COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00013-CV

RAYMAX MANAGEMENT, L.P. APPELLANT

V.

SBC TOWER HOLDINGS LLC APPELLEE

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 153-267049-13

MEMORANDUM OPINION ON REHEARING[1]

I. Introduction

Appellant RayMax Management, L.P. filed a motion for rehearing of our July 13, 2017 memorandum opinion and judgment. We deny the motion but withdraw our prior opinion and substitute the following in its place. Our

[1]*See* Tex. R. App. P. 47.4.

memorandum opinion, with the exception of some clarifying footnotes added on rehearing, otherwise remains unchanged.

In five issues[2] in this dispute over 425 square feet of property,[3] RayMax appeals the trial court's judgment for Appellee SBC Tower Holdings LLC on RayMax's trespass, declaratory judgment, and breach-of-lease claims. SBC brings two conditional cross-points. We affirm the trial court's judgment for SBC without reaching its conditional cross-points.

II. Discussion

We related the underlying facts in this case in *RayMax Management, L.P. v. American Tower Corp.* (*RayMax I*), No. 02-15-00298-CV, 2016 WL 4248041, at *1–3 (Tex. App.—Fort Worth Aug. 11, 2016, pet. denied) (mem. op.), *cert. denied*, 137 S. Ct. 2131 (2017), which is dispositive of two of the issues in this appeal and informs the appeal's remaining issues.[4]

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[2]In its motion for rehearing, RayMax argues that another issue on appeal was "whether the trial court erred in refusing to appoint an independent surveyor," an issue that RayMax argues we "did not even address" in our prior memorandum opinion. While in the body of RayMax's brief, RayMax stated that it was error for the trial court to deny its pretrial request for the appointment of an independent surveyor, RayMax did not raise this as an issue on appeal, did not provide argument to support its bare assertion that "this was error," and did not cite to any authorities to support its assertion that the trial court "erred." *See* Tex. R. App. P. 38.1(f), (i).

[3]As characterized to the jury in SBC's opening statement, "[A]bout double the size of your jury box."

[4]This is the third case involving RayMax that has recently been addressed by this court. *See RayMax Mgmt. L.P. v. New Cingular Wireless PCS, LLC* (*RayMax II*), No. 02-15-00053-CV, 2016 WL 7241475, at *2 (Tex. App.—Fort

In summary, in 1994, RayMax and its president and predecessor in interest, Charles Ray Hawkins, now deceased, leased a portion of property out of a larger tract of land to SBC's predecessor in interest.[5] *Id.* at *1 & n.3. Almost twenty years later, RayMax sued SBC and its sublessees American Tower, American Tower's subsidiary, and MetroPCS. *Id.* at *1–2. RayMax raised claims for trespass, unjust enrichment, and declaratory relief regarding the boundaries of the leased premises as to all of the parties and also sued SBC for breach of the lease. *Id.* The trial court granted summary judgment for the other parties not involved in this appeal on RayMax's declaratory judgment, trespass, and unjust enrichment claims. *Id.* at *1–2, *7. In the same order, the trial court granted summary judgment to SBC on RayMax's trespass and declaratory judgment

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Worth Dec. 15, 2016, pet. denied) (mem. op.) (referencing American Tower dispute in *RayMax I*). In its motion for rehearing, RayMax complains that we followed the holding in *RayMax I* despite the fact that its "approach has since been expressly rejected" by the Corpus Christi Court of Appeals in *Gearhart v. Wardell*, No. 13-15-00096-CV, 2016 WL 7011402, at *1 (Tex. App.—Corpus Christi Dec. 1, 2016, no pet.) (mem. op.). While we respect our sister court, we are not bound by its precedent. In declining to follow *Gearhart*, RayMax accuses us with "upending long-standing Texas jurisprudence," yet it cites no authority to support its contention.

[5]As we set out in *Raymax I*, on March 24, 1994, Ray leased part of a tract of land to Dallas SMSA, SBC's predecessor in interest, to build, operate, and maintain a radio transmission facility. 2016 WL 4248041, at *1. Ray and SMSA attached to the lease a metes and bounds description of the entire tract, but the portion of the tract that comprised the leased premises itself was not described by metes and bounds; rather, handwritten notations indicated the boundaries of the leased premises. *Id.* at *1.

claims against it but elected to send the breach-of-lease claim to a jury.[6] *Id.* at *3 & n.7. The trial court severed out the other parties, and we affirmed the summary judgment as to those other parties in *RayMax I*. *Id.* at *1–2, *7.

Thus, as determined by the trial court by summary judgment as a matter of law on the trespass issue and by the jury as a matter of fact in the instant trial,[7] at some indeterminate point, SBC or its sublessees overstepped the boundary of the leased premises. This case's dispositive fact was whether RayMax (via Ray or his wife Maxine) knew, actually or constructively, that the boundary of the leased property had shifted to include the additional 425 square feet, and the jury was asked in Question 2 whether SBC's failure to comply with the lease was excused by waiver, equitable estoppel, laches, or ratification.[8]

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[6]During the trial, the trial court reconsidered the declaratory judgment question and on RayMax's request, reserved the claim for reconsideration after submission to the jury on the breach-of-lease question. The claim was implicitly disposed of in the final judgment.

[7]After hearing several days of evidence, the jury was asked whether SBC had failed to comply with the material terms of the 1994 lease, as amended in 2007, in Question 1 and, in a 10–2 verdict, the jury answered, "Yes." In RayMax's motion for rehearing, it argued that, in our prior memorandum opinion, we "never examine[d] the lease agreement to determine if the trial court erred as a matter of law in *declining to decide*" whether the lease was ambiguous. [Emphasis added.] But by including an ambiguity instruction in the charge—an instruction to which RayMax made no objection—it appears that the trial court implicitly found that the lease was ambiguous. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business* PJC 101.8 Cmt. (2016) ("If the court determines that the contract contains ambiguous language, PJC 101.8 should accompany PJC 101.1.").

[8]RayMax objected to Question 2 on the ground that there was no evidence to support it. The trial court overruled RayMax's objections.

In its closing argument, RayMax acknowledged that the litigation had taken over two and a half years and argued that the case began in March 2013 when Ray "began selling the exterior of what is the parent tract of the leased premises," discovered the encroachment, and called Seng Hi Nguyen at American Tower. Seng confirmed the encroachment, and RayMax hired John Grant to perform a survey to document the encroachment. RayMax argued that Ray had not policed the property because he had trusted his lessee to police its sublessees and that SBC's breach should not be excused because there were "nothing but efforts from day one to conceal what the agreement of the parties would be and to simply not live by the agreement from day one" and that no one "effectively understood" what was actually going on with the property until Grant's survey in March 2013. RayMax further argued that for two and a half years, it had demanded compliance with the lease boundaries and SBC had refused.

RayMax claimed that nothing excused SBC's failure to comply, particularly when during the litigation, SBC or its lessees had proceeded to "boldy go" into the disputed area, and that there was nothing to support equitable estoppel, that SBC had made false representations acting through its agents and had concealed material facts, and that laches did not apply because SBC had only gotten away with its behavior for 19 of the 30 years of their ongoing relationship and that there was no reason not to come into compliance now. RayMax's

counsel then stated, with regard to Question 3,[9] which asked what sum of money would compensate RayMax for its damages, "We didn't put on any future value for the next 20 years because we want to consider this lease in default and the last thing we want is for this to continue on. So we certainly don't want future rent based on the lease itself at the contract rate" because the contract rate was too small. RayMax instead wanted $212,505 in damages for what it claimed that the rent would have been on the 425 square-foot disputed area, "the present value today as if that lease had gone out for the next 19 years that they are to go."

SBC replied that it had always been in the right spot on the property, since 1994 when Ray signed off on the building permit, and that the best evidence that SBC was right was RayMax's "19 years of silence" from 1994 to 2013, particularly after an easy-to-see fence extension was built in 2006. SBC further argued that if it had breached the lease, then RayMax had excused the breach through waiver because Ray had signed off on the site plan in 1994, and rather than objecting to the fence's location, RayMax was actually listed as a contractor in MetroPCS's 2005 permit application to extend the fence. SBC also argued ratification, laches, and equitable estoppel.

[9]Question 3 was conditioned as follows: "If you answered 'Yes' to Question 2, please stop and answer no more questions. If you answered 'No' to Question 2, then answer Question 3. Otherwise, do not answer Question 3."

In rebuttal, RayMax responded to SBC's arguments and asserted that SBC could have done several things to come into compliance with the lease, such as moving the fence line back or negotiating an amendment but instead required litigation to stop SBC's agent "from making $600,000 on a disputed piece of property."

In a 10–2 verdict, the jury answered, "Yes" to Question 2, that SBC's breach was excused. The trial court subsequently denied RayMax's various motions, and this appeal of the trial court's take-nothing judgment followed.[10]

A. *RayMax I* is dispositive of RayMax's Fourth and Fifth Issues.

In its fourth and fifth issues, RayMax complains about the trial court's summary judgment on its trespass[11] and declaratory judgment claims. RayMax argues that the trial court erred by determining that its trespass claim was barred by the two-year statute of limitations. But in *RayMax I*, we held that the

[10]At the conclusion of RayMax's case, SBC requested and received a directed verdict on some of RayMax's claims not raised in this appeal but the trial court denied directed verdict on the breach-of-lease claim in favor of sending that claim to the jury.

[11]In RayMax's motion for rehearing, it complains that we "did not realize that the cause of action in this appeal involved a trespass to try title claim," not a trespass claim. RayMax's ability to recover on a trespass-to-try-title claim was waived when RayMax failed to request a jury question on that cause of action in the court's charge and to preserve error regarding its omission from the charge, or to obtain a ruling from the court on the claim as a matter of law. As to its briefing on appeal, in RayMax's fourth issue, it refers to its claim as a claim for "trespass" and recites the elements of a trespass, not a trespass-to-try-title claim. *See* Tex. R. App. P. 38.1. For these reasons, it appears that the cause of action in this appeal did *not* involve a trespass-to-try-title claim.

undisputed facts showed that RaxMax's trespass injury was permanent as a matter of law and that, because the continuing-tort doctrine does not apply to a permanent injury arising from a trespass, RaxMax's trespass claims were time-barred as a matter of law. 2016 WL 4248041, at *5–6. RayMax also argues that the trial court erred by finding that declaratory judgment relief was not appropriate. But in *RayMax I*, we held that declaratory judgment relief was not appropriate because the relief sought was not preventative but rather constituted redress for alleged injuries already sustained and was duplicative of the relief sought in the trespass claim. *Id.* at *4.

On December 16, 2016, our supreme court denied RayMax's petition for review in *RayMax I*, and mandate issued from this court on February 9, 2017, affirming the trial court's summary judgment for SBC's sublessees. We are bound by the holdings in *RayMax I* in determining our conclusions here. *See, e.g.*, *Thomas v. Torrez*, 362 S.W.3d 669, 679 (Tex. App.—Houston [14th Dist.] 2011, pet. dism'd) (observing that because the court had already addressed a particular set of facts, it was bound despite contrary cases from other courts of appeals); *see also Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) (emphasizing the necessity of narrowing the issues in successive stages of litigation to "achieve uniformity of decision as well as judicial economy"); *Anheuser-Busch Cos. v. Summit Coffee Co.*, 934 S.W.2d 705, 709 (Tex. App.—Dallas 1996, writ dism'd by agr.) (observing that while perhaps not strictly applicable, the law of the case doctrine and its underlying rationale support an

intermediate appellate court's decision not to reexamine its earlier opinion). Bound by our own precedent, we overrule RayMax's fourth and fifth issues without revisiting the merits.

B. *RayMax I* informs our analysis of RayMax's sufficiency issues.

In part of its first issue and in its second issue, RayMax complains that the evidence is legally and factually insufficient to support the jury's answer to question 2.[12]

SBC responds that RayMax's arguments are not supported by the lease, the law, the jury's verdict, or the record and that the evidence is legally and factually sufficient to support the jury's finding that any failure by SBC to comply with the lease was excused because RayMax knew or should have known about its right to complain about the placement of the fence to the right of the billboard pole in 1994 yet did nothing for nineteen years.

1. Standards of Review

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital

[12]In the remainder of its first issue, RayMax contends that the trial court erred by not terminating the lease agreement and granting damages and legal fees to RayMax. Based on our disposition on sufficiency, we do not reach this argument. *See* Tex. R. App. P. 47.1.

fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005).

With regard to factual sufficiency, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

The trier of fact is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003).

2. Sufficiency Analysis

a. Evidence

We set out the following facts in *RayMax I*, which are supported by the parties' evidence at trial:

- The lease acknowledged that SBC's predecessor SMSA's use of the leased premises was contingent on SMSA obtaining all certificates, permits, and other approvals required by federal, state, or local authorities, and in 1994, SMSA filed a site plan[13] for the leased premises with the City of Fort Worth. 2016 WL 4248041, at *1. The filed site plan was a scale drawing of the leased premises and included metes and bounds descriptors of the leased premises along its boundary lines.[14] *Id.*

- When SBC subleased the premises to Southern Towers, Dennis Walker surveyed the leased premises (the Walker Survey), describing it by metes and bounds, "which matched the metes and bounds descriptions included in the site plan SMSA filed with the City of Fort Worth in 1994."[15] *Id.*
- In 2005, Southern Towers contracted with MetroPCS to install, operate, and maintain equipment on the leased premises. *Id.* at *2. MetroPCS received a

[13]Paul Baumgardner, area manager of real estate and construction for AT&T Mobility, who had started working on cell tower sites for an SBC-related entity in 1993, appeared at trial as SBC's corporate representative. As defined by Baumgardner, a site plan is the basic layout of the cell tower site's components: the tower, the building, and the fence. A land survey is the starting point to build a site plan. And a site plan is a component of getting a building permit—a requisite event to trigger the beginning of the lease term. Once the property is surveyed, "you would apply all the variations, the fence, where . . . the tower is going, where the building is going. And all the parts of the . . . site would be based on where that survey was so that we would know what was agreed to."

[14]Ray testified that other than driving by occasionally to look at the grass, after 1994 he did not visit the site again until construction started across the street in 2012 or 2013. He said that the parties never talked about the square footage of the lease during their negotiations. Instead, he met the representative at the site and physically showed to the representative the amount that he would lease.

[15]Baumgardner testified that SBC had the metes and bounds description of the leased premises as of March 31, 2001, and then an as-built survey of the leased property was conducted by Dennis Walker on August 12, 2001. According to Baumgardner, the leased area's legal descriptions for those dates match. And as of April 3, 2002, RayMax had a copy of the metes and bounds description of the leased premises matching the site designation supplement, which matched the 2001 Walker as-built survey. According to Baumgardner, RayMax did not raise any questions regarding the metes and bounds description after it received the April 3, 2002 copy of the metes and bounds description.

building permit on December 2, 2005, and installed equipment in 2006. *Id.* MetroPCS moved the eastern boundary of the fence, which enclosed the leased premises, to encompass the additional 425 square feet at issue here, as shown by the Walker survey. *Id.* "The locations of the equipment and the fence undisputedly were 'not hidden' and 'very visible.'"[16] *Id.* At the trial in this case, no one disputed that the fence extension occurred in 2006.

- In February 2007, Southern merged into a subsidiary of American Tower and assigned its sublease to another American Tower subsidiary. *Id.*

- On December 11, 2007, SBC and Ray amended the lease to extend the lease term and increase the rent. *Id.* Under the amendment's express terms, the remaining 1994 lease provisions "remain in full force and effect and are hereby ratified and affirmed." *Id.* Thus, as referred to in the jury charge in the instant case, the "lease" referred to the lease agreement entered in 1994 by RayMax and SBC's predecessors and the lease amendment entered in 2007 by Ray and SBC.

- On March 22, 2012, American Tower sent Ray a letter requesting an amended agreement to reflect RayMax's ownership of the leased parcel; the metes and bounds description of the leased premises attached to the proposed amended agreement mirrored the Walker Survey description, which matched the 1994 site plan. *Id.* Ray did not sign the amended agreement. *Id.*

- In 2013, when Ray began trying to sell the entire tract, including the leased premises, he observed that the fence had been moved.[17] *Id.* He hired John

[16]Ray stated that he noticed that the fence had been moved when he started paying attention to the property again around 2012 or 2013, when a shopping center was put in nearby, increasing the value of his property. He said that it was "very visible" where the fence had been extended out. His wife Maxine disagreed, stating that they discovered that the fence had been moved "shortly after this Grant survey" and described the fence's expansion as "not really" clearly visible. This was a fact question for the jury, which viewed evidence containing photographs of the fence and the site map.

[17]Ray called American Tower about it and said that an American Tower representative went by the site, looked at it, and then told Ray that "they had encroached on [his] property." Ray said that once he found out there was an encroachment on his property, he turned everything over to his attorney. Maxine testified that Seng Hi Nguyen, an American Tower employee, told them that there

Grant,[18] who determined that the eastern boundary of the leased premises, marked by a billboard pole in the 1994 lease-agreement illustration, had been expanded in the Walker Survey by 425 square feet, which constitutes the disputed area here.[19] *Id.* RayMax filed suit in 2013. *Id.* Maxine testified that RayMax did not complain about the fence's extension until just prior to the lawsuit in 2013; RayMax made its first demand in June 2013.

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was an encroachment and that they should sue but told them, "Don't tell them I said so because I'll lose my job."

Ray said that he did not pull the building permit records for any of the improvements related to the leased property. He did not know when the encroaching equipment was erected on his property because he did not go to each of his properties and look at them very often. When asked whether he thought the equipment had been put in around 2000, 2001, or some year after that, Ray replied, "I'd say it was back in that . . . time frame." When asked for the basis of his statement, Ray said, "Well, I don't think it was in recent years that it was put on. I -- I don't know the exact date it was put on there," but he thought it was around 2001 because the billboard people had been having a problem "for a while" with accessing the billboard sign to maintain it. Ray said that a RayMax employee had mowed the grass on the site every two or three weeks since he had owned the property but that "they're not down there looking at telephone equipment and stuff like that."

[18]Ray hired John Grant in 2013 when he "found out that [he] had an encroachment and [Grant] went down and surveyed it." Grant, a licensed surveyor and civil engineer, provided a survey to Ray in April 2013.

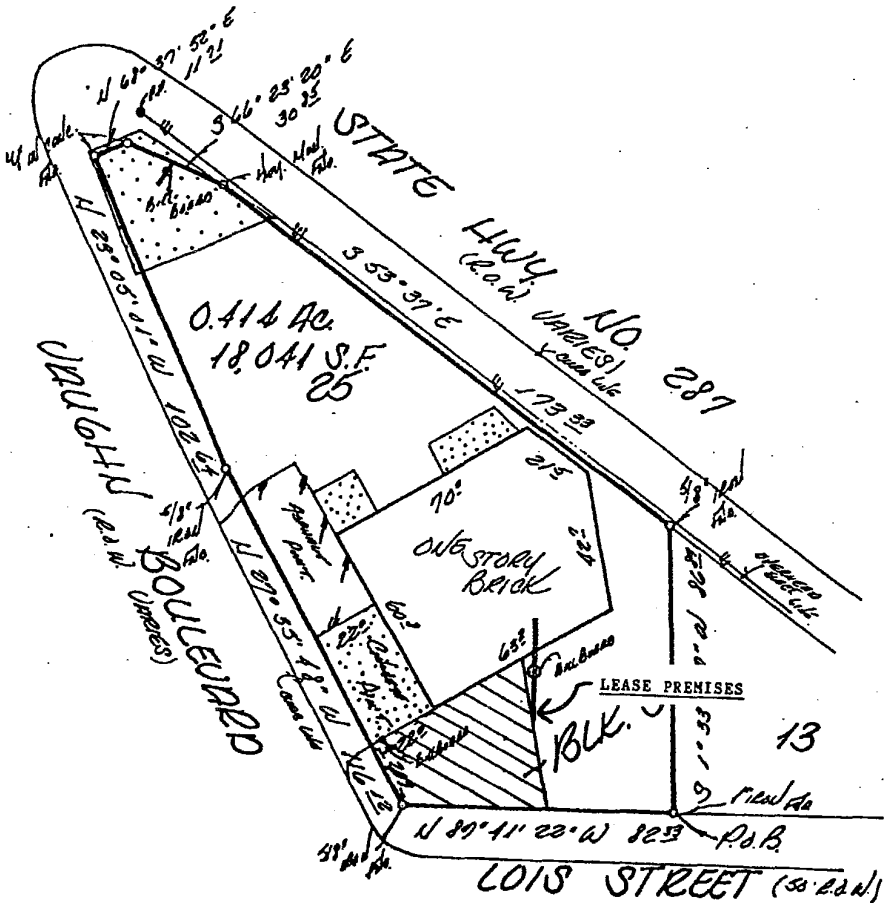
[19]Alexis Smith, an American Tower employee, sent an email to Maxine on March 13, 2013, attaching a 2001 survey of the leased premises. Smith told Ray that based on the 2001 survey, which Smith considered to be Exhibit B under the 1994 lease, she and her colleagues could not see where there was any encroachment. Ray said that he did not know about the 2001 survey until then and that he had never approved the additional 425 square feet.

Grant testified that the Walker survey contained "a lot more land" than Exhibit A of the lease, extending "clearly beyond the billboard." He stated that he thought the Walker survey contained around 300 square feet more than the leased premises. Grant clarified that the Walker survey was a five-sided figure while the leased premises was a four-sided figure. He further testified that the fence that was moved was not in compliance with the 2001 Walker survey but rather was slightly outside of it. Grant said that Walker made a mistake when he surveyed the leased premises.

The March 1994 lease was admitted into evidence. Because the parties do not dispute on appeal that a breach occurred, we do not revisit the terms of the lease or lease amendment except as pertinent to the jury's excuse finding. The 1994 lease states, in pertinent part,

> Said property is further shown on Exhibit "A" attached and made a part hereof for all purposes, and a portion thereof is hereinafter referred to as the "Leased Premises." Location of said Leased Premises therein is also shown on Exhibit "A" . . . .
>
> . . . .
>
> 2. LESSOR hereby grants to LESSEE the right to survey the Leased Premises. Said survey, if made, shall become Exhibit "B" to this Agreement.
>
> 3. The term of this Agreement shall be twenty (20) years beginning on the date a Building Permit is issued LESSEE by the City of Fort Worth, Texas. . . .
>
> . . . .
>
> 5. It is understood and agreed that LESSEE'S ability to use the Leased Premises is contingent upon its obtaining, either before or after the effective date of this Lease Agreement, all of the certificates, permits, and other approvals that may be required by any federal, state or local authorities. LESSEE shall make due and timely application for all such necessary certificates, permits and other approvals.
>
> LESSOR shall cooperate with LESSEE in its effort to obtain such approvals and shall take no action which would adversely affect the status of the Leased Premises with respect to the proposed use thereof by LESSEE.

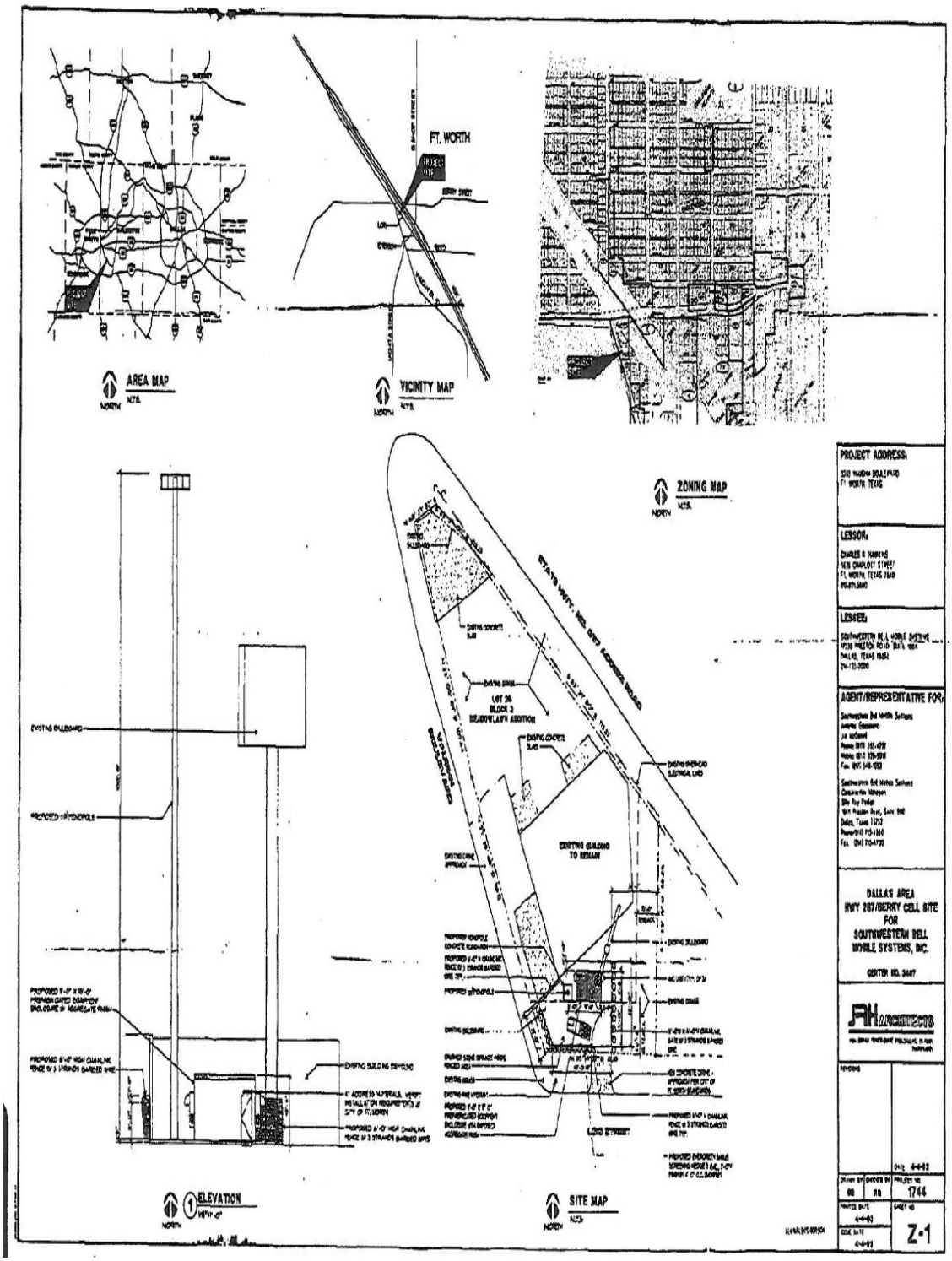
Exhibit "A" of the lease contained the following, which shows the hand-drawn boundaries of the leased premises.



Another exhibit showed that on March 23, 1994, SBC's real estate department had completed a form to order a site survey, which Baumgardner testified meant that SBC had ordered a survey in 1994. Baumgardner said that he did not know if that survey was given to Ray but that the site plan, "which was contained on the zoning document that was supplied that [Ray] signed, as well as the zoning 1 construction drawing page that was contained in [Ray's] safe," reflected the information contained in the 1994 survey.

The trial court admitted an exhibit consisting of documents found in Ray's safe after the lawsuit was filed.[20] The first page of the collection of documents included an architectural rendering that contained maps of the property's geographic location, elevation, zoning, and the site itself. The site map on that first page is set out below:

[20]Maxine testified that she discovered RayMax's original copy of the lease in Ray's safe after he died.



Although the site map is dated April 4, 1993, the collection of documents also included Ray's March 1, 1994 warranty deed with vendor's lien; because Ray did

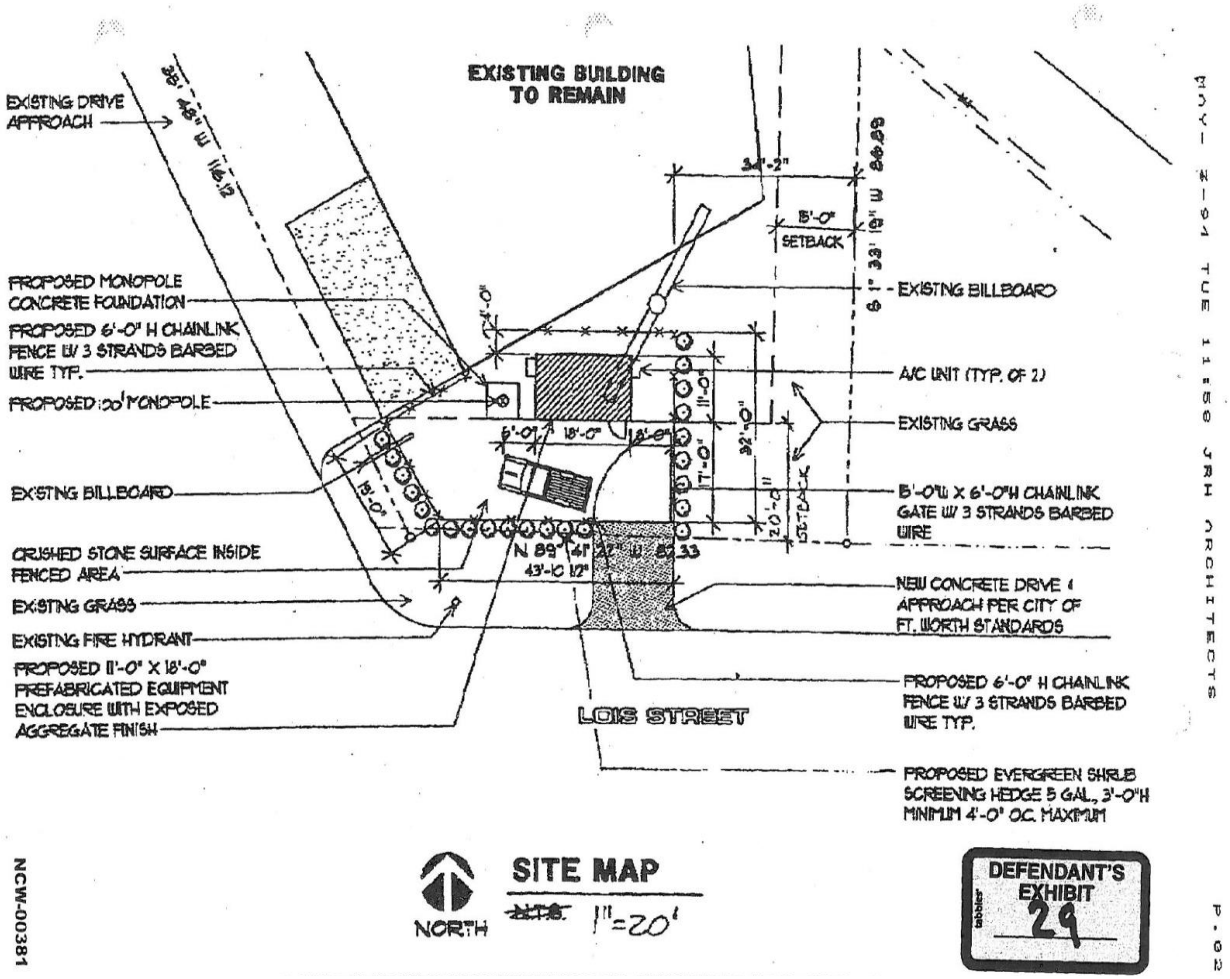
not own the property until March 1, 1994, this means that the date on the site plan, which states that Ray is the lessor and SBC is the lessee, bears a typo and should have been correctly dated April 4, 1994.[21]

The collection of documents also included a copy of the March 1994 lease and a survey plat indicating that the City required 10-foot setbacks on both bordering streets, which Baumgardner testified had required SBC to relocate the cell tower to a different portion of the leased premises. The collection contained Ray's title insurance policy on the entire tract, his HUD settlement statement showing that he had closed on the property in March 1994, the property's recording receipt from Tarrant County, Ray's deed of trust note on the property and his March 1, 1994 promissory note, and the 1995 release of lien, among other papers. And the collection included an application for special exception, variance, or interpretation of provisions of the zoning ordinance to the City of Fort Worth signed by Ray on April 4, 1994. The application requested a special exception to erect a cellular tower antenna on the site.

Two more exhibits contained a two-page fax. The first page was the May 3, 1994 fax transmittal memo and architectural rendering of the leased premises site plan from the architectural firm to SBC's site acquisition agent Gary Vest with the notation, "Site plan submitted to Ft. Worth. Hearing is 5-4-94 @ approx. 3:00 p.m. Will let you know of any required changes after we hear from Peter

[21]Baumgardner testified that the site map's date bore a typo and that it should have been dated 1994.

Kavanagh." The second page was the site map as rendered by the architectural firm, expanded as a separate exhibit below.

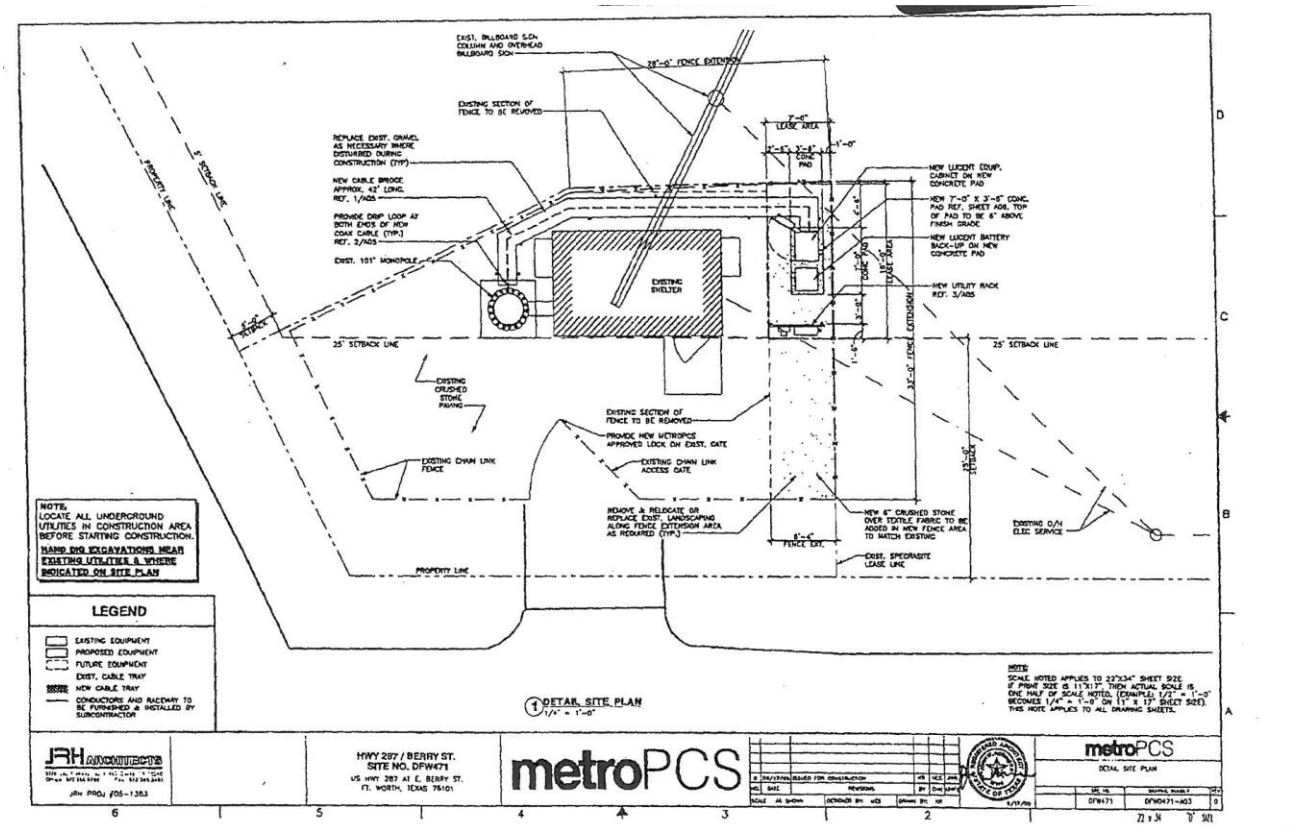


As set out above, Paragraph 5 of the March 1994 lease required RayMax to cooperate with the building permit process. On August 4, 1994, SBC notified Ray that the City had issued the building permit on July 1, 1994, making that the lease's commencement date. As testified by Baumgardner, building permit hearings are open to the public, and building permits are available to the public for review.

On the lease's illustration of the leased premises, Baumgardner acknowledged that the boundary line of the leased premises was to the left "and also above" the billboard. But he opined that based on his review of the documents, Ray was informed in 1994 of the fence's proposed location "to the right and below" the billboard pole when Ray himself attached the site map to the building permit application.

When asked whether from 1994 until 2013, when the lawsuit was filed, RayMax ever complained to SBC about its use of the property, Baumgardner replied, "No, sir."

The final acceptance by the city inspector of the fence extension by MetroPCS was January 31, 2006. The building permit lists RayMax as a contractor, which Baumgardner testified indicated that RayMax was performing "some kind of contracting service related to this installation." The MetroPCS site plan is set out below:



The 2007 amendment provided for an extension of the 1994 lease for four additional five-year terms and an increase in rent commencing July 1, 2014, but otherwise provided for the terms of the 1994 lease to "remain in full force and effect," as ratified and affirmed. RayMax could have given notice 90 days before July 1, 2014, the new term of the lease, that it elected not to renew the lease, but it did not do so.

Ray was eighty-one at the time that he testified via video deposition.[22] In addition to RayMax, he also owned some other businesses.[23] Ray stated that he

[22]When Ray was seventy years old, he broke four ribs in an accident and was in the hospital for two or three weeks. On his way home from the hospital, his vehicle was hit by a dump truck, which knocked his vehicle into a bridge pole, and he hit his head and required installation of a brain shunt. Since then, he had

had two cell tower leases—the one at issue and the one across the street from it. He bought the tract with the leased premises for investment; when he purchased it, it already had on it a billboard sign with a big pedestal, which was continuously under a lease that renewed every five years.

Ray acknowledged that the lease provided for the tenant to survey the land at a later date but said that he did not ask anyone whether a survey had been prepared "until we got into this situation."[24] Ray stated that he did not recall

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also had a stroke, and his health had further deteriorated after that. Ray acknowledged that he had incurred some memory lapses.

[23]Maxine testified that after she received her GED, she took business courses, had worked as an administrative assistant for an oil company, and then worked with Ray from then on.

[24]Baumgardner testified that this type of clause, with an illustration attached to the lease, was not unusual because subsequent surveying would be used to develop the leased property's site plan. He further explained,

> Based on looking at a number of these leases over the years, the best thing that makes sense with the way these leases were entered into is a lease would be entered into, and then there would be a determination after a survey was conducted, after communication with the authority having jurisdiction over the property such as a municipal or county organization, or in the case of a state park, a state government organization that would indicate if there were any setbacks, if there are any easements, anything that would preclude us from going where the potential landlord and the lessee wanted to put the property or put that site lease.
>
> I mean, we might want to put it at an intersection, but due to the City, they might want us to put it 10 foot further in, 10 foot further to the side. There might be a sewer easement that we would not be able to put a foundation for the tower in because of the sewer easement. There could be a variety of reasons why they would

receiving an October 26, 2007 letter and enclosure from American Tower asking him to review the amendment for the additional renewal terms of the lease; the enclosure was the lease amendment that Ray signed on November 28, 2007. But Ray acknowledged that some of the handwriting on the first page regarding bonus payments was "probably [his]." He also did not recall seeing or reading a March 22, 2012 letter that was sent to RayMax, stating, "[O]n stuff like this, usually my wife will get it and read it."

The remainder of the parties' evidence focused on damages.

b. Applicable Law

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). 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. *Id.* (citing *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996)). While a party's express renunciation of a known right can establish waiver, "[s]ilence or inaction, for so

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agree on X marks the spot but then not eventually put it in that location.

long a period as to show an intention to yield the known right, is also enough to prove waiver." *Tenneco Inc.*, 925 S.W.2d at 643.[25]

When a party relies on inferred or implied waiver by conduct, it is that party's burden "to produce conclusive evidence that the opposite party manifested its intent to no longer assert its claim." *Nat'l Oilwell Varco, L.P. v. Flowserve Corp.*, No. 01-13-00388-CV, 2015 WL 1967490, at *7 (Tex. App.—Houston [1st Dist.] Apr. 30, 2015, no pet.) (mem. op.); *see Loch 'N' Green Vill. Section Two Homeowners Ass'n v. Murtaugh*, No. 02-12-00094-CV, 2013 WL 2339902, at *7 (Tex. App.—Fort Worth May 30, 2013, no pet.) (mem. op.) (stating that, coupled with judicial admissions, the evidence "establishe[d] appellant's long-term acquiescence in violations" of the relevant restrictions in the parties' agreement, supporting summary judgment for appellees based on waiver).[26]

[25]After a party breaches a contract, the other party can continue to insist on performance, excusing the breach. *See Inimitable Grp., L.P. v. Westwood Grp. Dev. II, Ltd.*, 264 S.W.3d 892, 901 (Tex. App.—Fort Worth 2008, no pet.) ("Thus, when one party materially breaches a contract, the nondefaulting party is forced to elect between two courses of action, i.e., continuing performance or ceasing performance.").

[26]Likewise, as set out in the charge, a non-breaching party can excuse a breach through ratification. *See Barker v. Roelke*, 105 S.W.3d 75, 84 (Tex. App.—Eastland 2003, pet. denied) (explaining that ratification occurs when a party recognizes validity by action, performance, or affirmative acknowledgment; it may be express or implied by course of conduct and once ratified, a party may not later seek to withdraw its ratification). Or through estoppel. *See Ulico Cas. Co.*, 262 S.W.3d at 778 (explaining that estoppel generally prevents one party from misleading another to the other's detriment or to the misleading party's own benefit). Laches may also excuse a breach. *See Forman v. Classic Century*

c. Application

Paragraph 3 of the March 1994 lease provides that the twenty-year lease term would not begin until the City of Fort Worth issued a building permit. Paragraph 5 of the March 1994 lease provides that the lease was contingent until all certificates, permits, and approvals from federal, state, and local authorities were obtained, i.e., the City's approval of SBC's site plan, and further provides that RayMax had to cooperate with SBC to obtain the approvals. RayMax did so on April 4, 1994, when Ray signed the application for a special exception for the leased premises for placement of a cell tower, which Baumgardner testified was a building permit application of which the site plan was a component. The first page of the documents found in Ray's safe is a site map. The face of the site map includes the statement, "Proposed 6'0" chainlink fence," illustrated by a line of Xs to the right side of the demarcated billboard pole. Baumgardner opined that, based on his review of the documents, Ray was informed in 1994 of the fence's proposed location to the right of the billboard pole when he attached the site map to the building permit application. The record reflects that Ray signed off on the site map in 1994, even though he did not learn of the Walker survey

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Homes, Ltd., No. 02-12-00362-CV, 2014 WL 6840173, at *2 (Tex. App.—Fort Worth Dec. 4, 2014, no pet.) (mem. op.) (explaining that to prevail on the affirmative defense of laches, a defendant must show that the plaintiff had a legal or equitable right and unreasonably delayed in asserting that right and that the defendant suffered harm as a result of that delay). Because we conclude that the jury had legally and factually sufficient evidence to find waiver, we do not reach these other bases for the jury's answer to Question 2. *See* Tex. R. App. P. 47.1.

until it was produced in the March 2013 email. Ray admitted that he "could have seen" the site plan, which was found in his safe, and the fence was actually built to the right of the billboard pole, consistent with the site plan.

In 2002, RayMax received a letter containing the metes and bounds description determined by SBC to govern the premises but said nothing, even though it differed from the illustration attached to the lease.

Further, although MetroPCS extended the fence in 2006, Ray nonetheless signed an amendment to the lease in 2007 that extended the lease's terms, modified the amount of rent, and issued to him a one-time $10,000 payment. Ray did not ask anyone to move the fence or return it to its pre-2006 location even though it was "very visible" and "not hidden." Instead, RayMax was listed as a contractor on MetroPCS's building permit application.

RayMax acquiesced in the actions of SBC and its sublessees for over nineteen years, until 2013: Baumgardner testified that from 1994 until 2001, the fence was on the right side of the billboard pole, and from 1994 until a few months before Ray filed the lawsuit in 2013, Baumgardner was unaware of any complaints related to the location of the fence or equipment on the leased premises. Ray took no action after the 2006 extension until 2013.

Under both our legal and factual sufficiency standards, the jury could have reasonably found that the above evidence showed that RayMax had actual or constructive knowledge of its right to claim that the fence should have been placed to the left of the billboard pole but took no action to enforce its right for

over a decade. Therefore, we overrule this portion of RayMax's first issue and its second issue. In light of our disposition here, we do not reach the remainder of RayMax's first issue. *See* Tex. R. App. P. 47.1.

C. Future Compliance with Lease Term

In its third issue, RayMax argues that the trial court erred by "declining to order SBC to comply with the lease agreement for the remainder of the lease term." RayMax contends that if this court finds the evidence legally sufficient to support Question 2, as we have done above, then because this finding "does not pertain to actions after suit was filed . . . SBC should be ordered to comply with the lease agreement through 2034." RayMax refers us to its motion for JNOV and motion for omitted findings to support of this argument's preservation. However, both motions focused primarily on cancelling the lease, not continuing it,[27] and neither motion cited the trial court to authority to support ordering SBC to comply with the lease agreement in the future. *See* Tex. R. App. P. 38.1(i). To wit, the motion for omitted findings referenced rule of civil procedure 279 and included cases in support of assessing legal fees against SBC but included no authority for ordering SBC to comply with the lease through 2034.[28] And the

[27]In other portions of its appellate brief, RayMax merely argues that this court should render a termination of the lease agreement or remand the case for a new trial.

[28]In its motion for omitted finding, RayMax asked that if the trial court did not disregard the jury's answer to Question 2, then it should "order [SBC] to return the fence line to their original position and comply with the lease agreement," which is not the same argument presented in issue 3.

motion for JNOV focused primarily on RayMax's no-evidence arguments as to Jury Question 2, RayMax's desire for declaratory relief and to set aside the judgment, its desire to cancel the lease, and its request for a new trial.[29] In pertinent part, in the motion for JNOV, RayMax referred the trial court to *Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006),[30] and *Mustang Pipeline Co.,*

[29]In the JNOV motion, RayMax stated, "[RayMax] conclusively established its right to cancel the lease agreement, damages and legal fees as such issues were not contested or rebutted by [SBC]," and "[SBC] offered no evidence that it should be excused from future performance. The suit was filed in July 2013 and runs through 2034. [RayMax] has made it known that [SBC's] failure to comply breaches the lease through 2034." While RayMax argued in its motion for JNOV that the lease term ran to 2034 and that as long as it was in force, RayMax should be entitled to enforce it, referencing *Brink v. Fidelity Bank of Fort Worth*, 966 S.W.2d 684, 684–85 (Tex. App.—Fort Worth 1998, no pet.), it made this argument in the context of applying laches in its favor. In *Brink*, we acknowledged that laches may be a valid defense even when limitations would otherwise permit an action but indicated that it required an extraordinary case. *Id.* Whether RayMax was entitled to use laches to enforce the lease was not a fact issue resolved by the jury in the case before us nor one raised in RayMax's live pleading. That is, in its eighth amended petition, the live pleading at trial, in its breach of contract claim, RayMax demanded that the lease be terminated, asked for damages for SBC's use of the property, and sought removal of all of the equipment from the premises. It also sued for fraud by nondisclosure, trespass to try title, unjust enrichment, and fraudulent concealment, and it sought a declaratory judgment that the lease was terminated and an injunction to force SBC to remove all equipment from the premises. RayMax prayed for termination of the lease, actual damages, exemplary damages, injunctive relief, declaratory judgment relief, attorney's fees, pre-judgment interest, post-judgment interest, court costs, and "such other and further relief to which [RayMax] may be entitled either at law or in equity."

[30]In *Long Trusts*, a case involving disputes arising from joint participation in oil and gas ventures, the supreme court addressed two agreements: monthly billing and payment of shared litigation expenses and payment of part of the drilling and operating costs in exchange for part of the working interest in producing wells. 222 S.W.3d at 414–15. Long Trusts failed to bill monthly and then presented to Griffin a bill for twenty months of accumulated litigation

Inc. v. Driver Pipeline Co., Inc., 134 S.W.3d 195 (Tex. 2004).[31] Nonetheless, to the extent that RayMax has preserved this issue for our review, because none of the cases that it cites in the two paragraphs of its argument on this issue support

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expenses, which Griffin refused to pay in full within the 30 days required by the agreement but still demanded its share of the recovery. *Id.* at 414. The supreme court concluded Griffin could not refuse performance and still insist on its full benefits under the agreement. *Id.* The supreme court reasoned that when Long Trusts failed to bill each month, Griffin could have demanded that it comply with the billing agreement and could have sued to enforce the agreement but did not do so, and by claiming its share of the recovery—the benefit of the bargain—Griffin treated the agreement as continuing and deprived itself of any excuse for not performing its part. *Id.* at 415–16. With regard to the second agreement, the court stated that the leasehold interests were not sufficiently identified, so while Long Trusts could not invoke the statute of frauds with respect to performance already accepted, "future performance under the agreement was unenforceable." *Id.* at 414–15, 417 ("To the extent the court of appeals enforced the 1978 and 1982 agreements for future wells, it was in error."). We do not see how this authority supports RayMax's argument in issue 3.

[31]In *Mustang Pipeline*, the parties obtained favorable jury findings as to each other's breaches of a pipeline construction contract. 134 S.W.3d at 196. Mustang sued Driver for Driver's failure to complete work in a timely manner, and Driver counterclaimed for Mustang's wrongful termination of the contract. *Id.* The supreme court held that an express finding on materiality of the breach is not required when time is of the essence, and because time was of the essence under the contract and Driver had failed to timely perform, Mustang was excused from performance. *Id.* at 196, 198 (acknowledging that a party is released from further obligation under a contract only if the other party materially breached the contract). The court held that as a matter of law, Driver committed a material breach, thereby discharging Mustang from its duties under the contract and that the trial court therefore should have disregarded the jury's answer to the wrongful termination question and granted Mustang a JNOV. *Id.* at 200. Because the crux of the matter was who committed a material breach first, this case is inapposite. *See id.* ("These problems could have been avoided had the trial court submitted the breach of contract question disjunctively . . . accompanied by an appropriate instruction directing the jury to decide who committed the first material breach."). We likewise do not see how this authority supports RayMax's argument in issue 3.

ordering a party to comply with a lease agreement in the future,[32] we overrule this issue as inadequately briefed. *See* Tex. R. App. P. 38.1(i).

[32]RayMax cites *Consolidated Engineering Co. v. Southern Steel Co.*, 699 S.W.2d 188 (Tex. 1985), *Stowers v. Harper*, 376 S.W.2d 34 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e), *Cal-Tex Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802 (Tex. App.—Tyler 1999, no pet.), and *Estes v. Wilson*, 682 S.W.2d 711 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.), to support this argument, but these cases do not support its request for an order compelling a party to perform a contract in the future in anticipation of a future breach. Although these cases in part stand for the proposition it cites—"A party's continuing performance after the other party's breach is not waiver of the breach"—it ignores the rest of the rule, which requires a case-by-case determination based on the facts *after* an alleged breach and waiver. In *Consolidated*, for example, the supreme court concluded that although a party can affirm a breached contract by either showing a conscious intent to do so or by acting so as to induce the other party's detrimental reliance, this rule, under the facts as presented, did not prevent Consolidated's recovery for breach of contract. 699 S.W.2d at 191–92 (holding no waiver or estoppel when Consolidated reserved its legal rights as it continued performance). In *Stowers*, likewise, the Tyler court concluded that the evidence supported the trial court's fact findings and conclusions that the employee had not waived his right to receive what he was due under the contract with his employer because the evidence showed that he did not have full knowledge of the amount he was owed and no intent on his part to waive his right to the full amount after the breach. 376 S.W.2d at 37–40. In *Cal-Tex*, the Tyler court stated that nothing in the record indicated Owens's desire to relinquish its claim of past breaches by Cal-Tex; rather, the letter sent by Owens to Cal-Tex indicated a forewarning to Cal-Tex that if it did not move forward with the contract, Owens was not going to walk away without remuneration for its expenditures. 989 S.W.2d at 813–14 (stating that only Owens's nonacceptance of Cal-Tex's subsequent repudiation of the 1990 contract in the form of Cal-Tex's proposed 1993 contract kept the 1990 contract alive). And in *Estes*, the record reflected that despite Wilson's having accepted payments that were due under the parties' contract, she had continued to take steps to evict Estes, "thus making it clear that acceptance of any payments was not to be construed as a waiver of her rights." 682 S.W.2d at 713–14. Further, Wilson testified that at no time did she intend to waive any of her rights with regard to the real property and the lease agreement, and Estes admitted in his pleadings that she had continuously complained of his subletting and had continuously notified him of her objections. *Id.* at 714–15 ("It has been held that a material fact issue is created where a landlord knows of and accepts payments after a sublease has occurred, *but it is*

IV. Conclusion

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

/s/ Bonnie Sudderth
BONNIE SUDDERTH
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

LIVINGSTON, C.J.; and GABRIEL, J., concur without opinion.

DELIVERED: August 31, 2017

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imminently clear that this is a fact question, which was resolved by the jury in Wilson's favor." (emphasis added)).