NO. 12-11-00023-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MASON J. NEVIL, JAMES ROBERT CROCCO AND MARY ROSE CROCCO REVOCABLE LIVING TRUST, PAUL R. THORNBURG, MELVINE A. THORNBURG, KEN CARLISLE, NADYNE CARLISLE, GEORGE W. LONER, AND WILLIAM E. BOYNER, APPELLANTS	***§***	***APPEAL FROM THE 411TH JUDICIAL DISTRICT COURT***
V.		
TFW MANAGEMENT, INC. AND TIM WILLIAMS d/b/a WESTWOOD SHORES COUNTRY CLUB, APPELLEES	***§***	***TRINITY COUNTY, TEXAS***

MEMORANDUM OPINION

Mason J. Nevil, James Robert Crocco and Mary Rose Crocco Revocable Living Trust, Paul R. Thornburg, Melvine A. Thornburg, Ken Carlisle, Nadyne Carlisle, George W. Loner, and William E. Boyner (Appellants) appeal the trial court's summary judgment entered in favor of Appellees TFW Management, Inc. and Tim Williams d/b/a Westwood Shores Country Club (collectively TFW). In one issue, Appellants contend that the trial court erred in entering summary judgment in TFW's favor. We affirm.

BACKGROUND

In 1973, BRL Venture, a joint venture consisting of Westwood Shores, Inc. and Houston Imperial Corporation, developed the Westwood Shores subdivision in Trinity County. Appellants are homeowners in Westwood Shores. As homeowners, Appellants are subject to

certain restrictive covenants set forth in their respective deeds.[1] The relevant covenants state, in pertinent part, as follows:

> VI
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> Maintenance Fund
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> 6.01. Each lot (or residential building site) in the Subdivision shall be and is hereby made subject to an annual maintenance charge, except as otherwise hereinafter provided.
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> 6.02. The maintenance charge referred to shall be used to create a fund to be known as the "Maintenance Fund"[] and each such maintenance charge shall (except as otherwise hereinafter provided) be paid by the owner of each lot (or residential building site) annually, in advance, on or before January 1st of each year, beginning [in] 1973.
>
> 6.03. The maintenance charge shall initially be Eight Dollars and Fifty Cents ($8.50) per month unless and until such charge is hereafter changed; the maintenance charge may be changed from time to time by the Developer and shall be the amount determined by the Developer during the month preceding the due-date of said maintenance charge. All other matters relating to the assessment, collection, expenditure[,] and administration of the Maintenance Fund shall be determined by the Developer.
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> . . . .
>
> 6.08. The maintenance charges collected shall be paid into the Maintenance Fund to be held and used for the benefit, directly or indirectly, of the Subdivision; and such Maintenance Fund may be expended by the Developer for any purposes which, in the judgment of the Developer will tend to maintain the property values in the Subdivision including, but not by way of limitation . . . any . . . thing necessary or desirable in the opinion of the Developer to maintain or improve the property or the Subdivision. The use of the Maintenance Fund for . . . these purposes is permissive and not mandatory, and the decision of the Developer with respect thereto shall be final, so long as made in good faith.
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> . . . .
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> VII
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> Recreational Facilities Membership
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> 7.01. There shall be included in the maintenance charge levied upon each lot the sum of $5.00 per month[,] which amount shall be paid by the Developer to the entity which owns the golf course, marina, club house, and other recreational facilities. . . .

In 1996, TFW purchased Westwood Shores Country Club from the developer. As part of the purchase, TFW received an assignment from the developer of its right, pursuant to the aforementioned covenants, "to assess, change, collect, receive, expand, and administer the

[1] The language of the relevant covenants is the same in all of the deeds. However, the section and paragraph numbers vary. The above numbering system is selected for ease of reference within this opinion.

amount of the Maintenance Fund as it relates to the Recreational Facilities Membership of all owners of lots within [Westwood Shores Subdivision]." Thereafter, TFW sought to increase the amount charged for the recreational facilities membership to Appellants and other homeowners in Westwood Shores.

On March 29, 2007, Appellants filed suit against TFW seeking a declaratory judgment that the recreational facilities fees in excess of the five dollar amount set forth in their deeds violated the express terms of those restrictive covenants. TFW filed a counterclaim against Appellants and sought to recover damages for unpaid recreational facilities fees. Both parties filed motions for summary judgment. Finding that "the Recreational Facilities Membership [fee] is part of the Maintenance Charge" and that TFW "has the right and power to increase both the Recreational Facilities Membership Fee and the Maintenance Fee," the trial court granted TFW's motion and denied Appellants' motion. On November 29, 2010, the trial court entered a final judgment in TFW's favor and awarded it damages against Appellants. This appeal followed.

SUMMARY JUDGMENT

In their sole issue, Appellants argue that the trial court erred in entering summary judgment in TFW's favor. Specifically, Appellants contend that the trial court erroneously construed the restrictive covenants governing Appellants' lots to permit TFW to increase the Recreational Facilities Membership Fee.

Standard of Review

Declaratory judgments are reviewed under the same standards applicable to other judgments; thus, the denial or grant of a declaratory judgment in a summary judgment is reviewed under summary judgment standards. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.010 (West 2008); ***Crimson Exploration, Inc. v. Intermarket Mgmt., LLC***, 341 S.W.3d 432, 447 (Tex. App.–Houston [1st Dist.] 2010, no pet.). When, as here, both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law; neither party can prevail because of the other's failure to discharge its burden. ***Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n***, 205 S.W.3d 46, 50 (Tex. App.–Dallas 2006, pet. denied). A reviewing court may determine all questions presented; it may affirm the summary judgment entered, reverse and render a judgment for the other party, if

appropriate, or reverse and remand if neither party has met its summary judgment burden ***Id.*** (citing ***Calhoun v. Killian***, 888 S.W.2d 51, 54 (Tex. App.–Tyler 1994, writ denied)).

Because the propriety of summary judgment is a question of law, we review the trial court's summary judgment determinations de novo. *See* ***Valence Operating Co. v. Dorsett***, 164 S.W.3d 656, 661 (Tex. 2005). The standard of review for a traditional summary judgment motion pursuant to Texas Rule of Civil Procedure 166a(c) is threefold: (1) the movant must show there is no genuine issue of material fact and he is entitled to judgment as a matter of law; (2) in deciding whether there is a disputed, material fact issue precluding summary judgment, the court must take as true evidence favorable to the nonmovant; and (3) the court must indulge every reasonable inference from the evidence in favor of the nonmovant and resolve any doubts in the nonmovant's favor. *See* TEX. R. CIV. P. 166a(c); ***Nixon v. Mr. Prop. Mgmt. Co.***, 690 S.W.2d 546, 548–49 (Tex.1985); ***Palestine Herald-Press Co. v. Zimmer***, 257 S.W.3d 504, 508 (Tex. App.–Tyler 2008, pet. denied).

Interpretation of Restrictive Covenants

Restrictive covenants are subject to the general rules of contract construction. ***Pilarcik v. Emmons***, 966 S.W.2d 474, 478 (Tex. 1998); ***Scoville v. SpringPark Homeowner's Ass'n***, 784 S.W.2d 498, 502 (Tex. App.–Dallas 1990, writ denied). Whether restrictive covenants are ambiguous is a question of law. ***Emmons***, 966 S.W.2d at 478. Courts must examine the covenants as a whole in light of the circumstances present when the parties entered the agreement. *See* ***Grain Dealers Mut. Ins. Co. v. McKee***, 943 S.W.2d 455, 458 (Tex. 1997); ***Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.***, 940 S.W.2d 587, 589 (Tex. 1996). Like a contract, covenants are "unambiguous as a matter of law if [they] can be given a definite or certain legal meaning." ***Grain Dealers***, 943 S.W.2d at 458; *accord* ***Columbia Gas***, 940 S.W.2d at 589. On the other hand, if the covenants are susceptible to more than one reasonable interpretation, they are ambiguous. ***Grain Dealers***, 943 S.W.2d at 458; ***Columbia Gas***, 940 S.W.2d at 589.

Contractual Construction

In the same manner in which we construe a written contract, our primary concern here is to ascertain the true intentions of the parties as expressed in the instrument. *See* ***Coker v. Coker***, 650 S.W.2d 391, 393 (Tex. 1983); *see also* ***Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI***

Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995). To achieve this objective, we examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *See* ***CBI Industries, Inc.***, 907 S.W.2d at 520; ***Coker***, 650 S.W.2d at 393. No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *See* ***CBI Indus., Inc.***, 907 S.W.2d at 520; ***Coker***, 650 S.W.2d at 393; ***Myers v. Gulf Coast Minerals Mgmt. Corp.***, 361 S.W.2d 193, 196 (Tex. 1962).

If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law. ***Coker***, 361 S.W.2d at 393. The interpretation of an unambiguous contract is a question of law, which we review de novo. *See* ***MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.***, 995 S.W.2d 647, 650 (Tex. 1999). Ambiguity does not arise simply because the parties advance conflicting interpretations of the contract; rather, for an ambiguity to exist, both interpretations must be reasonable. ***Lopez v. Munoz, Hockema & Reed, L.L.P.***, 22 S.W.3d 857, 861 (Tex. 2000).

We must presume that the parties thereto intended every clause to have some effect; therefore, we consider each part of the document with every other part of the document so that the effect and meaning of one part on any other part may be determined. *See* ***Birnbaum v. SWEPI LP***, 48 S.W.3d 254, 257 (Tex. App.–San Antonio 2001, pet. denied). Moreover, we give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used such terms in a technical or different sense. ***Id.*** Finally, we enforce an unambiguous agreement as written. ***Id.*** We are not permitted to rewrite an agreement to mean something it did not. ***Id.*** We cannot change the contract simply because we or one of the parties comes to dislike its provisions or thinks that something else is needed in it. ***Id.*** Parties to a contract are masters of their own choices and are entitled to select what terms and provisions to include in or omit from a contract. ***Id.***

Here, while neither of the opposing parties argue that the restrictive covenants at issue are ambiguous, each side interprets their language differently. Neither side concedes that its interpretation of the relevant passage is any less reasonable than the opposing side's

interpretation of the same. Based on our reading of the relevant deed restrictions, we agree that they are not ambiguous.

Provisions Pertaining to Maintenance Fee and Recreational Facilities Membership

In the instant case, section 7.01 specifically sets forth that the so called "recreational facilities fee" is a portion carved out of the annual maintenance charge. Accordingly, under section 6.03, TFW, as assignee, had the right to assess, change, collect, receive, spend, and administer the amount of the Maintenance Fund as it relates to the Recreational Facilities Membership. The Developer possessed this right that it assigned to TFW since section 6.03 of the restrictive covenant states that the Developer could determine all matters relating to the assessment, collection, expenditure, and administration of the maintenance fund. Moreover, section 6.03 permitted the Developer to change the amount assessed as a maintenance charge to accommodate any increased allocation of that charge toward recreational facilities.

Appellants argue that the absence of any specific language stating that the recreational facilities fee could be changed indicates that the framer of the deed intended that the five dollar per month allocation to the recreational facilities owner remain fixed at that amount. However, based on our reading of the relevant covenants, we conclude that since section 7.01 specifically states that this recreational facilities fee is included in the maintenance charge, any language indicating that this recreational facilities fee could be changed is redundant because section 6.03 already provides that the maintenance charge can be changed.

In sum, the plain language of the deed indicates that the recreational facilities fee is part of the maintenance charge, a matter over which TFW, by virtue of its assignment, had a right to assess and change. There is no language in the deed demonstrating that the framer intended to fix the "recreational facilities fee" at its 1973 amount. Thus, we conclude that TFW demonstrated to the trial court that it was entitled to raise the maintenance charge to account for a higher recreational facilities membership. Accordingly, because TFW established that it is entitled to judgment as a matter of law, we hold that the trial court correctly granted summary judgment in TFW's favor. Appellants' sole issue is overruled.

DISPOSITION

Having overruled Appellants' sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered January 25, 2012.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 25, 2012

NO. 12-11-00023-CV

MASON J. NEVIL, JAMES ROBERT CROCCO AND MARY ROSE CROCCO REVOCABLE LIVING TRUST, PAUL R. THORNBURG, MELVINE A. THORNBURG, KEN CARLISLE, NADYNE CARLISLE, GEORGE W. LONER, AND WILLIAM E. BOYNER,

Appellants

V.

TFW MANAGEMENT, INC. AND TIM WILLIAMS d/b/a WESTWOOD SHORES COUNTRY CLUB,

Appellees

Appeal from the 411th Judicial District Court

of Trinity County, Texas. (Tr.Ct.No. 19833)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the appellants, **MASON J. NEVIL, JAMES ROBERT CROCCO AND MARY ROSE CROCCO REVOCABLE LIVING TRUST, PAUL R. THORNBURG, MELVINE A. THORNBURG, KEN CARLISLE, NADYNE CARLISLE, GEORGE W. LONER, AND WILLIAM E. BOYNER,** for which execution may issue, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.