeal from the 320th District Court
Potter County, Texas
Trial Court No. 104,736-D, Honorable Pamela C. Sirmon, Presiding

June 22, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

If one asks why agreements should be memorialized in writing, this case illustrates why.

Appellants Kevin and Wiyada Kongvongsay¹ appeal the trial court's judgment enforcing by specific performance Kevin Kongvongsay's oral agreement with appellee

¹ Wiyada Kongvongsay did not testify at trial, and there is no evidence that she participated in the transaction in any capacity other than by name as an owner of an interest in the property. Our opinion will refer to Kevin Kongvongsay hereinafter.

Phouphet Sayasane concerning the sale of commercial real estate located at 521 SE 10th Avenue in Amarillo, Texas. Kongvongsay challenges the legal and factual sufficiency of the evidence supporting several of the trial court's findings underlying the judgment. We address each of these contentions in turn and affirm the trial court's judgment.

Background

On or about September 25, 2012, Sayasane and Kongvongsay entered into an oral agreement under which Sayasane agreed to buy and Kongvongsay agreed to sell a commercial building located at 521 SE 10th Avenue in Amarillo. The men agreed upon a purchase price of \$110,000. Sayasane made an initial down payment that same day of \$10,000 to Kongvongsay. Both parties acknowledge the agreement generally.

They do, however, disagree as to some of the specific terms of the contract, with each having presented to the trial court their respective understandings of the agreement. First, they disagreed as to the original agreement concerning how Sayasane would pay the remaining balance of the purchase price. Sayasane maintains that the parties agreed from the beginning that he would make monthly payments of \$1,000 until the remaining balance was paid in full. Kongvongsay contends that Sayasane initially represented to him that he would pay the remainder of the purchase price within two to three months with the proceeds of the sale of one of Sayasane's other properties. Kongvongsay seems to admit that when Sayasane failed to pay the remainder on those terms, Kongvongsay agreed to accept monthly payments of \$1,000.

They also disagreed as to when Kongvongsay would deliver the deed to Sayasane. Sayasane insists that Kongvongsay agreed to provide the deed to the

property as soon as possible after their initial agreement, to, as he explains, secure his payments to Kongvongsay and understanding that Kongvongsay could be named as a lienholder. Kongvongsay, on the other hand, denies that he agreed to do so until Sayasane had paid off the balance owed on the property.

In the approximately two and one-half years that would follow their initial agreement, Sayasane made monthly payments, most often in the amount of \$1,000 and occasionally would pay \$2,000 per month, each time urging Kongvongsay to transfer the deed per what he understood to be the parties' agreement. The 10th Avenue property remained occupied by a commercial tenant during most of that time and Kongvongsay continued to receive the rents paid by the tenant. Sayasane undertook electrical and air conditioning repairs and a major repair or replacement of the building's roof. In all, Sayasane spent at least \$28,500 in repairs and improvements to the building as he was undertaking the purchase.

In March 2015, seemingly frustrated with Kongvongsay's refusal to sign over the deed to the property, Sayasane ceased monthly payments and improvements on the property and, instead, sought legal advice. In June 2015, through counsel, Sayasane offered full performance of the contract and demanded that Kongvongsay do the same by accepting the remaining balance and signing over the deed to the property. The letter failed to accomplish its goal.

On July 29, 2015, Sayasane sued Kongvongsay alleging a breach and seeking specific performance of their oral contract for the sale of real estate. Years passed before trial was held to the bench, which court ultimately concluded that Sayasane was entitled to specific performance of the oral contract. The trial court also entered a judgment

directing specific performance of the contract, ordered Sayasane to deposit \$59,000 into the registry of the court within thirty days of the judgment, ordered that Sayasane becomes the sole owner of legal and equitable title to the property upon making the deposit, ordered that Kongvongsay execute a special warranty deed to the property upon Sayasane's deposit, awarded attorney's fees to Sayasane, and taxed costs against Kongvongsay.

Kongvongsay appealed the trial court's judgment and presents to this Court five issues. He questions the legal and factual sufficiency of the evidence underlying the trial court's decisions. That is, he asserts that the evidence did not permit the trial court to (1) enter a judgment for specific performance, (2) order Sayasane to deposit \$59,000 into the registry of the Court within thirty days from the date the judgment was signed, (3) order that upon deposit by Sayasane of \$59,000 into the registry of the Court, Sayasane became the sole owner of the property, (4) require Kongvongsay to execute a special warranty deed to the property upon deposit of the \$59,000 by Sayasane, and (5) award Sayasane attorney's fees and post-judgment interest.

Standard of Review

For purposes of clarity and brevity, we address the issues in an order that varies from the way presented to us. We also employ the familiar standards of review for legal and factual sufficiency of the evidence. See *Windrum v. Kareh*, 581 S.W.3d 761, 781–82 (Tex. 2019) (factual sufficiency); *McAllen Hosps., L.P. v. Lopez*, 576 S.W.3d 389, 392 (Tex. 2019) (legal sufficiency). Moreover, the record does not reflect that anyone requested findings of fact or conclusions of law. Nor does it contain findings and conclusions in a separate document. Some were incorporated into the judgment,

however. See *S. Plains Lamesa R.R. v. Heinrich*, 280 S.W.3d 357, 365 (Tex. App.—Amarillo 2008, no pet.) (stating that findings in a judgment are given effect if they do not conflict with those in a separate document). We imply others supporting the judgment when necessary and so long as they have evidentiary support. See *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009).

Payment Arrangements and Payments Made

First, we address the existence of an agreement and manner of payment. The trial court found that the parties “on September 25, 2012 . . . made an oral contract for the sale of the property located at 521 SE 10th Street, Amarillo, Potter County, Texas, more specifically described on Exhibit A to this Judgment (the “Property”) for \$110,000.00.” No one contests that finding.

As for the manner of payment, Kongvongsay testified that, originally, the two men agreed Sayasane would pay the remaining balance with the proceeds of a sale of another property. He also admitted to accepting the payment plan to which Sayasane testified, that is, \$1,000 per month. Receipts substantiate Kongvongsay’s acquiescence to that mode of payment. Though the trial court entered no express finding on that matter, the evidence supports an implied finding that the balance due after the initial \$10,000 was to be paid through monthly payments of at least \$1,000.

Next, we consider Kongvongsay’s attack upon the balance due. Again, the trial court found it to be \$59,000. We observe that the parties and counsel proceeded to trial under the impression that \$59,000 was the balance remaining on the purchase price. Some evidence suggests that an accounting error back in 2013 on Kongvongsay’s part indicated that Sayasane owed \$10,000 less than what was, in fact, owed. However,

Kongvongsay's own records indicate a balance due of \$59,000 as of the date Sayasane stopped paying the monthly installments. Kongvongsay also acknowledged that he may have lost some receipts associated with payments Sayasane claimed he made between September 2012 and February 2013. And, until trial, the parties jointly operated under the belief that only \$59,000 was due. These circumstances and bits of evidence support the trial court's finding about the sum owed by Sayasane. The evidence is sufficient to show that Sayasane's payments over the course of the years, reduced the balance due under the contract to \$59,000. And, the evidence concerning Kongvongsay's accounting error and its effect is not so overwhelming that it could be said to greatly outweigh the contrary evidence. That being so, we overrule Kongvongsay's second issue and his third issue to the extent its focused on the amount due.

Terms of the Agreement

As might be predicted and serving as a compelling illustration as to why contracts for the sale of real estate should be written, the two men also disagreed about the precise terms of the contract relating to the delivery or execution of the deed. By its judgment, the trial court necessarily found that Kongvongsay breached the oral contract by failing to provide the deed as the two men had agreed. This finding is one of the many sub-issues included in Kongvongsay's first issue concerning Sayasane's entitlement to specific performance. In other words, before we can determine whether there is evidence that Kongvongsay breached the contract, we must determine whether sufficient evidence supports the implied finding that Kongvongsay was obligated to provide the deed "as soon as possible" after execution of the agreement.

No one disputes the existence of an oral contract. On the other hand, the trial court heard conflicting evidence regarding its terms. As factfinder, it had the duty to resolve the conflict and select whom to believe. See *In re A.G.*, No. 07-17-00440-CV, 2018 Tex. App. LEXIS 3010, at *14 (Tex. App.—Amarillo Apr. 27, 2018, pet. denied) (mem. op.) (stating that “[a]s the finder of fact and sole judge of the credibility of the witnesses, the trial court has sole discretion to resolve evidentiary conflicts and is free to disregard any or all of a witness’s testimony”). Based upon our review of the record, there is evidence, albeit contradicted by Kongvongsay, that the agreement consisted of (1) a sale price of \$110,000, (2) a \$10,000 down payment, (3) monthly payments of \$1,000 until the balance is paid, and (4) transfer of the deed to Sayasane as soon as possible after striking the agreement, as opposed to complete performance of it. Other evidence appeared of record indicating that \$59,000 was due and owing on the purchase price as of March 2015. Evidence that the sum may have arisen from a miscalculation appears of record. Yet, again, the conflict caused by it does not make the finding that \$59,000 was due either legally or factually insufficient; it simply created another evidentiary dispute for the factfinder to address and resolve. And, we cannot second guess the factfinder in that context.

Specific Performance

We now move to the equitable remedy of specific performance and assess whether the evidence showed that Sayasane was entitled to same. Our effort begins with the question of breach. Kongvongsay considers the evidence insufficient to illustrate he breached the contract. Having concluded that there is sufficient evidence to support the trial court’s finding that the two men had agreed Kongvongsay would deliver the deed to

Sayasane soon after the September 2012 agreement, we conclude that evidence also exists illustrating that Kongvongsay failed in that regard. That is, some evidence appears of record illustrating that he never deeded the property to Sayasane despite the substantial payments made by the latter. So, the trial court had sufficient evidence before it of a promise to deliver the deed soon after the deal was struck and Kongvongsay's failure to perform it.

Next, we consider the contention that because Sayasane ceased making payments in March 2015, he defaulted or breached the agreement. Having failed to completely perform the agreement, Sayasane allegedly was not entitled to specific performance.

Specific performance is an equitable remedy that may be awarded for breach of contract. See *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008). "It is a general rule of equity jurisprudence in Texas that a party must show that he has complied with his obligations under the contract to be entitled to specific performance." *Id.* at 594. A corollary is the principle that, when a defendant refuses to perform or repudiates a contract, the plaintiff may be excused from actually tendering performance before suing for such relief. *Id.* In such a circumstance, a plaintiff may simply plead that performance would have been tendered but for the defendant's breach or repudiation. *Id.* The Texas Supreme Court recently reiterated that principle dispensing with the need to tender performance so long as the plaintiff pleads and prove that, at all relevant times, he was ready, willing, and able to perform under the contract. See *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 890 (Tex. 2019). Whether a party to a contract is "ready, willing, and able" to perform presents a question of fact, not a question of law.

Mustang Amusements, Inc. v. Sinclair, No. 10-07-00362-CV, 2009 Tex. App. LEXIS 8338, at *12 (Tex. App.—Waco Oct. 28, 2009, no pet.) (mem. op.).

On March 1, 2015, Sayasane ceased making payments. Evidence indicates that he so acted because Kongvongsay would not transfer to him the deed to the property as they agreed. Instead, Sayasane hired legal counsel, and, in June 2015, sent to Kongvongsay a letter bearing the subject line “Tender of performance of contract relating to property located at 521 SE 10TH AVE, AMARILLO, POTTER COUNTY, TEXAS.” Through that missive, Sayasane informed Kongvongsay that he (Sayasane) had “fully paid all sums owing for the purchase of the property” and was demanding execution and delivery of a warranty deed to the property.

The foregoing amply supports a finding that Sayasane was excused from fully complying with his obligations under the contract or tendering full performance. So too did Sayasane (1) plead in his petition that he remained ready, willing, and able to fully perform his obligations under the contract and (2) attest, at trial, to his readiness, willingness, and ability to perform the agreement.

In short, “[i]t is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance.” *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). Evidence supports a finding that Kongvongsay breached first by refusing to deliver the deed. So, the fact that Sayasane ceased his payments did not preclude specific performance on these facts. We overrule the remaining aspects of Kongvongsay’s first issue and those aspects of his third and

fourth issues concerning the trial court's orders that give effect to the parties' original agreement.

Attorney's Fees

The trial court awarded to Sayasane \$21,219 in attorney's fees in addition to conditional attorney's fees in the amount of \$15,000 in the event of an appeal to an intermediate appellate court and another \$15,000 in the event of an appeal to the Texas Supreme Court. Kongvongsay contends it was error for the trial court to so order. He maintains that, because the contract at issue was an oral contract and the two men did not make an agreement as to attorney's fees, attorney's fees are not recoverable under the contract.

As we recently noted, Texas adheres to the American Rule regarding attorney's fees. It provides that a litigant may recover them only if authorized by statute or by a contract between the parties. See *Renegade Well Servs., Inc. v. Amerivax, Inc.*, 07-21-00211-CV, 2022 Tex. App. LEXIS 3105, at *7 (Tex. App.—Amarillo May 9, 2022, no pet. h.) (mem. op.) (citing *Intercont'l Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009)).

Kongvongsay fails to address the statutory aspect of the American Rule on attorney's fees. That is, a person may recover reasonable attorney's fees, in addition to the amount of a valid claim and costs, if the claim is "for an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8). Under § 38.001(8), a "valid claim" is not limited to an action seeking monetary damages and may include an action seeking specific performance of the underlying contract. See *Jarvis v. Peltier*, 400 S.W.3d 644, 655 (Tex.

App.—Tyler 2013, pet. denied); *see also Woody v. J. Black's, L.P.*, No. 07-12-00192-CV, 2013 Tex. App. LEXIS 13062, at *18 (Tex. App.—Amarillo Oct. 18, 2013, pet. denied) (mem. op.) (concluding that a judgment awarding specific performance on a breach of contract claim is a valid claim under § 38.001(8)).

Section 38.001 authorized the trial court to award Sayasane attorney's fees. In fact, under § 38.001, an award of reasonable attorney's fees is mandatory if there is proof of the reasonableness of the fees. *Brent v. Field*, 275 S.W.3d 611, 622 (Tex. App.—Amarillo 2008, no pet.). In other words, the trial court had no discretion to deny Sayasane reasonable attorney's fees when it was presented with evidence of same. *See Ellison v. Samson Res. Co.*, No. 13-17-00046-CV, 2022 Tex. App. LEXIS 968, at *30 (Tex. App.—Corpus Christi Feb. 10, 2022, no pet.) (mem. op.) (citing *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998)). We overrule Kongvongsay's fifth and final issue.

Having overruled Kongvongsay's issues, we affirm the trial court's judgment.

Per Curiam