Affirmed in Part and Reversed and Remanded in Part; and Memorandum Opinion filed June 24, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00776-CV

MARK STANFORD & PENNY STANFORD, Appellants

V.

JOHN EVANS, Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2007-67277

MEMORANDUM OPINION

This appeal arises from a suit for property damages brought by appellants Mark Stanford and Penny Stanford against their landlord, appellee John Evans, after a home leased to the Stanfords by Evans was destroyed by a fire. Evans filed a motion for summary judgment claiming that he was not liable for any of the Stanfords' alleged damages. The trial court granted Evans's motion and entered a take nothing judgment against the Stanfords. In two issues, the Stanfords contend that the trial court erred in

granting summary judgment. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January 2005, the Stanfords signed a lease agreement to lease a residence from Evans. The lease agreement granted the Stanfords an option to purchase the home from Evans if they met certain requirements before the lease expired. The Stanfords lived in the home until July 2007, when the home and all of the Stanfords' personal belongings were destroyed in a fire. Approximately two weeks after the fire, an electrician inspected the home and discovered several problems with its electrical system. The Stanfords subsequently filed suit against Evans, alleging that Evans was negligent in allowing the home's electrical system to become overloaded and in failing to upgrade the home's electrical service panel. The Stanfords sought damages of over $87,000 for the loss of their personal belongings and $99,000 for the loss of the home's value.

Evans filed a motion for summary judgment, arguing in two grounds that he was not liable for any of the Stanfords' damage claims. First, Evans alleged that several exculpatory provisions in the lease protected him from liability for any damages to the Stanfords' personal property. Next, Evans alleged that the Stanfords could not recover damages for the home's value because they had no ownership interest in the home. After considering Evans's motion and the evidence produced by both parties, the trial court entered a final judgment granting Evans's motion and ordering a take-nothing judgment against the Stanfords.

In two issues, the Stanfords argue that the trial court erred in granting summary judgment because (1) the exculpatory provisions relied upon by Evans do not provide fair notice that Evans is not liable for the consequences of his own negligence and (2) there is a genuine issue of material fact as to whether the Stanfords notified Evans of their intent to purchase the home and therefore possessed an ownership interest in the home.

II. STANDARD OF REVIEW

We review the trial court's grant of summary judgment de novo. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004). To prevail on a traditional motion for summary judgment,[1] the movant must show that there is no genuine issue of material fact and that judgment should be granted as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Brown v. Hearthwood II Owners Ass'n*, 201 S.W.3d 153, 159 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). We take as true all evidence favorable to the non-movant and indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Joe*, 145 S.W.3d at 157; *Aguirre v. Vasquez*, 225 S.W.3d 744, 750 (Tex. App.—Houston [14th Dist.] 2007, no pet.). When, as here, the trial court's order granting summary judgment does not specify the grounds upon which it was granted, we will affirm the judgment if any of the theories advanced by the movant are meritorious. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Brocail v. Detroit Tigers, Inc.*, 268 S.W.3d 90, 99 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

[1] Evans labeled his motion as a "Motion for Summary Judgment" and attached evidence in its support, but failed to denote whether he sought summary judgment on traditional or no-evidence grounds. He also failed to cite to either of the summary judgment rules. *See* TEX. R. CIV. P. 166a(c), (i). Evans's motion outlines the legal standard for succeeding on traditional grounds, but also intermixes language from the no-evidence rule. In the portion containing no-evidence language, Evans fails to "state the elements as to which there is no evidence." TEX. R. CIV. P. 166a(i). For these reasons, we analyze Evans's motion as a traditional motion for summary judgment. *See, e.g.*, *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 195 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (treating movant's motion for summary judgment as traditional because the motion failed to specify whether it was brought under traditional or no-evidence grounds, thus providing non-movant with insufficient notice that movant sought no-evidence summary judgment).

III. THE LEASE'S EXCULPATORY PROVISIONS

In his first ground for summary judgment, Evans argued that several exculpatory clauses contained within the lease agreement relieved him from any liability for the Stanfords' claims for personal property damages. Evans relied upon sections four and twenty-nine of the lease agreement in support of this contention. Section four reads, in relevant part:

> [LANDLORD IS] NOT RESPONSIBLE FOR DAMAGE OR LOSS OF [TENANTS'] PERSONAL PROPERTY STORED IN THE PREMISES. FOR THIS REASON [LANDLORD] ENCOURAGE[S] [TENANTS] TO PROTECT [TENANTS'] PERSONAL PROPERTY WITH [TENANTS'] INSURANCE.

Section twenty-nine reads:

> 29. **Indemnification**. [Landlord] shall not be liable for any damage or injury to [Tenants], [Tenants'] family, employees, or visitors, or any other persons, or to any property, occurring in or near the premises, and [Tenants] agree[s] to hold [Landlord], [Landlord's] estate, heirs, employees, agents and contractors harmless from any claims for damages no matter how caused.

The Stanfords argue in their first issue that the trial court erred in granting summary judgment because the provisions relied upon by Evans did not provide them with fair notice that Evans would be protected from liability for his own negligent acts.

A. The Fair Notice Requirements

Because indemnifying or releasing a party from its own negligence involves an extraordinary shifting of risk, the Texas Supreme Court has enacted fair notice requirements—including the express negligence doctrine and the conspicuousness requirement—that apply to such agreements. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *Ayres Welding Co., Inc. v. Conoco, Inc.*, 243 S.W.3d 177, 181 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). These fair notice requirements apply to indemnity agreements and releases in which a party is seeking to relieve itself in advance of liability for its own negligence. *Dresser Indus.*, 853 S.W.2d at 508–09. Compliance with the fair notice requirements is a question of law for the court.

Id. at 509. A release or indemnity provision that fails to satisfy either of these requirements is unenforceable as a matter of law. *Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190, 192 (Tex. 2004).

B. The Express Negligence Doctrine

Under the express negligence doctrine, a party seeking to indemnify or release itself from the consequences of its own negligence must express that intent in specific terms within the four corners of the contract. *Ayres Welding*, 243 S.W.3d at 181. Indemnity provisions that do not state the intent of the parties within the four corners of the instrument are unenforceable as a matter of law. *English v. BGP Int'l, Inc.*, 174 S.W.3d 366, 374 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Evans argues that sections four and twenty-nine of the lease satisfy the requirements of the express negligence doctrine by including language providing that he is "not responsible for damage or loss" suffered by the Stanfords and that he is not liable for "any claims for damages no matter how caused." Evans cites three cases in support of this contention. *See Dupont v. TXO Prod. Corp.*, 663 F. Supp. 56, 57–58 (E.D. Tex. 1987) (finding contract language indemnifying defendant from all claims "*without limit and without regard to the cause or causes thereof or the negligence of any party or parties*" satisfied express negligence doctrine under Texas law); *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 51 n.1, 56–57 (Tex. 1991) (holding contract provision protecting indemnitee from liability for all claims "without limit and without regard to the cause or causes thereof or the negligence of any party or parties" satisfied the express negligence test); *Adams Res. Exploration Corp. v. Res. Drilling, Inc.*, 761 S.W.2d 63, 64–65 (Tex. App.—Houston [14th Dist.] 1988, no writ) (finding contract provisions indemnifying defendant for all claims "without limit and without regard to the cause or causes thereof or the negligence of any party or parties" clearly expressed parties' intent and satisfied express negligence doctrine). Evans thus contends that the lease clearly and

unambiguously states the parties' intent that he should not be liable for any damages to the Stanfords' personal property, even those allegedly caused by his own negligence.

The Stanfords argue that the lease fails the express negligence test because neither section four nor section twenty-nine includes the word negligence or any synonym thereof. The Stanfords also correctly note that the exculpatory provisions discussed in each of the cases cited by Evans include language explicitly disclaiming liability for the negligent acts of any party. *See Dupont*, 663 F. Supp. at 57 n.1; *Maxus Exploration*, 817 S.W.2d at 51 n.1; *Adams Res. Exploration Corp.*, 761 S.W.2d at 64.

The express negligence doctrine does not require an indemnity or release provision to include the word "negligence." *See Lehmann v. Har-Con Corp.*, 76 S.W.3d 555, 562 n.3 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Banzhaf v. ADT Sec. Sys. Sw., Inc.*, 28 S.W.3d 180, 189 (Tex. App.—Eastland 2000, pet. denied). When exculpatory provisions fail the express negligence test, however, it is typically because they fail to specifically mention negligence or the extent of the coverage to be applied. *See Trinity Indus., Inc. v. Ashland, Inc.*, 53 S.W.3d 852, 869 (Tex. App.—Austin 2001, pet. denied); *Adams Res. Exploration Corp.*, 761 S.W.2d at 65. In order for an exculpatory provision to meet the requirements of the express negligence doctrine, the parties' intent to indemnify the indemnitee's own negligent acts must be clearly stated within the four corners of the agreement. *See Lehmann*, 76 S.W.3d at 562 n.3; *Banzhaf*, 28 S.W.3d at 189.

After reviewing the lease agreement, we conclude that the exculpatory provisions relied upon by Evans fail to satisfy the requirements of the express negligence doctrine. The lease's exculpatory provisions broadly assert that Evans will be held harmless from "any claims" or "any damage," "no matter how caused." Although Evans was not specifically required to use the word "negligence" in order to escape liability, the broad language of this lease does not specifically and unambiguously express the parties' intent to hold Evans blameless for his own negligent acts. *See Enserch Corp. v. Parker*, 794 S.W.2d 2, 8 (Tex. 1990); *see also Trinity Indus.*, 53 S.W.3d at 868–69. Therefore, as a

matter of law, this lease does not indemnify Evans from the consequences of his own negligence. *See Fisk Elec. Co. v. Constructors & Assocs.*, 888 S.W.2d 813, 814–15 (Tex. 1994); *English*, 174 S.W.3d at 374.[2]

Because the exculpatory provisions relied upon by Evans do not satisfy the requirements of the express negligence doctrine, Evans is unable to show that he is entitled to judgment as a matter of law and that there is no genuine issue of material fact with respect to the Stanfords' claim for damages to their personal property. The trial court, therefore, could not properly grant summary judgment based upon the first ground alleged by Evans.[3] We sustain the Stanfords' first issue.

IV. THE STANFORDS' OWNERSHIP INTEREST IN THE HOME

In his second ground for summary judgment, Evans alleged that the Stanfords were precluded from recovering damages for the value of the home itself because they had no ownership interest in the home. Evans asserted that the Stanfords had no ownership interest because they failed to provide him with proper notice of their intent to exercise

[2] Our holding is consistent with other cases interpreting the express negligence doctrine. In the following cases, reviewing courts held that indemnity or release provisions did not meet the requirements of the express negligence doctrine because the exculpatory provisions did not clearly indemnify or release the parties from their own negligent acts. *See Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 707–08 (Tex. 1987); *English*, 174 S.W.3d at 374–75; *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880, 883–84 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Trinity Indus.*, 53 S.W.3d at 869; *Lee Lewis Constr., Inc. v. Harrison*, 64 S.W.3d 1, 21–22 (Tex. App.—Amarillo 1999), *aff'd*, 70 S.W.3d 778 (Tex. 2001); *Monsanto Co. v. Owens-Corning Fiberglas Corp.*, 764 S.W.2d 293, 295 (Tex. App.—Houston [1st Dist.] 1988, no writ). These decisions may be compared with the following cases where the reviewing court held that the express negligence doctrine was satisfied by contractual language specifically mentioning the consequences of the parties' negligence. *See Ayres Welding*, 243 S.W.3d at 181–82; *Tynes v. Nations Rent of Tex. L.P.*, No 10-05-00372-CV, 2006 WL 2438683, at *2 (Tex. App.—Waco Aug. 23, 2006, no pet.) (mem. op.); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 334–35 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Banzhaf*, 28 S.W.3d at 189–90; *Adams Res. Exploration Corp.*, 761 S.W.2d at 65.

[3] Evans argues that he is not liable even if the express negligence test is not satisfied because the Stanfords possessed actual knowledge of Evans's intent to indemnify and release himself from his own negligent acts. Evans averred in an affidavit that he stressed the lease's exculpatory provisions when the lease was signed. While actual notice of an indemnity or release provision may serve as a substitute for the conspicuousness prong of the fair notice doctrine, it does not serve as a substitute for the express negligence requirement. *Sydlik*, 195 S.W.3d at 333. Thus, we need not discuss whether the requirements of the conspicuousness test are satisfied.

their option to purchase the home (the "Purchase Option") before the lease expired. The Purchase Option is a handwritten provision located at the end of the lease which reads:

> If tenant makes all lease payments by the 7th of each month owner shall sell this property to tenant for $99,000.00 with no down payment and no closing costs except for [illegible] of attorney[']s fee[s]. Term[s] of the note will be 30 years with no prepayment penalty, interest rate to be 9 [illegible]%. Principal and interest to be $851.40 plus taxes and insurance. Tenant will notify owner 30 days before lease end if the option is desired.

In their second issue, the Stanfords argue that the summary judgment should be reversed because they provided Evans with notice of their intent to purchase the home more than thirty days before the lease expired,[4] thereby creating a genuine issue of material fact as to whether they possessed an ownership interest in the home.

A. General Rule: Strict Compliance

The holder of an option to purchase property possesses the right to compel a sale of the property on stated terms before the option expires. *Comeaux v. Suderman*, 93 S.W.3d 215, 219–20 (Tex. App.—Houston [14th Dist.] 2002, no pet.). A contract between the option holder and the property owner is created when the option holder properly exercises the purchase option. *City of Brownsville v. Golden Spread Elec. Coop., Inc.*, 192 S.W.3d 876, 880 (Tex. App.—Dallas 2006, pet. denied). Acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. *See City of Brownsville*, 192 S.W.3d at 880; *Comeaux*, 93 S.W.3d at 220. Failure to exercise an option according to its terms, including defective or untimely acceptance, amounts to a rejection. *Comeaux*, 93 S.W.3d at 220. Applying these rules to the present case, the Stanfords would obtain an ownership interest in the home by (1) timely making

[4] In an affidavit filed as summary-judgment evidence, Mark Stanford stated that he notified Evans more than thirty days before the end of the lease term that the Stanfords wished to purchase the home. According to Stanford, Evans responded that he would discuss the terms of the purchase after he returned from a vacation. In an affidavit filed by Evans, Evans averred that the Stanfords never provided any notice of their intent to exercise the Purchase Option.

all rent payments[5] and (2) notifying Evans of their intent to purchase the home thirty days before the lease expired.

B. Notice Required Under the Purchase Option

Evans contends that, under the terms of the lease, the Stanfords were required to provide written notice of their intent to exercise the Purchase Option by certified or registered mail. According to Evans, the Stanfords' failure to provide written notice in the manner specified by the lease precludes them from claiming an ownership interest in the home. The Stanfords respond that the Purchase Option does not provide a specific method of providing notice.

Here, the Purchase Option does not specify what manner of notice the Stanfords were required to provide; it simply states that the Stanfords must furnish notice thirty days before the lease expires. We consider the entire instrument when construing contractual provisions, however, and no single provision taken alone will control. *Luccia v. Ross*, 274 S.W.3d 140, 146 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The more specific provisions of a contract control over the general. *See Ayres Welding*, 243 S.W.3d at 181. Paragraph twenty-four of the lease states that "[a]ll notices to be given under this agreement will be given by certified mail or registered mail." Therefore, under the more specific terms of the lease, the Stanfords were required to give written notice of their intent to exercise the Purchase Option through certified or registered mail. *See Besteman v. Pitcock*, 272 S.W.3d 777, 784–85 (Tex. App.—Texarkana 2008, no pet.) (concluding written notice of intent to exercise purchase option was required; although option provision did not specify what form of notice was required, general notice provision of contract specified written notice). It is undisputed that the Stanfords never provided Evans with written notice of their intent to exercise the Purchase Option. To overcome this failure,

[5] Evans does not allege that the Stanfords failed to timely pay rent; we therefore infer that the Stanfords satisfied the first requirement under the Purchase Option. *See Aguirre*, 225 S.W.3d at 750 (stating that reviewing courts indulge every reasonable inference in the non-movant's favor).

the Stanfords argue that Evans waived his right to receive written notice concerning the lease.

C. Waiver

Contractual rights can be waived. *Johnson v. Structured Asset Servs., LLC*, 148 S.W.3d 711, 722 (Tex. App.—Dallas 2004, no pet.). Waiver is defined as the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003); *Mandell v. Mandell*, 214 S.W.3d 682, 692 (Tex. App.—Houston [14th Dist.] 2007, no pet). Waiver may be established by a party's express renunciation of a known right or by silence or inaction for a period long enough to demonstrate an intention to yield the known right. *Aguiar v. Segal*, 167 S.W.3d 443, 451 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Waiver is largely a matter of intent. *Beal Bank, S.S.B. v. Schleider*, 124 S.W.3d 640, 654 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g). For implied waiver to be found, the surrounding facts and circumstances must clearly demonstrate intent. *Id.*; *see also Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 624 (Tex. App.—Texarkana 2002, pet. denied). To establish waiver by conduct, "the conduct must be 'unequivocally inconsistent' with claiming a known right." *Potter v. Clear Channel Outdoor, Inc.*, No. 01-07-00578-CV, 2009 WL 1886168, at *7 (Tex. App.—Houston [1st Dist.] July 2, 2009, no pet.) (mem. op.) (quoting *Van Indep. Sch. Dist. v. McCarty*, 165 S.W.3d 351, 353 (Tex. 2005)).

Evans argues, and we agree, that the Stanfords' waiver argument must fail because the Stanfords do not point to any specific instances where a notice required by the lease to be provided by certified or registered mail was provided orally by either party. The Stanfords' evidence of waiver consists of general averments in Mark Stanford's affidavit that both parties discussed "problems or events concerning the lease by telephone" and that neither party ever provided notice concerning the lease by certified or registered mail. Because these averments do not reference specific instances where Evans accepted or

provided oral notice as a substitute for written notice, they do not evidence any "clear, unequivocal, and decisive acts" conclusively establishing Evans's intent to waive his right to receive written notice regarding the lease through certified or registered mail. *See Taub*, 75 S.W.3d at 624; *see also Jernigan*, 111 S.W.3d at 156 ("There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right.").[6]

Because of the undisputed evidence that the Stanfords did not provide written notice of their intent to exercise the Purchase Option through certified or registered mail and the Stanfords' failure to prove Evans waived his right to receive such notice, there is no genuine issue of material fact as to whether the Stanfords possessed an ownership interest in the home. The trial court, therefore, did not err in granting summary judgment with respect to the Stanfords' claims for damages related to the value of the home. We overrule the Stanfords' second issue.

V. CONCLUSION

After concluding the exculpatory provisions relied upon by Evans fail to satisfy the requirements of the express negligence doctrine, we reverse that portion of the trial court's grant of summary judgment related to the Stanfords' claims for damages to personal property. Because no genuine issue of material fact exists regarding the Stanfords'

[6] *Compare Beal Bank*, 124 S.W.3d at 654 (concluding representations that "an extension would not be a problem," the parties were "set to go," and the bank would "get back to" appellant did not evidence bank's waiver of loan provision requiring all loan modifications to be made in writing), *and Cattle Feeders, Inc. v. Jordan*, 549 S.W.2d 29, 33 (Tex. Civ. App.—Corpus Christi 1977, no writ) (finding no waiver of right to written notice of intent to exercise purchase option where only evidence of waiver was general statements that land owner was in the area occasionally and knew appellant was using the land and had made some improvements), *with SP Terrace, L.P. v. Meritage Homes of Tex., LLC*, — S.W.3d — , No. 01-09-00155-CV, 2010 WL 1840183, at *6–7 (Tex. App.—Houston [1st Dist.] May 6, 2010, no pet. h.) (finding appellants raised genuine issue of fact regarding appellee's waiver of deadline to file subdivision plat by providing facts showing (1) appellee orally agreed to extend filing deadline, (2) appellee failed to object after receiving appellants' written request to extend the deadline, (3) appellee's representatives continued working with appellants on development plans several months after filing deadline passed, and (4) appellants referenced specific date on which appellee's representatives met with appellants to discuss the subdivision changes).

ownership interest in the home, we affirm that portion of the trial court's grant of summary judgment denying the Stanfords' damages for the value of the home. Accordingly, we affirm the judgment of the trial court in part, reverse the judgment of the trial court in part, and remand the case for further proceedings consistent with this opinion.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost, and Brown.