

Affirmed and Memorandum Opinion filed May 4, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00404-CV

BRANDYWOOD HOUSING, LTD., Appellant

V.

HARRIS COUNTY APPRAISAL DISTRICT, Appellee

**On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2006-79105**

MEMORANDUM OPINION

Brandywood Housing, Ltd., appeals the trial court's denial of its motion for summary judgment as well as the trial court's grant of appellee Harris County Appraisal District's cross motion for summary judgment. We affirm.

I

Brandywood Housing, Ltd., ("Brandywood") owns the Brandywood Apartments, which is a complex that provides housing to low-to-moderate-income families in Harris County. The apartments were built before January 1, 2004. Brandywood's limited partnership, MC-CDC-BW, Inc., ("MC-CDC-BW") owns 1 percent of and is the sole

general partner of Brandywood, and MC-CDC-BW's sole shareholder is Mid-Continent Community Development Corporation ("Mid-Continent"). An unrelated entity owns 99 percent of and is the sole limited partner of Brandywood.

Brandywood applied for a property-tax exemption under section 11.1825 of the Texas Tax Code for the 2004 and 2005 tax years, but the Harris County Appraisal District ("HCAD") denied the requests.¹ Brandywood appealed to HCAD's review board, but on or about October 26, 2006, the review board also denied the requests for exemptions.² Brandywood brought suit in district court to overturn HCAD's denial. The district court overruled Brandywood's first amended motion for partial summary judgment and granted HCAD's cross motion for summary judgment. After the district court affirmed HCAD's denial of the 2004 and 2005 tax exemptions, this appeal followed.

II

Brandywood asserts that it meets the requirements to constitute an organization eligible for a tax exemption under Texas Tax Code section 11.1825. *See* Tex. Tax Code Ann. §§ 11.1825(a)–(c) (Vernon 2008). To support this contention, Brandywood submitted evidence of its corporate structure to illustrate how Mid-Continent, its sole shareholder, qualifies as an organization under the statute. Brandywood also argues that it has properly rehabilitated the housing project in accordance with the statute. *See id.* § 11.1825(l). In HCAD's motion for summary judgment, HCAD contended that: (1) "none of the taxing units in which Brandywood Apartments is located approved the exemption

¹ Under section 11.1825, an organization is able to receive a tax exemption on real property if the organization constructs or rehabilitates and uses its property to provide housing to low-to-moderate-income individuals or families. Tex. Tax Code Ann. § 11.1825 (Vernon 2008). Section 11.1825, however, states that "[a]n organization may not receive an exemption for a housing project constructed by the organization if the construction of the project was completed before January 1, 2004." *Id.* § 11.1825(k).

² Brandywood's Second Amended Petition alleges that the 2004 and 2005 requests were adjudicated by the review board on or about October 26, 2006. We presume for the purposes of our analysis that this is correct.

for 2004 and 2005”; and (2) “[t]he Brandywood Apartments were constructed before January 1, 2004.”

We review the traditional motion for summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The party moving for a traditional summary judgment has the burden to show that no material fact exists and that it is entitled to summary judgment as a matter of law. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). We take as true evidence favorable to the non-movant, and we must resolve any doubt in the non-movant’s favor as well as make reasonable inferences in the non-movant’s favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). If a defendant is the movant, he will be entitled to summary judgment if he disproves an element of the plaintiff’s theory of recovery, or if he pleads and conclusively proves each element of an affirmative defense. *Rudisill v. Arnold White & Durkee, P.C.*, 148 S.W.3d 556, 559 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997)).

In its appellate brief, HCAD concedes that Brandywood created a “fact issue regarding its ownership of the apartments for rehabilitation.” Although this concession cuts against HCAD’s second ground in its motion, we will affirm the trial court’s determination if any of the grounds presented are meritorious. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000). The trial court could have decided to grant HCAD’s motion for summary judgment because no taxing units approved Brandywood’s requests for tax exemptions, which is a requirement under the statute. *See* Tex. Tax Code Ann. § 11.1825(v). Brandywood, however, argues that HCAD waived its reliance on subsection (v) of section 11.1825. In pertinent part, section 11.1825 of the Texas Tax Code provides:

(v) Notwithstanding any other provision of this section, an organization may not receive an exemption from taxation of property described by

Subsection (f)(1) by a taxing unit any part of which is located in a county with a population of at least 1.4 million unless the exemption is approved by the governing body of the taxing unit in the manner provided by law for official action.

Tex. Tax Code Ann. § 11.1825(v). It is undisputed that neither HCAD nor any governing body for a taxing unit approved Brandywood's tax exemptions for 2004 and 2005, so the issue is whether HCAD waived the approval requirement.

III

Brandywood argues that HCAD waived the approval requirement in subsection 11.1825(v). HCAD contends that it has no authority to waive the statutory approval requirement, and even if it did, its conduct did not amount to waiver. For the purposes of our analysis, we presume without deciding, that HCAD had authority to waive the statutory approval requirement. Waiver is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008); *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right. *Ulico Cas. Co.*, 262 S.W.3d at 778.

The right, benefit, or privilege must exist before the waiver occurs. *Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 451 (Tex. App.—Fort Worth 2005, pet. denied). Courts mainly focus on the party's intent when the question of waiver arises. *Cont'l Casing Corp. v. Siderca Corp.*, 38 S.W.3d 782, 789 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Intent to waive must be clear, decisive, and unequivocal. *Ferguson v. Ferguson*, 111 S.W.3d 589, 598 (Tex. App.—Fort Worth 2003, pet. denied). But a party's silence or inaction for an extended period of time can prove intent to relinquish a known right. *Tenneco*, 925 S.W.2d at 643; *Walden v. Affiliated Computer*

Servs., Inc., 97 S.W.3d 303, 321 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Although waiver is generally a question of fact to be determined by the jury, if the facts and circumstances are clearly established, then waiver becomes a question of law. *Tenneco*, 925 S.W.2d at 643; *Comsys Info. Tech. Servs, Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 190 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Because the facts in this case are undisputed, waiver is a question of law in this instance.³

In its pleadings, Brandywood asserts that the requirement set forth at subsection 11.1825(v) is not applicable because HCAD “waived such requirement for the years 2004 and 2005 by failing to identify that provision as grounds for denial of the exemption and further, by only having requested that specific information in 2006.” Brandywood complains that HCAD did not inform Brandywood of HCAD’s intent to rely on subsection 11.1825(v) until July 26, 2006, which was after Brandywood had filed its application for a tax exemption for the 2004, 2005, and 2006 tax years. The hearing before the review board was in October 2006. Brandywood does not cite, and we have not found, any authority that required HCAD to notify Brandywood of the basis for HCAD’s denial of the exemption before July 26, 2006. The record reflects that HCAD sent Brandywood a letter dated July 26, 2006, stating that for HCAD to process the tax-exemption application, Brandywood must provide “copies of approvals by the governing bodies of the taxing units granting exemption from taxation under Sec. 11.1825(v)” The letter further provided that Brandywood had thirty days to comply with the request, but if additional time were required to fulfill the request, Brandywood should contact HCAD. Brandywood contends in its summary-judgment evidence that until it received this letter, “HCAD had not specifically requested information related to approval from governing bodies of the taxing units pursuant to § 11.1825.” Brandywood does not cite,

³ Brandywood and HCAD do argue about whether, as Brandywood puts it, “Texans [will] lose a major provider of housing to low and moderate income families [if it cannot receive the exemption provided by the statute]”; but that does not amount to a material issue of disputed fact.

and we have not found, any authority that required HCAD to specifically request information from Brandywood regarding subsection 11.1825(v) before July 26, 2006.

The record also contains a letter from Brandywood to the eight “governing bodies of the taxing units” on August 4, 2006, requesting their approval of Brandywood’s tax exemption for the 2004, 2005, 2006, and subsequent tax years. The only response to these requests contained in our record is from the Harris County Commissioners Court. In this response, dated November 21, 2006, the Commissioners Court appears to approve a partial 25 percent exemption for Brandywood Apartments. The Commissioners Court, however, does not state that this exemption applies retroactively to 2004 and 2005, and the Commissioners Court sent its response after the review board rejected Brandywood’s requests for exemptions as to 2004 and 2005. This response is not relevant to whether HCAD waived its right to rely on subsection 11.1825(v) as to tax years 2004 and 2005.

Brandywood also presented evidence from Liz Stokes, a paralegal for the American Housing Foundation. In 2007, she contacted various taxing authorities within HCAD to request information about how to make an application for tax exemption approval under the Texas Tax Code.⁴ Several taxing authorities informed her that HCAD was responsible for the tax exemption and “that all tax exemption information and/or application must go through Paul Bettencourt”—the Harris County Tax Assessor. Together with the failure to notify Brandywood about HCAD’s intent to rely on subsection (v), Brandywood asserts that HCAD’s conduct clearly demonstrates waiver.

Brandywood relies on *Morris County Tax Appraisal District v. Nail* for the proposition that an appraisal district can waive a statutory requirement. 708 S.W.2d 473, 474 (Tex. App.—Texarkana 1986, writ ref’d n.r.e.). *Nail* concerns a statute that provided an appraisal board an affirmative defense should the plaintiff fail to give notice and file its appeal by the statutory deadline. *Id.* The court held that the statutory provision was

⁴ The taxing authorities or governing bodies that Stokes contacted, however, were not all the same as the governing bodies Brandywood originally contacted in August 2006.

waived because the appraisal board did not plead the affirmative defense in its petition in the district court. *Id.* In contrast, this case does not involve a failure to plead an affirmative defense. At issue is whether HCAD's failure to inform Brandywood of the existence of subsection (v) constitutes waiver. *Nail* does not apply to the case at hand.

To receive an exemption for 2004 and 2005, Brandywood had to satisfy all of the statutory requirements for this exemption, including the requirement contained in subsection 11.1825(v). Brandywood failed to do so. Even presuming that HCAD had authority to waive this statutory requirement, there is no evidence raising a fact issue as to whether HCAD intentionally relinquished this right or whether it engaged in intentional conduct inconsistent with claiming this right. Accordingly, we overrule Brandywood's sole issue and affirm the trial court's rulings.

* * *

For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Frost, and Brown.