COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

PAMELA M. BROWNE,	§	No. 08-20-00195-CV
Appellant,	§	Appeal from the
v.	§	171st Judicial District Court
ROBERT J. ORTIZ and ODETTE THOMAS, Individually and as Partner of ORTIZ FARMS,	§	of El Paso County, Texas
	§	(TC# 2019DCV0870)
Appellees.	§	

O P I N I O N

In this declaratory judgment action, Robert J. Ortiz (Ortiz) and Odette Thomas, individually (Thomas), and as partners of Ortiz Farms Partnership (Ortiz Farms), Appellees, sought to establish that any obligations owed to Pamela M. Browne (Browne), Appellant, under a post-divorce settlement agreement between Ortiz and Browne are time-barred. Among other things, Appellees argued in the trial court any claims Appellant has pursuant to the settlement agreement are barred by the statute of limitations. The trial court agreed with Appellee's position and found the claims and causes of action raised by Appellant are barred by the statute of limitations.

On appeal, Appellant argues the trial court erred in allowing Appellees to bring a declaratory judgment action, asserting Appellee's suit is barred by the statute of limitations. Further, Appellant maintains the source of funds due to her under the settlement agreement has not yet come into existence, so any cause of action she has under the settlement agreement has not yet accrued.

We conclude the trial court erred in its interpretation of the settlement agreement, causing it to incorrectly calculate the accrual date of the statute of limitations. We reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

Pamela Browne and Robert Ortiz divorced in July 1997. In 2005, Browne sued Ortiz; Ortiz Farms, the family partnership; and Odette Thomas, Ortiz's sister, in her capacity as estate representative of the Ortiz's father's and grandmother's estates, seeking to collect certain monies Browne believed she was due under the divorce decree.

Members of the Ortiz Farms partnership over the years have included Ortiz's and Thomas's grandmother, their father, their father's two wives, and the seven siblings that include Ortiz and Thomas. Partners' interests have increased and decreased over the years as the older generations of the family have passed and have gifted shares to the younger generations. In 2005, Ortiz's interest in the partnership was 11.425%. The partnership owned two assets, an El Paso farm property and a Pecos mineral interest, which was common knowledge in the family.

The parties to the 2005 lawsuit settled by entering into an agreement effective December 17, 2005 (the Settlement Agreement). Pursuant to the Settlement Agreement, Browne was to receive payment of $70,000 and subsequently deliver a release of judgment lien and a mutual release to Ortiz.

1. **Resolution of Collection Matter.** BROWNE agrees that the payment of $70,000.00 (the "Resolution Payment"), in accordance with the terms herein, shall operate as the full and complete satisfaction of any and all claims of BROWNE under the Divorce Decree.

The source of the $70,000.00 payment was spelled out in the Settlement Agreement.

2. **Source of Resolution Payment**. ORTIZ is to receive, from Ortiz Farms, a Texas partnership ("Ortiz Farms"), a 4.681% interest (the "Resolution Payment Source") in Ortiz Farms, that owns a parcel of real property in El Paso County, Texas which consists of fifty-nine (59) acres more or less (the "Property"). So long as any portion of the Resolution Payment remains unpaid, ORTIZ shall direct and the remaining owners of Ortiz Farms acknowledge and agree that distributions, net of Federal income tax, from Ortiz Farms and which are associated with said 4.681% interest shall be paid directly to BROWNE until the full balance of the Resolution Payment plus interest, if applicable, is paid in full. BROWNE acknowledges and

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agrees that she must deliver an acknowledgement of receipt for each payment received from the Resolution Payment Source, with such acknowledgement, the payment records of Ortiz Farms shall be conclusive evidence of such payment. Additionally, any payment received hereunder shall be deemed to be received upon the date that BROWNE is notified that such payment is available pending her acknowledgement of payment. Until the Resolution Payment and applicable interest is paid in full to BROWNE, ORTIZ shall only receive so much of the income from Resolution Payment Source, to permit ORTIZ to pay in full his Federal income tax associated with the earnings from the Resolution Payment Source.

In 2006 and 2007, Ortiz received distributions from Ortiz Farms in the amounts of approximately $1,500 and $1,833, respectively. From 2008 through 2017, Ortiz did not receive any distributions from Ortiz Farms. In 2018, Ortiz Farms sold the Pecos mineral interests, and as a result, Ortiz was due a partnership distribution. Because Thomas was unsure whether any of the distribution due to Ortiz should be paid to Browne, she withheld Ortiz's 2018 partnership distribution. Appellees then filed a declaratory judgment action seeking declaration that no funds were due and owing to Appellant because, among other reasons, they were barred by the statute of limitations. Ortiz argued that the 2006 and 2007 distributions to him, with no payments made from

those distributions to Appellant, constituted breaches of the Settlement Agreement, causing any claim by Appellant under the Settlement Agreement to accrue.[1]

After a bench trial, the trial court entered judgment that any claims Appellant had under the Settlement Agreement were barred by the statute of limitations. Shortly thereafter, the trial court entered Findings of Fact and Conclusions of Law. In its conclusions of law, the trial court stated that Appellant's claims and causes of action accrued in 2009 and expired in 2013.[2]

STANDARD OF REVIEW

"We review declaratory judgments under the same standards as other judgments and look to the procedure used to resolve the issue in the trial court to determine the standard of review on appeal." *Donias v. Old Am. Cnty. Mut. Fire Ins. Co.*, No. 08-20-00207-CV, 2022 WL 2128065 at *2 (Tex.App.—El Paso June 14, 2022, no pet. h.) (citing TEX.CIV.PRAC.& REM.CODE ANN. § 37.010).

Findings of fact entered after a bench trial are reviewed on appeal for legal and factual sufficiency of the evidence. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). Findings of fact "are not binding on a court of appeals where a complete reporter's record is part of the record on appeal[,]" *Pearl Res. LLC v. Charger Servs., LLC*, 622 S.W.3d 106, 115 (Tex.App.—El Paso 2020, pet. denied), and "if the contrary is established as a matter of law or if

[1] Ortiz concedes limitations would have been tolled until sometime in 2009 because he provided tax returns to Appellant at that time that would have allowed her to discover the earlier distributions. Because of our ruling on the interpretation of the Settlement Agreement, we do not address the question of whether the documents provided to Appellant in 2009 were sufficient to put her on notice of any distribution to Ortiz.

[2] We take exception with the wording of the conclusion of law stating Appellant's claims and causes of action accrued in 2009. Ortiz's arguments make it clear that he believes the breaches occurred in either 2006 or 2007 (according to his Second Amended Petition for Declaratory Relief and trial testimony) or 2007 or 2008 (according to his Brief) and should have been discovered by Appellant in 2009. Using this reasoning, the conclusion of law should have stated the claims and causes of action of Appellant accrued sometime before 2009 but were tolled due to the discovery rule until then.

there is no evidence to support the findings." *Ramsey v. Davis*, 261 S.W.3d 811, 815 (Tex.App.—Dallas 2008, pet. denied). "A court's conclusions of law are reviewed de novo as legal questions." *Pearl Res.*, 622 S.W.3d at 115.

"The trial court abuses its discretion when it fails to properly apply the law to the undisputed facts, when it acts arbitrarily or unreasonably, or when it bases its ruling on factual assertions unsupported by the record." *Chromalloy Gas Turbine Corp. v. United Tech. Corp.*, 9 S.W.3d 324, 328 (Tex.App.—San Antonio 1999, pet. denied) (citing *Remington Arms Co., Inc. v. Luna*, 966 S.W.2d 641, 643 (Tex.App.—San Antonio 1998, pet. denied)).

DISCUSSION

In Issues One, Two, and Three, Appellant argues that Appellees' declaratory judgment cause of action was barred by the four-year statute of limitations. In Issues Four and Five, Appellant disputes Settlement Agreement funds for payment had yet to materialize, therefore, the statute of limitations has not begun to run. In Issue Six, Appellant questions whether Ortiz's failure to make payments from 2009 until 2013 gave rise to a cause of action. In Issue Seven, Appellant contends that her claims under the Settlement Agreement were preserved because they were timely filed as a counterclaim. Finally, in Issue Eight, Appellant urges that the evidence at trial was legally insufficient to support the trial court's judgment. The threshold issue is whether Browne's causes of action under the Settlement Agreement are barred by the statute of limitations. We hold they are not.

Statute of Limitations as to Appellees' claim

For the first time on appeal, Appellant asserts Appellees' declaratory judgment action is barred by the statute of limitations. Limitations is an affirmative defense that if not pled, is waived. *Izen v. Laine*, 614 S.W.3d 775, 796 (Tex.App.—Houston [14th Dist.] 2020, pet. denied); *see*

Zorrilla v. Aypco Constr. II, LLC, 469 S.W.3d 143, 155 (Tex. 2015). Appellant has waived this argument because she did not raise the issue of limitations before the trial court.

Moreover, it is inappropriate to raise limitations as a bar to bringing a declaratory judgment action seeking declaration that limitations bars a claim. Appellees' declaratory judgment action sought a judgment that the defense of limitations barred any claims Appellant may have had under the Settlement Agreement. A request for a declaration that limitations bar a claim is not a request for affirmative relief. "As a general rule," and as in this case, "limitations statutes do not apply to defenses." *Villages of Greenbriar v. Torres*, 874 S.W.2d 259, 266 (Tex.App.—Houston [1st Dist.] 1994, writ denied). "If the subject-matter of the contention is intrinsically defensive in nature and would, if given effect, operate merely to negate the plaintiff[']s asserted right to recover, the statute of limitations does not apply." *Tamimi Global Co. v. Kellogg Brown & Root, LLC*, 483 S.W.3d 678, 702 (Tex.App.—Houston [14th Dist.] 2015, no pet.) (citing *Morriss-Buick Co. v. Davis*, 91 S.W.2d 313, 314 (1936)). Appellee correctly states, "a limitations defense will not be barred by limitations." Appellant's arguments regarding the application of the statute of limitations to Ortiz's declaratory judgment action are not grounded in the law. We overrule Issues One, Two, and Three.

Statute of Limitations as to Settlement Agreement

Appellant raises several arguments relating to the accrual of any cause of action she may have had under the Settlement Agreement. She claims the Settlement Agreement requires a "fund" or "sole source" be established from which the settlement payment is to come. She argues there was not actually a controversy between the parties until sometime after 2009. She contends her claims were preserved by the timely filing of her counterclaim. Appellees assert Appellant's primary argument on appeal is "Browne's claims against Ortiz for breach of the Settlement

Agreement did not accrue in 2009." We agree and will address the accrual of the limitations period.[3]

Whether a cause of action has accrued is a question of law that the appellate courts review *de novo*. *Eiland v. Turpin, Smith, Dyer, Saxe & McDonald*, 64 S.W.3d 155, 158 (Tex.App.—El Paso 2001, no pet.). A determination that the statute of limitations has run on Appellant's claims under the Settlement Agreement turns on whether and when payments under the Settlement Agreement were due to her. A breach of contract claim accrues when the contract is breached. *Barker v. Eckman*, 213 S.W.3d 306, 311 (Tex. 2006); *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002). We must consider the terms of the Settlement Agreement to determine whether a breach has occurred, and if so, when.

Although the parties have not specifically advanced differing interpretations of the Settlement Agreement, their contrary positions as to whether and when Appellant's cause of action for breach accrued reveal their differing interpretations of it.[4]

Appellees posit payments were due to Browne out of "***any*** distributions . . . from the farm, ***equal to*** a 4.681% interest in the farm." Based on this interpretation, Appellees contend that ***any*** distributions to Ortiz, including the distributions to him in 2006 and 2007, were distributions from which Appellant should have been paid, and his failure to do so breached the Settlement Agreement, causing limitations to accrue. The trial court entered judgment that limitations barred

[3] We note that the parties agree that the four-year statute of limitations would apply.

[4] Here, we note that neither party raised an issue regarding construction of the Settlement Agreement on appeal. Neither party objected to the admission of evidence concerning interpretations of the agreement or raised issues regarding that on appeal. Nonetheless, we must construe the Settlement Agreement to determine whether and when a breach occurred, and when the statute of limitations began to accrue.

Appellant's claims and several findings of fact and conclusions of law aligned with this interpretation.

Conversely, one of the arguments Appellant asserts is that payments due to her must come from a fund from which the 4.681% interest would be paid, and since such a fund had not been established, Ortiz had not breached the contract and limitations did not accrue.

"Both the presence of ambiguity and interpretation of an unambiguous contract are questions of law we review de novo using well-settled contract-construction principles." *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018). As we review the Settlement Agreement, we must "ascertain the true intentions of the parties as expressed in the instrument[,]" *J.M. Davidson, Inc., v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003), analyzing "the language chosen by the parties[.]" *Burlington Res. Oil & Gas Co. v. Texas Crude Energy, LLC.*, 573 S.W.3d 198, 200 (Tex. 2019). "To achieve this objective, we must 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." *J.M. Davidson*, 128 S.W.3d at 229. We presume the contracting parties "intend every clause to have some effect." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). The most important consideration in interpreting any contract is "the plain meaning of the [agreement's] operative language." *PPC Acquisition Co. v. Delaware Basin Res., LLC*, 619 S.W.3d 338, 345 (Tex.App.—El Paso 2021, no pet.) (internal quotation marks omitted).

The Settlement Agreement dictates Appellant was to receive the $70,000 Resolution Payment from a specific source, dictated in the Resolution Payment Source provision (the Payment Source provision):

> ORTIZ is to receive, from Ortiz Farms . . . a 4.681% interest (the "Resolution Payment Source") in Ortiz Farms, that owns a parcel of real property in El Paso County, Texas which consists of fifty-nine (59) acres more or less (the "Property").

> So long as any portion of the Resolution Payment remains unpaid, ORTIZ shall direct . . . distributions . . . from Ortiz Farms and which are associated with said 4.681% interest shall be paid directly to BROWNE until the full balance of the Resolution Payment . . . is paid in full.

The plain language of the provision indicates the parties contemplated the source of payment to Browne would be a 4.681% interest in Ortiz Farms, which Ortiz was to receive at some future date after the execution of the Settlement Agreement. The second sentence of the provision provides Ortiz shall direct distributions ***associated with*** that future interest to Appellant until she is paid in full.

Using the plain meaning analysis, we cannot agree with Appellee's interpretation of the Payment Source provision. The language of the Settlement Agreement plainly reflects Ortiz's payments to Appellant were to come from distributions **associated with** the 4.681% interest. **Associated with** does not mean **equal to**. The unambiguous words of the Settlement Agreement indicate 4.681% identifies the anticipated interest Ortiz was to receive and the use of "associated with" evidences the intent that only distributions related to that future interest were to be paid to Appellant.

The twofold question then becomes: what is the anticipated 4.681% future interest and were any distributions associated with that interest paid to Ortiz? If such distributions were made without any payment to Appellant, then Ortiz breached the contract and limitations began to accrue.

Although we have determined the Settlement Agreement is not ambiguous, we cannot determine from its face what the anticipated 4.681% interest Ortiz was to receive.

> A latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter. For example, if a contract called for goods to be delivered to 'the green house on Pecan Street,' and there were in fact two green houses on the street, it would be latently ambiguous.

Ridge Nat'l Res., LLC v. Double Eagle Royalty, LP, 564 S.W.3d 105, 150 n.4 (Tex.App.—El Paso 2018, no pet.) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, v. CBI Indus. Inc.*, 907 S.W.2d 517, 520 n.4 (Tex. 1995)). While parol evidence is not admissible for the purpose of creating an ambiguity, if a latent ambiguity arises, it is admissible "for the purpose of ascertaining the true intention of the parties as expressed in the agreement." *Nat'l Union*, 907 S.W.2d at 520; *see Lopez-Franco v. Hernandez*, 351 S.W.3d 387, 394 (Tex.App.—El Paso 2011, pet. denied).

There was ample trial testimony regarding the origin of the 4.681% figure, how it was calculated, and why it was included in the Settlement Agreement. Trial testimony also explains the anticipated source of the funds, clarifying why the Payment Source provision utilizing ownership of the 59-acre El Paso property to identify the partnership at a time when it was common knowledge the partnership also owned another asset, the Pecos mineral interests. Finally, the testimony relates the 4.681% interest to the 59-acre farm property and to the $70,000 amount of the Resolution Payment, giving meaning to all parts of the Payment Source provision.

Thomas testified "the 4.681 percent interest was calculated by dividing our grandmother's partnership share by seven." Then they considered the hypothetical sale of the property and what its sale would generate, and a 4.681% interest produced $70,000 due to Appellant. It was Thomas's understanding the reason for including the reference to the 59 acres in the Settlement Agreement was the sale of that land would be the source of the funds for the payment. Thomas said she understood Appellant was expected to get a portion of Ortiz's percentage of the farm property when it was sold.

Ortiz testified he understood the Payment Source provision to mean the source of the payment to Appellant was to be from the El Paso farm. He testified repayment is based on the sale of the farm.

Appellant disagreed as to how the $70,000 she is due was calculated, but she did not dispute she is owed $70,000 and did not contradict Ortiz and Thomas as to what was to be the source of those funds. She testified Ortiz had told her he would not be able to pay her until the partnership sold the land. She said the land was for sale even when they were married. The Settlement Agreement reflected their understanding that when Ortiz received his share from the sale of the land, then she expected him to have the funds to pay her what he owed her from the divorce. Appellant testified she placed a lien on the land because her understanding, based on Ortiz's representations, is the source from which the $70,000 Ortiz owed her would be paid. One of the conditions of the Settlement Agreement was that Appellant would provide Ortiz with a release of lien which would be held in trust until the Resolution Payment is paid in full.

There was no testimony from any of the parties the Resolution Payment was expected to come from any source other than the sale of the land. In fact, in Count 7 of his Second Amended Petition for Declaratory Relief, Appellees assert "that the Agreement requires the parties to look to the 59-acre parcel identified in paragraph 2, and the proceeds thereof, as the source of any payments under the Agreement."

To the extent the Settlement Agreement was latently ambiguous regarding the definition of the 4.681% interest, which was to be the source of Ortiz's payment to Appellant, the circumstances surrounding the signing of the Settlement Agreement combined with the testimony of the parties to the agreement collectively indicate they all understood the source of the Resolution Payment was to be Ortiz's share in the future sale of the El Paso farm property. Such an

understanding explains the use of the 4.681% figure and the reference to the fifty-nine-acre partnership property in the Source of Resolution Payment paragraph. This reading, the Resolution Payment was to be triggered upon the sale of the fifty-nine acres of land, gives effect to all the parts of the contract. Under Appellees' interpretation that ***any*** partnership distribution to Ortiz would trigger a payment due to Appellant, both the use of the 4.681% descriptor of a future interest not yet received and the reference to the fifty-nine acre El Paso farm property, would be meaningless.

When a promise is made to pay money out of the proceeds of a sale, limitations does not begin to run until the collection of the proceeds of the sale has been made. *Bowers v. Bowers*, 99 S.W.2d 334, 337 (Tex.App.—Amarillo 1936, writ dism'd). It is undisputed the El Paso farm property has not sold, and the partnership is still attempting to develop and sell it. The partnership distributions in 2006 and 2007 did not come from sale of the land. Our review of the Settlement Agreement indicates there is insufficient evidence to support a finding that any and every distribution from Ortiz Farms to Ortiz was to trigger payment to Appellant. We hold as a matter of law the sale of the property triggers the obligation to pay the Resolution Payment under this Settlement Agreement.

Because the property had not sold as of the time of trial, Appellant has yet to possess a cause of action for failure to pay the Resolution Payment delineated in the Settlement Agreement. Since Appellant's cause of action had not yet accrued, her claims under the Settlement Agreement were not barred by the statute of limitations. We hold there is insufficient evidence to support the trial court's determination the statute of limitations barred Appellant's claims, and the trial court abused its discretion in determining Appellant's claims are barred.

Appellant's remaining issues

In Issue Seven, Appellant argues her counterclaim was raised within 30 days of the date on which her answer to Ortiz's petition was due. Our ruling in Issues Four through Six make it unnecessary to address the issue of whether Browne's counterclaim revived any cause of action under the Settlement Agreement.

In Issue Eight, Browne challenges the legal sufficiency of the trial court's judgment. Our analysis of the issues regarding limitations, stated above, reflect our opinion on this point.

CONCLUSION

We reverse the trial court's judgment finding that Browne's causes of action under the Settlement Agreement are barred by the statute of limitations and remand this matter to the trial court for further proceedings in accordance with this opinion.

YVONNE T. RODRIGUEZ, Chief Justice

September 30, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J., dissenting without separate opinion