TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00711-CV

**Appellant, Saltworks Ventures, Inc. d/b/a Bruegger's Bagels//
Cross-Appellant, Residences at The Spoke, LLC**

v.

**Appellees, Residences at The Spoke, LLC &
Transwestern Development Company, LLC//Cross-Appellee,
Saltworks Ventures, Inc. d/b/a Bruegger's Bagels**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT
NO. D-1-GN-15-000379, HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING**

M E M O R A N D U M O P I N I O N

This is a landlord-tenant dispute over a commercial lease. The tenant, Saltworks Ventures, Inc., claims the landlord, Residences at the Spoke, LLC, breached the lease and then wrongfully denied access to the leased premises; Residences contends lockout was proper because Saltworks had paid no rent despite maintaining possession of the premises for more than a year. Following a bench trial, the court awarded Saltworks damages and attorneys' fees, finding the Residences had breached two sections of the lease. The primary question before this Court is whether Saltworks introduced sufficient evidence to support the trial court's findings and conclusions regarding breach. Additional issues include challenges to the calculation of damages, the award of attorneys' fees, and the disposition of several motions. We will affirm the trial court's judgment.

I. BACKGROUND

A. The Lease

In March of 2013, Saltworks Ventures, Inc., executed a five-year lease with Residences at the Spoke, LLC, the owner of a mixed-use development under construction in south-central Austin. Construction of the development was coordinated by Transwestern Development Company, LLC. Although the lease mentions Transwestern, Transwestern is not a party to the lease.

The lease required Residences to construct a retail space from which Saltworks would operate a restaurant under a franchise agreement with Bruegger's Bagels. Saltworks' president, Roger Cusick, had purchased the rights to open several of these restaurants in the Austin area. Cusick's son managed the day-to-day business of the first restaurant, which opened in March of 2012, and planned to oversee operation of this location, as well.

Residences and Saltworks agreed on the size and layout of the retail space, which the lease refers to as "the premises." Because the premises were not yet constructed, the lease did not require Saltworks to begin paying rent immediately. The lease instead describes a commencement date—a date to be determined by certain construction and retail benchmarks—and requires Saltworks to remit rent on that date and on the first of every month thereafter.

Section 3.2 of the lease sets forth the procedures by which Residences would transfer possession of the premises to Saltworks, requiring Residences to:

> notify Tenant in writing that Landlord's Work is substantially complete and that possession of the Premises is granted to Tenant which notice, in order to be valid, shall include (i) a certificate of occupancy with respect to Landlord's Work or

> evidence that Landlord's Work has passed all applicable governmental inspections for issuance thereof, and (ii) a certificate from Landlord's architect stating that the Landlord's Work is substantially complete.

Upon transfer of possession, Saltworks would then begin its own work on the premises.

The lease requires rent abatement in the event of delayed transfer of possession. Section 3.2 provides:

> [I]f Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete by October 1, 2013 (the "Penalty Date"), then Tenant shall be entitled to an abatement of one day's Rent for each day after the Penalty Date that Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete . . . .
>
> [I]f Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete by November 1, 2013 (the "Outside Possession Date"), then (i) in addition to the rent abatement described in the preceding sentence, Tenant shall be entitled to an abatement of two days' Rent for each day after the Outside Possession Date that Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete.

This section also authorizes Saltworks to terminate the lease after November 1, 2013, if Residences should fail to deliver possession with its work substantially complete by that date.

Section 3.7 provides for additional abatement in the event of delayed completion of the common areas of the mixed-use development, which the parties anticipated might impair Saltworks' use of the premises:

> Landlord estimates that the Mixed[-]Use Project will be complete by February 1, 2014. Landlord will take all reasonable steps to avoid unreasonable delays in completion of the Mixed[-]Use Project. In the event that the Common Area . . . is not complete

> by February 1, 2014, and if Landlord's construction activities . . . materially impair Tenant's access, use[,] or visibility of the Premises, then as Tenant's sole and exclusive remedy therefor, Tenant shall be entitled to an abatement of one day's Base Rent for each full week after February 1, 2014 that such material impairment continues as a result of the Landlord's construction . . . .

The lease defines "Common Area" to include landscaping, parking facilities, lighting, utilities, and other parts of the development intended for the use and benefit of the mixed-use community.

The lease also establishes the parties' rights and remedies in the event of default. Section 17.2 lists eight types of tenant default, including failure to remit rent, and section 17.3 outlines Residences' rights should default occur:

> Landlord may, without judicial process and without notice of any kind, without terminating the Lease, terminate Tenant's right of possession of the Premises by entering upon and taking possession of the Premises and expelling or removing Tenant and any other person who may be occupying the Premises or any part thereof, by force if necessary, without being liable for prosecution or any claim for damages therefor. In furtherance of the foregoing, Landlord may change the locks to the Premises (in which event, Tenant shall have no right to any key for the new locks) and take any other actions as are necessary for Landlord to take absolute possession of the Premises. . . .

Section 17.4 addresses default by Residences, requiring Saltworks to notify Residences in writing of any "defaults in fulfilling any of its covenants, obligations[,] or agreements," and to allow 30 days for cure. Saltworks would then be "entitled to exercise any right or remedy at law or equity should the default remain uncured after 30 days."

B. Transfer of Possession

The penalty date of October 1, 2013, passed without Saltworks obtaining possession of the premises, which were still under construction. The commencement date had not yet occurred and rent was not yet due, but under section 3.2 of the lease, abatement began accruing at a rate of one day of rent for each day that passed without delivery of substantially complete premises.[1]

Later in October, Residences contacted Cusick to ask him to execute a lease addendum certifying substantial completion and transfer of possession.[2] A series of emails reflect the negotiations that ensued. Cusick, an attorney who lives and practices in New York, had not recently inspected the premises and hesitated to accept possession or execute this addendum. Because Cusick was not able to travel to Austin to conduct an inspection, his wife walked through the premises with a Residences representative. She apparently did not point out any flaws or any work that remained to be done. Even so, Cusick did not want to confirm substantial completion, and requested revisions to the language of the addendum. The parties ultimately executed an addendum confirming transfer of possession on October 30, 2013. The addendum did not mention substantial completion but indicated that "to Tenant's knowledge, all Landlord's Work required to be performed by Landlord under the Lease has been satisfactorily completed."

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[1] Residences does not deny that rent abatement began accruing under section 3.2 on October 1, 2013. The parties disagree as to how long the abatement continued to accrue, and the trial court's findings of fact are silent as to the issue.

[2] Execution was required by section 3.5 of the lease, which refers to "a certificate in the form of Exhibit E." The parties have used various names for this certificate, which they acknowledge is mislabeled as "Exhibit D." We will simply refer to it as a lease addendum.

Saltworks spent the next several months building out the premises and obtaining the requisite construction and operating permits. According to Cusick, Saltworks had originally planned to open the restaurant in mid-winter and to begin serving the development's tenants as early as February 1, 2014, the day Residences had indicated the development would be complete. But delays in permitting and construction prevented a winter opening, and February 1 passed without completion of the common areas of the development, thus triggering additional rent abatement under section 3.7 of the lease.

C. Dispute and Lockout

Saltworks opened the restaurant on April 28, 2014, while Residences continued construction of the development. In June, Residences sent its first rent demand, identifying a commencement date of June 9, 2014. The demand itself is not part of the record, so it is not clear how this date was calculated or how much, if any, rent was abated under sections 3.2 and 3.7 of the lease. But when Saltworks objected to the alleged commencement date and insisted on rent abatement, Residences asked its attorneys to review the lease. Residences sent a revised demand letter dated July 16, 2014, conceding it had miscalculated the commencement date in the first letter. The correct date, according to the revised letter, was May 4, 2014. Residences then offered a combined 31 days of abatement under sections 3.2 and 3.7.

The next three months were marked by a series of increasingly contentious communications between Cusick and various representatives of Residences and Transwestern. Cusick sent emails complaining of construction delays and insisting Saltworks was not obligated to pay rent because the development was not complete and Residences had never delivered the notice

and certificates listed in section 3.2 of the lease. Residences increased its offer of abatement but insisted that Saltworks begin paying rent immediately, arguing that the notice and certificates were of no consequence given that Saltworks was already operating the restaurant.

The dispute escalated in October and November of 2014. On October 10th, Residences sent a letter demanding more than $26,000 in past-due rent within ten days. Six days later, Saltworks sent a letter purporting to terminate the lease, claiming Residences had breached its terms by failing to demonstrate substantial completion of the premises prior to transfer of possession, failing to provide the notice and certificates required at that transfer, and failing to offer sufficient rent abatement for delays pursuant to sections 3.2 and 3.7 of the lease. On November 10th, Residences sent a final demand letter requesting payment of $5,131.60 within two days and warning that failure to remit would result in the pursuit of all available legal remedies. After receiving no response from Saltworks, Residences posted notice of lockout and changed the locks on November 12th, eventually removing all of Saltworks' equipment and fixtures from the premises.

Saltworks subsequently sued Residences and Transwestern, alleging breach of contract, unjust enrichment, fraudulent misrepresentation, unlawful lockout, and constructive eviction. The court entered summary judgment in favor of Transwestern on Saltworks' claim that Transwestern had breached the contract. Saltworks' remaining claims were tried to the bench.

Over the course of the two-day trial, the court granted defendants' joint motions for directed verdicts on Saltworks' claims of fraudulent misrepresentation, unlawful lockout, and constructive eviction, thus leaving breach of contract and unjust enrichment as Saltworks' only viable claims. A few weeks after trial, the court rendered judgment holding that Residences had

breached the lease and awarding Saltworks $104,440.00 in actual damages and $43,382.32 in attorneys' fees. The court subsequently issued findings of fact and conclusions of law, finding, among other things, that Residences had breached sections 3.2 and 3.7 of the lease by failing to provide the written notice and certificates and by failing to provide sufficient rent abatement for construction delays. Saltworks and Residences both filed timely appeal.

II. DISCUSSION

A. Breach of Section 3.2

Residences challenges the legal and factual sufficiency of the evidence to support the trial court's conclusion that Residences breached section 3.2 of the lease, arguing that Saltworks waived any right to performance of that section. The trial court found that the section required Residences, before transferring possession to Saltworks, to "demonstrate . . . substantial completion through service of a written notice attesting to said completion accompanied by: a) a final certificate of occupancy demonstrating compliance with all governmental obligations; and b) a certificate of its architect demonstrating that the work performed conformed to the original plans."[3] The court found that Residences never provided the notice or the certificates. Residences concedes that fact but contends Saltworks waived its right to performance when it executed the lease addendum acknowledging transfer of possession. Residence further argues the lease addendum confirmed substantial completion of its work.

[3] Punctuation revised.

As the party with the burden to prove waiver at trial, to prevail on its legal-sufficiency challenge, Residences must now "demonstrate that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)); *see also* Tex. R. Civ. P. 94 (listing waiver among affirmative defenses). "In conducting our review, 'we credit evidence that supports the verdict if reasonable jurors could have done so and disregard contrary evidence unless reasonable jurors could not have done so.'" *Graham Cent. Station, Inc. v. Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (citing *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. & Research Corp*., 299 S.W.3d 106, 115 (Tex. 2009)). "The court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it." *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

To prevail on its factual-sufficiency challenge, Residences "must demonstrate on appeal that the adverse finding [or, more precisely, the failure to find that Residences had proven its defense of waiver] is against the great weight and preponderance of the evidence." *Dow Chem. Co.*, 46 S.W.3d at 242 (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)).

Residences cannot prevail on its challenge to the trial court's failure to find waiver. The lease itself contains a non-waiver clause that would render any finding of waiver immaterial. The provision provides, "The failure of either party to insist in any one or more cases upon the strict performance of any of the covenants of the Lease or to exercise any option herein contained will not

be construed as a waiver or relinquishment for the future of such covenant or option." The Supreme Court of Texas recently emphasized that, particularly in the commercial context wherein parties are likely to retain counsel to carefully negotiate and review contracts, "these non[-]waiver provisions are binding and enforceable." *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 481 (Tex. 2017) (citations omitted). So even assuming Residences failed "to insist . . . upon strict performance" of section 3.2, this clause would preclude a finding of waiver.

Residences argues that section 3.3 of the lease somehow limits the scope of the non-waiver clause by "provid[ing] an alternative to the requirements of [s]ection 3.2." "[T]he proper construction of an unambiguous lease is a question of law determined de novo." *Samson Expl., LLC v. T.S. Reed Props., Inc*., 521 S.W.3d 766, 787 (Tex. 2017) (citation omitted). Section 3.3 states that "taking possession of any portion of the Premises will be conclusive evidence that such portion of the Premises was in good order and satisfactory condition, and that all of Landlord's Work in or to such portion of the Premises was satisfactorily completed . . . except as to any patent defects or uncompleted items identified on a punch list . . . ." This language, which both parties agree is unambiguous, does not relieve Residences of its obligations under section 3.2. Section 3.3 makes no mention of the requisite certificates or of the "substantial completion" those certificates were intended to demonstrate. Moreover, section 3.3 expressly reserves Saltworks' right to notify Residences of any latent defects within a year of transfer of possession.

Even assuming the non-waiver clause does not dispose of this issue, the record does not establish waiver as a matter of law or show the trial court's failure to find waiver to be contrary to the great weight of the evidence. Waiver "requires intentional relinquishment of a known right

or intentional conduct inconsistent with claiming that right." *Id.* at 474. "Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances." *Id.* at 485 (quoting *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003)). In a series of emails sent in October of 2013, Cusick repeatedly asked to postpone the transfer of possession or to revise the language of the lease addendum to avoid confirming substantial completion. He could not travel to Austin to inspect the premises, and complained, "I really have no knowledge [of completion] unless you or someone tells me it is done." He continued, "Shouldn't I have some information from you advising me it is done?" And indeed, the trial court found that the information regarding completion should have been demonstrated through the occupancy certificate and architect's certificate required by section 3.2. At Cusick's insistence, the executed addendum did not acknowledge substantial completion but only indicated that "to Tenant's knowledge, all Landlord's Work required to be performed by Landlord under the Lease has been satisfactorily completed." Even following execution, Saltworks continued to ask for compliance with section 3.2. These facts and circumstances do not "clearly demonstrate" waiver of Saltworks' right to performance of section 3.2. *Langley*, 111 S.W.3d at 156.

Because Residences has not shown waiver as a matter of law, *Dow Chem. Co.*, 46 S.W.3d at 241, and because it has not shown that the trial court's failure to find waiver is contrary to the great weight and preponderance of the evidence, *id.* at 242, we overrule its sufficiency challenge to trial court's findings regarding breach of section 3.2.

B. Breach of Section 3.7

Residences challenges the legal and factual sufficiency of the evidence that Residences breached section 3.7 of the lease, which required rent abatement in the event Residences failed to complete the mixed-use development on time if that delay materially interfered with Saltworks' use of the premises. In support of that breach, the court found that Residences failed to complete the mixed-use development on time and failed to offer the required rent abatement. As the plaintiff seeking damages for breach, Saltworks had the burden of proof on this issue at trial. *Foster v. Centrex Capital Corp*., 80 S.W.3d 140, 143–44 (Tex. App.—Austin 2002, pet. denied). As the party challenging the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof at trial, Residences "must demonstrate on appeal that no evidence supports the adverse finding." *Peña*, 442 S.W.3d 261, 263 (Tex. 2014) (citing *Croucher*, 660 S.W.2d at 58).

"When a party attacks the factual sufficiency of an adverse finding on an issue on which the opposing party has the burden of proof, we should set aside the verdict only if the evidence supporting the jury finding is so weak as to be clearly wrong and manifestly unjust." *Bechtel Corp. v. CITGO Prod. Pipeline Co.*, 271 S.W.3d 898, 916 (Tex. App. Austin—2008, no pet.) (op. on rehearing) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)). We may not substitute our own judgment for that of the factfinder, even if the evidence would support a different result. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998).

Section 3.7 required Residences to "take all reasonable steps to avoid unreasonable delays in completion of the mixed-use project." The lease identified a target completion date of February 1, 2014, but the trial court found that Residences "did not complete said mixed[-]use

project until the third week of October . . . ." Residences does not dispute that finding. "Unchallenged findings of fact are binding unless the contrary is established as a matter of law or there is no evidence to support the findings." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). Saltworks' evidence supports the finding. Photographs introduced at trial reveal the extent to which the development remained unfinished throughout the summer and early fall, and, Saltworks contends, illustrate the lack of urgency with which the contractors went about their tasks. Cusick's son Jason, who oversaw the day-to-day operation of the restaurant, testified that construction was essentially "stagnant," with neither Residences nor Transwestern "push[ing] these guys to do anything," notwithstanding his father's repeated complaints to Residences and Transwestern about the delays and associated interference with the restaurant. Based on this record, we cannot say Saltworks produced legally insufficient evidence of unreasonable delays, or that its evidence is so weak as to result in manifest injustice. *Peña*, 442 S.W.3d at 263; *Bechtel Corp*., 271 S.W.3d at 916.

Residences also challenges the trial court's finding that its abatement offer was insufficient. Section 3.7 requires one day of abatement for each full week after February 1, 2014, the construction of the common areas of the mixed-use project "materially impair[ed] Tenant's access, use[,] or visibility of the Premises." Residences does not deny the construction continued through the third week of October, but denies any material impairment resulted. "In determining the materiality of a breach, courts will consider, among other things, the extent to which the non[-]breaching party will be deprived of the benefit that it could have reasonably anticipated from full performance." *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693 (Tex. 1994). The record here supports the trial court's conclusion that construction delays deprived Saltworks of benefits it

reasonably anticipated under the lease. Jason Cusick testified that he and his employees were ready to open the restaurant in March, but that dust and debris from the ongoing construction prevented that opening. Photographs reveal that even after the opening, contractor vehicles and equipment impeded access to the restaurant. Cusick explained that without the parking garage, which was not operational until October, there was limited parking for customers in cars, and with the rest of the development still unfinished, there was little or no foot traffic. Roger Cusick testified the restaurant was grossing a mere fraction of what he and the franchisor had projected, which he attributed primarily to the construction delays. Drawing all inferences in favor of the trial court's judgment, *City of Keller*, 168 S.W.3d at 822, and taking care not to substitute our judgment for that of the trial court, *Maritime Overseas Corp.*, 971 S.W.2d at 407, this evidence supports the trial court's finding that Residences breached section 3.7 and supports any underlying inferences that the mixed-use construction delays deprived Saltworks from benefits it reasonably anticipated under the lease and therefore materially interfered with use of the restaurant.

The trial court found that this material interference continued through late October—36 weeks after February 1, 2014. Under section 3.7, this 36-week delay requires 36 days of rent abatement, but Residences concedes it offered only three days of abatement under the section. The record thus includes sufficient evidence to allow a reasonable factfinder to conclude Residences breached section 3.7 of the lease by failing to prevent construction delays and by failing to offer sufficient rent abatement. *City of Keller*, 168 S.W.3d at 827; *Peña*, 442 S.W.3d at 263. And based on this record, the finding is neither wrong nor unjust. *Bechtel Corp.*, 271 S.W.3d at 916. We

overrule Residences' legal and factual sufficiency challenges to the findings regarding the breach of section 3.7.

C. Directed Verdicts

Saltworks contends the trial court erred by directing verdicts on its claims of unlawful lockout and constructive eviction. "A directed or instructed verdict is proper when: (1) a specifically indicated defect in the opponent's pleadings makes it insufficient to support a judgment; (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact." *Encina P'ship v. Corenergy, L.L.C.*, 50 S.W.3d 66, 68 (Tex. App.—Corpus Christi 2001, pet. denied). In evaluating the record, "we consider all of the evidence in a light most favorable to the party against whom the verdict was instructed," and "give the losing party the benefit of all reasonable inferences created by the evidence." *Coastal Transp. Co. v. Crown Cent. Petroleum Corp*., 136 S.W.3d 227, 234 (Tex. 2004) (citations omitted).

The material facts are not disputed. On October 10, 2014, Residences sent a letter demanding execution of a settlement agreement and remission of $26,665.57 in unpaid rent within ten days. Saltworks sent a letter ostensibly terminating the lease six days later. Saltworks concedes it remained in possession of the premises, continued to operate the restaurant, remitted no rent, and gave no indication of when or if it intended to surrender possession. Residences sent a final rent demand on November 10, 2014, insisting on compliance with the lease, and then changed the locks two days later. At the time it changed the locks, Residences posted a "Notice of Lockout," which

referred to its lockout authority under section 17.3 of the lease and included contact information for the local Residences representative.

1. Unlawful Lockout

Although the trial court directed a verdict in favor of Residences and Transwestern on the claim of unlawful lockout, the court's conclusions of law characterize the lockout as "unlawful[]" and a breach of the lease. Emphasizing that characterization, Saltworks contends the trial court must have erred in its directed verdict. The relevant lease provisions are not ambiguous, so we review the trial court's interpretation de novo. *Samson Expl.*, 521 S.W.3d at 787. We also review the interpretation of any statutes de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

Commercial lockout is governed by sections 93.002 and 93.003 of the Property Code. Those sections forbid landlords from "prevent[ing] a tenant from entering the leased premises except by judicial process" unless certain delineated circumstances exist. Tex. Prop. Code § 93.002(c). Section 93.002 creates a cause of action if a landlord violates the statute, allowing recovery of actual damages or $500, whichever is greater. *Id.* § 93.002(g). Notably, however, parties are free to establish other lockout procedures by contract, *see id.* § 93.002(h), which Residences and Saltworks chose to do in this lease. Section 17.3 of the lease allows Residences, in the event of default by Saltworks, to "without judicial process and without notice of any kind, without terminating the Lease, terminate Tenant's right of possession of the Premises by entering upon and taking possession of the Premises." "To the extent of any conflict, the lease supersedes the [statute]." *Id.* § 93.002(h).

Saltworks contends section 17.3 offered no authority for the lockout because Saltworks was not in default and had already exercised its right under section 3.2 "to terminate this Lease by written notice given to Landlord at any time after [November 1, 2013] that Landlord has not delivered the Premises to Tenant with Landlord's Work substantially complete." Residences disagrees, arguing that Saltworks could not terminate under section 3.2 because Residences had already delivered the premises with work substantially complete. The trial court made no findings regarding default or substantial completion.

Saltworks is correct that it terminated the lease before the lockout occurred, but it need not rely on section 3.2 to find its authority to do so. Section 17.4 provides, "If, during the Term, Landlord defaults in fulfilling any of its covenants, obligations[,] or agreements set forth in this Lease, Tenant shall give Landlord notice of such default, and, if at the expiration of 30 days . . . such default will continue to exist . . . then Tenant will be entitled to exercise any right or remedy available to Tenant at law or in equity. . . ." Saltworks provided the requisite notice on July 21, 2014, alleging breaches of sections 3.2 and 3.7. As discussed above, the trial court found the construction delays prohibited by section 3.7 continued until the third week of October, necessarily implying that this default was not cured before then. Because Residences failed to cure its default within 30 days, Saltworks was entitled to pursue any remedy available at law.

Lease termination was one remedy available to Saltworks. In Texas, a party aggrieved by material breach is "entitled to terminate the agreement." *Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006). As explained above, the evidence supports the trial court's conclusion that construction delays governed by section 3.7 deprived Saltworks of benefits it reasonably anticipated

under the lease, *Hernandez*, 875 S.W.2d at 693, and thereby materially interfered with its use of the premises. And Residences conceded, in a letter dated July 16, 2014, that the failure to provide section 3.2's certificates prevented the restaurant from opening when Saltworks was otherwise prepared for business. Multiple provisions in the lease and correspondence admitted at trial suggest timely performance was of utmost importance to these parties. "[W]hen it is clear that the parties intended that time be of the essence, the failure to timely perform can be a material breach as a matter of law." *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004). Because the lease and other evidence indicate time was of the essence, and because Residences' failure to timely comply with sections 3.2 and 3.7 deprived Saltworks of reasonably anticipated benefits, the breaches are material as a matter of law. *Id.* Saltworks thus had authority to terminate the lease under section 17.3, and did so with its notice of October 16, 2014.

Yet Saltworks is mistaken in interpreting the lease as allowing it to unilaterally terminate its tenancy and then remain in the premises with no further obligation. Saltworks contends its lease termination created a holdover tenancy, leaving Residences with no choice but to abide by the eviction procedures set forth in chapters 24 and 91 of the Texas Property Code. While it is true that statutory and common law will govern holdover tenancy if "the lease does not address the issue," the parties to a lease "may provide that its terms continue to apply to a holdover tenant." *Coinmach Corp. v. Aspenwood Apartment Corp*., 417 S.W.3d 909, 916 (Tex. 2013). Section 16.2 of this lease prohibits holdover tenancy, providing, "Tenant understands that it does not have the right to hold over at any time after the expiration or earlier termination of the Term . . . ." The lease requires a tenant violating the holdover prohibition to pay 150% to 200% of base rent in advance for

each month of holdover tenancy. Saltworks made no such payment, and made clear through its termination notice that it did not intend to do so. Saltworks was therefore in default when it failed to vacate the premises after terminating the lease, thus giving rise to Residences' authority under section 17.3 to change the locks and deny access to the premises.

Because Saltworks failed to vacate following termination, the lease also authorized Residences to dispose of the equipment and fixtures remaining in the restaurant. The lease stipulates, "On the last day of the Term, or on the sooner termination thereof, Tenant will peaceably surrender the Premises in good condition and repair." It also requires Saltworks to "remove all of its property and trade fixtures and equipment . . . from the Premises." Saltworks was afforded more than three weeks after its termination notice to vacate the premises, but still failed to vacate. The lease provides, under such circumstances, that "any property not removed will be deemed abandoned," and "Landlord will not be liable for damage, theft, misappropriation or loss thereof, nor will Landlord be liable in any manner in respect thereto . . . ." Under the plain language of the lease, Saltworks abandoned the equipment and fixtures when it failed to vacate and surrender possession at lease termination, and Residences cannot be held liable for any loss. Residences therefore did not breach the lease or violate governing law by changing the locks and taking custody of Saltworks' equipment and fixtures. Because the lease establishes Residences' "right to judgment as a matter of law," the trial court did not err in directing a verdict on Saltworks' claim of unlawful lockout. *Encina P'ship*, 50 S.W.3d at 68.

2. Constructive Eviction

Because Saltworks had already terminated the lease and failed to vacate before Residences changed the locks, the trial court did not err in directing a verdict on Saltworks' constructive eviction claim. A claim for constructive eviction is predicated on an express or implied "covenant in favor of the lessee that he will have peaceful and quiet enjoyment of the premises for the term of the lease." *Richker v. Georgandis*, 323 S.W.2d 90, 95 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). By terminating the lease, Saltworks ended its term of tenancy and any right to possess the premises. Saltworks has not identified any authority recognizing a constructive eviction where the lease itself reveals no remaining possessory right on the part of the tenant.

Even assuming, for the sake of argument, Saltworks remained entitled to possession of the premises at the time of lockout, there would have been no error in the directed verdict on this claim. To recover under the theory of constructive eviction, a tenant must demonstrate: "(1) an intention on the part of the landlord that the tenant shall no longer enjoy the premises, (2) a material act by the landlord that substantially interferes with the tenant's intended use and enjoyment of the premises, (3) an act that permanently deprives the tenant of the use and enjoyment of the premises, and (4) abandonment of the premises by the tenant within a reasonable time after the commission of the act." *Lazell v. Stone*, 123 S.W.3d 6, 11–12 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). The record reveals no evidence of the first and third elements of the claim. The correspondence admitted at trial reveals Residences' repeated efforts to try to salvage the landlord-tenant relationship and to arrange a settlement that would allow Saltworks to continue to enjoy the premises. Even when Saltworks announced its lease termination, Residences replied with a greatly

reduced rent demand and a revised settlement proposal that would have allowed Saltworks to remain in possession and continue to operate the restaurant. After Saltworks failed to respond, Residences changed the locks but insisted the lease was still in effect. And the lockout notice indicated whom Saltworks should contact with any questions, like how to regain access to the premises and continue the tenancy. But there is no evidence anyone at Saltworks attempted to do so. Even construing the record in Saltworks' favor, as we must, we conclude Saltworks failed to generate a fact issue regarding a permanent deprivation or an intent on the part of Residences that Saltworks should no longer enjoy the premises.[4] Because Saltworks' evidence is insufficient to raise a question of fact on essential elements of the constructive eviction claim, the court did not err in directing a verdict on that claim. *Coastal Transp. Co.*, 136 S.W.3d at 233; *Encina P'ship*, 50 S.W.3d at 68. We overrule Saltworks' challenge to the directed verdicts.

D. Summary Judgment in Favor of Transwestern

Saltworks challenges the dismissal on summary judgment of its contract claim against Transwestern. While conceding Transwestern is not a party to the lease, Saltworks contends Transwestern and Residences were so interrelated with respect to the development that they were, essentially, the same entity and therefore should share liability for the breach. Summary judgment is proper where "there is no genuine issue as to any material fact and the moving party is entitled to

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[4] *Cf. Lazell v. Stone*, 123 S.W.3d 6, 12 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (holding commercial lockout to constitute constructive eviction where landlord indicated she was terminating the lease effective immediately); *Charalambous v. Jean Lafitte Corp.*, 652 S.W.2d 521, 522 (Tex. App.—El Paso 1983, writ ref'd n.r.e.) (construing commercial lockout as constructive eviction where tenant repeatedly tried to regain access to the leased space only to be informed that "[she] and her employees were no longer permitted to come on the Premises").

judgment as a matter of law . . . ." Tex. R. Civ. P. 166a. We review summary judgment de novo, reversing only where an error caused the rendition of improper judgment or prevented the appellant from properly presenting the case on appeal. Tex. R. App. P. 44.

Over the course of this litigation, Saltworks has invoked a number of common-law doctrines, including alter ego and single business enterprise, in its attempt to impose contract liability on Transwestern. Even so, Saltworks has not identified any theory under which Transwestern can be held liable for Residences' breach. Texas law imposes contract liability on a corporation's affiliate only if that affiliate "expressly assume[s] liability" or "cause[s] the corporation to be used for the purpose of perpetrating . . . an actual fraud . . . ." Tex. Bus. Orgs. Code §§ 21.223–.225. Limited-liability companies like Residences and Transwestern are subject to the same standard. *Id*. § 101.002. The Supreme Court of Texas requires us to defer to this "strict[] approach" to corporate liability. *SSP Partners v. Gladstrong Invs. (USA) Corp*., 275 S.W.3d 444, 447 (Tex. 2008). Thus, theories of common law may not be used "to contravene the statutory imperative" set forth in these sections. *Willis v. Donnelly*, 199 S.W.3d 262, 272–74 (Tex. 2006) (referring to earlier version of statute). Because Transwestern did not assume liability for Residences' obligations, and because the trial court dismissed Saltworks' claims of fraud with a directed verdict—a decision Saltworks does not challenge on appeal—Transwestern is entitled to judgment as a matter of law. Thus, even accepting Saltworks' argument that the trial court should have allowed this claim to proceed to trial alongside its theories of fraud, that alleged error did not result in the rendition of an improper judgment and is not reversible on appeal. Tex. R. App. P. 44.

Saltworks' briefs appear to suggest the trial court granted summary judgment on its other claims against Transwestern. The summary judgment order only dismisses the contract claim, and the reporter's record confirms that Saltworks tried its other claims to the bench. As a consequence, we need not consider whether it would have been erroneous to dismiss any other claims. We overrule Saltworks' challenge to summary judgment.

E. Damages

Residences and Saltworks both challenge the legal sufficiency of the trial court's award of $104,440.00 in damages. Because Saltworks had the burden to prove the damages caused by the breach, *Foster*, 80 S.W.3d at 143–44, it will prevail only by showing it is entitled, as a matter of law, to additional damages. *Dow Chem. Co.*, 46 S.W.3d at 241. Residences will prevail only by showing no evidence in support of the existing award. *Peña*, 442 S.W.3d at 263.

Residences challenges the award of damages, contending there was no evidence of breach to support the award. At trial, Residences also argued that Saltworks is not entitled to a recovery because any breach was "immaterial in the grand scheme of things." But recovery of damages "requires a finding of breach, not a finding of material breach." *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc*., 518 S.W.3d 432, 436 (Tex. 2017) (citing *Mays v. Pierce*, 203 S.W.3d 564, 575 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)). And as discussed above, the record includes sufficient evidence to sustain the trial court's findings regarding breach. Residences has stipulated that, to the extent this court rejects its legal arguments, as we do, the award of $104,440 in damages is supported by the evidence. We therefore overrule Residences' challenge to the award.

Saltworks contends it is entitled to reliance damages of $444,979.69, a sum it characterizes as an undisputed measure of its "entire capital investment." "Reliance damages are measured as the out-of-pocket expenditures made by one party in reliance on the actions of another . . . ." *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793, 798 (Tex. App.—Houston [1st dist.] 2007, pet. denied) (citing *Mistletoe Express Serv. v. Locke*, 762 S.W.2d 637, 638–39 (Tex. App.—Texarkana 1988, no writ)) (other citations omitted). "Reliance damages, similar to out-of-pocket recovery, reimburse one for expenditures made toward the execution of the contract in order to restore the status quo before the contract." *Bechtel Corp.,* 271 S.W.3d at 916 (op. on rehearing) (citing *Hart v. Moore*, 952 S.W.2d 90, 97 (Tex. App.—Amarillo 1997, pet. denied)). "Reliance damages are distinguished from expectancy or 'benefit-of-the-bargain' damages, which serve to protect the promisee's 'expectation interest,' or his interest in having the benefit of his bargain by being put in as good a position as he would have been had the contract or promise been performed." *Id.* at 927 (citing Restatement (Second) of Contracts § 344).

Saltworks seems to argue it only sought reliance damages, ostensibly leaving the trial court with no choice but to award the entire lost investment, but Saltworks sought both reliance and expectancy damages at trial. Because reliance and expectancy are alternate theories of recovery, Saltworks "cannot have both." *Foley v. Parlier*, 68 S.W.3d 870, 885 (Tex. App.—Fort Worth 2002, no pet.). Over the course of trial, as Saltworks' claims were winnowed down by a series of directed verdicts, the trial court repeatedly asked Saltworks to clarify its theory of damages arising from the alleged breaches. Yet Saltworks declined to do so, instead deferring to the court's discretion to calculate damages based on the receipts and invoices included in its exhibits.

The question, then, is whether an award of $104,440.00 falls within the range of evidence presented at trial. *See Mays v. Pierce*, 203 S.W.3d 564, 578 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (citing *City of Houston v. Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d 322, 334 (Tex. App.—Houston [14th Dist.] 1994, writ denied)) (explaining, before conducting review of legal sufficiency, "A trial court has discretion to award damages within the range of the evidence presented at trial"). The parties agree that with respect to Residences' failure to provide the notice and certificates required by section 3.2, Saltworks is entitled, at the very least, to recover costs incurred to obtain its own architect's certificates and other permits necessary to open and operate the restaurant.[5] The invoices and receipts of record show Saltworks incurred expenses of at least $20,000 in doing so. Saltworks also introduced evidence showing additional expenditures of over $200,000 in construction costs and over $100,000 in payments to vendors. The trial court could have concluded some of these costs were necessary to remedy the breaches of section 3.2 at transfer of possession. *See Sage St. Assocs. v. Northdale Constr. Co.*, 937 S.W.2d 425, 428 (Tex. 1996) (deferring to factfinder's discretion to evaluate causation and alleged damages). Thus, the award of $104,440.00 is within the permissible range of recovery for this breach.

Saltworks has not shown it is entitled to any additional recovery for the breaches of section 3.7. With respect to the failure to timely complete the common areas of the mixed-use development, the section limits Saltworks' remedy to rent abatement. And with respect to the failure

[5] The parties emphasize section 3.2's phrase, "architect's fees, disbursements[,] and permit costs," which would represent the exclusive remedy available to Saltworks if it had terminated the lease due to Residences' failure to transfer possession with Landlord's work substantially complete. But the court did not find that Residences had failed to transfer possession with work substantially complete; nor did it find that Saltworks terminated the lease under that section.

to offer sufficient abatement, it is undisputed that Saltworks never remitted rent and is not entitled to any refund. Saltworks contends the failure to honor the abatement provisions led to the loss of Saltworks' property when Residences changed the locks. As discussed in our analysis of the lockout, the lease unambiguously precludes recovery of the costs of the fixtures, equipment, and other property abandoned when Saltworks failed to vacate the premises. The lease further stipulates that any "modifications, improvements, alterations, additions and fixtures made or installed by either Landlord or Tenant upon the Premises" become the property of Residences at lease termination, thereby precluding any additional recovery for those alleged losses. Because the award of damages is within the range supported by the evidence, and because Saltworks has not shown as a matter of law that it is entitled to additional damages, we overrule its challenge to that award.[6]

F. Attorneys' Fees

Residences challenges the award of attorneys' fees. The right to recover these fees is a question of law reviewed de novo, but the calculation of any award is reviewed only for abuse of discretion. *Gereb v. Smith-Jaye*, 70 S.W.3d 272, 273 (Tex. App.—San Antonio 2002, no pet.) (citing *Atlantic Richfield Co. v. Long Trusts*, 860 S.W.2d 439, 450 (Tex. App.—Texarkana 1993, writ denied)). Texas law generally allows the prevailing party in a contract dispute to recover reasonable attorneys' fees. Tex. Civ. Prac. & Rem. Code § 38.001. But parties are free to negotiate

[6] It is unclear whether Saltworks also raises a factual-sufficiency challenge. To the extent it intends to do so, it has not explained how the award is contrary to the overwhelming weight of the evidence. *See Sage St. Assocs. v. Northdale Constr. Co.*, 956 S.W.2d 583, 586 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (on remand from high court, evaluating factual sufficiency of damages under standard stated in *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)).

other terms, as the parties did here. *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). Residences contends the lease precludes any award of attorneys' fees, arguing that any recovery for the breach of section 3.2 is limited to "architect's fees, disbursements[,] and permit costs," and "the 'sole and exclusive remedy' for breach of Section 3.7 is rent abatement." Residences misconstrues the lease. Under section 3.7, rent abatement is the "sole and exclusive remedy" for any failure to complete the common areas without unreasonable delay. It is not the remedy for Residences' failure to honor the abatement remedy itself. The same is true of section 3.2. The fees, disbursement, and costs listed in that section serve as the exclusive remedy for any delay in transferring possession of the premises with landlord's work substantially complete—not as a remedy for the failure to provide sufficient rent abatement. Residences' failure to honor its abatement obligations under sections 3.2 and 3.7 gave rise to Saltworks' claim of breach, a claim upon which Saltworks prevailed. Section 17.1 of the lease provides an award of attorneys' fees under such circumstances, stipulating, "Each party agrees to pay, upon demand, all of the other party's costs, charges[,] and expenses, including the reasonable fees and out-of-pocket expenses of counsel . . . incurred in successfully enforcing the other party's obligations under this Lease." The trial court did not err in construing the lease as allowing an award of attorneys' fees, and Residences does not contend the fees themselves are unreasonable or unproven. We therefore see no abuse of discretion in the award and overrule Residences' challenge. *Gereb*, 70 S.W.3d at 273.

III. CONCLUSION

Having addressed and overruled each of the parties' challenges, we affirm the trial court's judgment.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

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