COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EIS DEVELOPMENT II, LLC,	§	
Appellant,	§	No. 08-22-00006-CV
v.	§	Appeal from the
BUENA VISTA AREA ASSOCIATION, LANCE W. HALL and HEATHER R. HALL, JASON PAUL SMITHEY, DAVID W. MOLENGRAAF and KIMBERLEY K. MOLENGRAAF, ALEXANDER E. W. J. SCHINDLER and ANGELA R. SCHINDLER, as individuals,	§	40th Judicial District Court of Ellis County, Texas (TC#104809)
Appellees.	§	

OPINION ON ORDER

Appellant EIS Development II, LLC (EIS) filed an "Emergency Motion to Review Trial Court's Supersedeas Order and to Continue Emergency Temporary Stay" requesting that this Court lower a supersedeas bond that the district court set and to continue a stay order that the 10th Court of Appeals issued before this case was transferred to our court.[1] For the reasons set forth below, we deny Appellant's motion, and we further lift the stay order at this time.

[1] This case was transferred from our sister court in Waco, and we decide this motion in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties' Dispute and the Court's Final Judgment

Appellees are individual homeowners in what they describe as a rural neighborhood, and the homeowner's association that governs their neighborhood (the Homeowners). The dispute here arose in 2020 after EIS purchased two tracts of land adjacent to their neighborhood and platted the property for 73 residential lots. All but one of the lots was platted to be less than two acres. The Homeowners sued EIS contending that the development would violate the deed restrictions on the property, which they assert allow for no more than two residences on any five-acre tract of land. The Homeowners sought a declaratory judgment and an injunction to prevent EIS from violating that deed restriction, alleging that they would be irreparably injured because EIS's proposed development would destroy the rural character of their neighborhood. EIS countered that the deed restrictions were unenforceable, raised several affirmative defenses, and further alleged that there had been such a change in conditions in the restricted area that it was "no longer possible" to enforce the restrictions.

In April 2021, the trial court granted a partial summary judgment in favor of the Homeowners, finding that the deed restrictions were enforceable and further rejecting EIS's affirmative defenses to their enforcement.[2] However, the court left to a jury the question of whether any changes in condition had taken place which negated enforcement of the restrictions. The jury found that no such changed conditions existed, and the trial court thereafter entered a final judgment in November 2021 granting the Homeowners' request for a declaratory judgment that the deed restrictions were enforceable and that the proposed development would violate those

[2] The district court also dismissed the counterclaims that EIS had filed against the Homeowners, as well as EIS's third-party claims, which are not at issue in this proceeding.

restrictions. It further entered a permanent injunction enjoining EIS from building more than two main residences per five-acre tract on the property. The final judgment awarded court costs in the amount of $426.28 and attorney's fees in the amount of $145,998, as well as conditional appellate attorney fees in the total amount of $96,350 if EIS unsuccessfully challenged the order up to the level of the Texas Supreme Court. No damages were awarded as the Homeowners did not seek any.

B. The Trial Court's Order Granting the Supersedeas Bond

EIS then filed a notice of appeal from the final judgment and permanent injunction. It also filed an expedited motion to set a supersedeas bond in the amount of $500. The effect of the supersedeas bond would have allowed EIS to begin building its proposed development while its appeal was pending. EIS argued that $500 would be a proper bond amount to secure the court cost award of $426.28. The Homeowners responded that the trial court should set the amount of the supersedeas bond at an amount that would restore the rural nature of the area if EIS proceeded with the development, but lost its appeal. They proposed an amount that would cover the cost of buying back the 73 houses that EIS proposed to build, tearing them down, and restoring the area to its proper condition. The Homeowners presented some evidence that cost would amount to $29,528,500. The trial court held two hearings on the motion, and at the first hearing, EIS orally requested that the court issue a "counter-supersedeas bond," arguing that such a bond was necessary to protect its interests, given the permanent injunction's prohibition preventing it from moving forward with its planned development.

Following the first hearing, the district court issued an informal memorandum, in which it agreed with the Homeowners that the measure of the bond should be more than just the amount of court costs, as EIS advocated, and should include the cost of restoring the land from any

development in violation of the deed restriction. However, it believed that the Homeowners' estimate of over $29 million in potential costs was excessive, pointing out that EIS would not be able to sell all 73 lots and build all 73 homes instantaneously. It therefore scheduled a second hearing to develop a "roadmap" by which it could set an initial bond in an amount that would protect the Homeowners in the event that EIS began its proposed development during the pendency of the appeal, but would allow it to modify the amount of the bond depending on EIS's actions or inactions during the pendency of the appeal.

From the evidence developed at both hearings, the Homeowners argued that: (1) the cost to restore the land from the first phase of development (placement of infrastructure for utilities, roadways, sewer systems, and street lights) would cost approximately $3,959,946; (2) the cost to restore from the second phase of development (sale of all 73 lots to third parties during the pendency of the appeal, but with no houses constructed) would cost $8,322,000 in buy-back of the lots; and (3) the cost to restore if all 73 houses were built on the property would cost well over 29 million dollars.

At the second hearing, EIS also presented the testimony that EIS would suffer significant damages if it were prevented from pursuing the development of the property, due primarily to lost profits and the interest that was accruing on the loans EIS previously took out to purchase the property. EIS therefore requested that the trial court set a counter-supersedeas bond in the amount of $1,250,000 to protect its interest pending appeal. Following the hearing, the trial court set a supersedeas bond in the amount of $250,000 but declined to set a counter-supersedeas bond as requested by EIS.

C. The Initial Stay Order

On December 9, 2021, while the appeal was still pending in the 10th Court of Appeals, EIS

filed an "Emergency Motion for Temporary Stay Pending Determination of Appellant's Emergency Motion to Review Trial Court's Supersedeas Order," based on the need to complete the reporter's records of the hearings that were held in the trial court. The court of appeals granted that motion and stayed enforcement of the judgment until further order from the court. Pursuant to the Texas Supreme Court's docket equalization efforts, this appeal was thereafter transferred to this Court with the stay order still in place. And in the meantime, the required reporter's records of both hearings in the trial court have been completed and filed with this Court.

II. EIS'S EMERGENCY MOTION

In its emergency motion filed in this Court, EIS contends that the trial court abused its discretion in setting the bond amount at $250,000, and in denying its motion for a counter-supersedeas bond. It asks that we set aside the district court's supersedeas bond order, and remand the matter to the trial court for "further determination of the appropriate amount of supersedeas and counter supersedeas bond[s]." For the reasons set forth below, we deny the motion and affirm the trial court's decision in its entirety.

A. Applicable Law and Standard of Review

Under Rule 24.1 of the Texas Rules of Appellate Procedure, a judgment debtor may supersede a judgment suspending its enforcement pending appeal by, among other things, filing with the trial court clerk a "good and sufficient bond" in an amount required by Rule 24.2. TEX.R.APP.P. 24.1(a)(2); *see also Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 305-06 (Tex.App.--El Paso 2009, mand. denied). Rule 24.2 provides differing methods for determining the amount of the bond depending on whether the judgment to be superseded was for compensatory damages, for the recovery of property, or, as in this case, for something "other than money or an interest in property." TEX.R.APP.P. 24.2(a)(1-3). A trial court is accorded broad discretion in

determining the potential amount of damages an appeal might cause, and in setting an appropriate bond to protect a party from any such potential damage. *See generally EMF Swiss Ave., LLC v. Peak's Addition Home Owner's Ass'n*, No. 05-17-01112-CV, 2018 WL 914900, at *1 (Tex.App.--Dallas Feb. 16, 2018, no pet.) (not designated for publication) (recognizing that a trial court has broad discretion in determining the amount of security necessary to protect an appellees' interests during the pendency of an appeal from a non-monetary judgment).

While setting a supersedeas bond is mandatory in cases involving compensatory damages, the trial court also has the discretion to deny a supersedeas bond in non-monetary cases altogether, such as in cases involving permanent injunctions if the appellees' interests will not be sufficiently protected by the setting of a bond. *See Klein Indep. Sch. Dist. v. Fourteenth Court of Appeals*, 720 S.W.2d 87, 88 (Tex. 1986) (recognizing that a trial court has the discretion to deny supersedeas of an injunction portion of a judgment); *see also In re State Bd. for Educator Certification*, 452 S.W.3d 802, 803 (Tex. 2014) (recognizing that a trial court has discretion to deny any party the right to supersede a non-money, non-property judgment). And if the trial court so declines to enter a supersedeas bond, the trial court may order the appellee to file a counter-supersedeas bond to protect the interests of the appellant in the event that the judgment is later overturned on appeal. *See* TEX.R.APP.P. 24.2(a)(3).

On the motion of either party, an appellate court may review the sufficiency or excessiveness of the amount of a supersedeas bond. *Rowe v. Watkins*, 324 S.W.3d 111, 112 (Tex.App.--El Paso 2010, no pet.), *citing* TEX.R.APP.P. 24.3(a). We review the trial court's determination of the amount of the bond under an abuse of discretion standard. *Id.* at 113; *see also Texas Custom Pools, Inc.*, 293 S.W.3d at 305-06. If we conclude that the trial court abused its discretion in setting the bond amount, we may order the amount of the bond increased or

decreased. *Rowe*, 324 S.W.3d at 113. Such a review includes a two-step inquiry: "(1) Did the trial court have sufficient information on which to exercise its discretion; and (2) did the trial court err in the application of its discretion?" *Id., citing Leibman v. Grand*, 981 S.W.2d 426, 429 (Tex.App.--El Paso 1998, no pet.). In step one, we utilize the traditional standards reviewing evidentiary sufficiency. *Id., citing Texas Custom Pools*, 293 S.W.3d at 305-06. In step two, we must determine whether, based on the record, the trial court's decision was arbitrary and unreasonable. *Id.* As with any abuse of discretion review, the question is not whether the reviewing court would have come to the same conclusion as the trial court, but whether the court acted without reference to any guiding rules and principles. *Id., citing Montelongo v. Exit Stage Left, Inc.*, 293 S.W.3d 294, 297 (Tex.App.--El Paso 2009, no pet.).

B. The Trial Court did not Abuse its Discretion in Setting the Bond Amount

In overlapping arguments, EIS contends that the trial court abused its discretion in setting the bond amount at $250,000, contending that the bond should have only been set in an amount equal to the court costs awarded by the trial court.[3] In support of its argument, however, EIS only cites to cases in which compensatory damages were awarded. *See, e.g., In re Longview Energy Co.*, 464 S.W.3d 353, 357-60 (Tex. 2015) (discussing the history and nature of supersedeas bonds in cases in which compensatory damages have been awarded); *see also In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013) (discussing factors that can be considered in setting a bond in a case involving a money judgment). In such cases, Rule 24.2(a)(1) provides that, "When the judgment is for money, the amount of the bond, deposit, or security must equal the sum

[3] EIS points out that attorney's fees are not to be considered as costs or as compensatory damages unless they are an element of the damages claim, and therefore could not be included in a calculation under Rule 24.2(a)(1). *See In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d at 173 (where attorney's fees are not part of the plaintiff's claim for damages, attorney's fees may not be considered either compensatory damages or costs for purposes of suspending enforcement of a money judgment, and should not be included in the calculation of the bond amount); *see also In re Corral-Lerma*, 451 S.W.3d 385, 386 (Tex. 2014) (same). For this reason, EIS contends that the trial court could only consider the amount of court costs is setting the bond.

of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment." TEX.R.APP.P. 24.2(a)(1).

But EIS's reliance on Rule 24.2(a)(1) and the cases interpreting that rule is misplaced. Rule 24.2(a)(1) only relates to cases involving awards of compensatory damages, and does not govern cases involving non-monetary judgments such as an award of injunctive relief. *See Klein Indep. Sch. Dist.*, 720 S.W.2d at 88 (discussing distinction between setting supersedeas bonds in monetary and non-monetary cases). And here, the trial court's final judgment was of a non-monetary nature, i.e., it only granted declaratory judgment and injunctive relief, and did not award any compensatory damages. Thus, the amount of the bond in this case is governed by Rule 24.2(a)(3), which provides that the "security must adequately protect the judgment creditor against loss or damages that the appeal might cause," and significantly, contains no language limiting the bond to the court costs issued in the case. TEX.R.APP.P. 24.2(a)(3).

Additionally, EIS contends that the trial court must have considered the attorney's fee award in its calculations of the amount of the bond, noting that the court awarded attorney fees in the amount of $145,998 and contingent attorney's fees in connection with the appeal in the total amount of $96,350, for a total of $242,348, which it believes is "strikingly similar to the $250,000 supersedeas bond set by the trial court." EIS believes that this is "more than just a coincidence," and that it demonstrates the trial court must have improperly considered attorney's fees in its calculation of the bond amount. And EIS argues that there was no other basis for the trial court's decision to set the bond in that amount, and it concludes that the bond should have been limited to the amount of the court costs only.

But contrary to EIS's argument, there is nothing in the record to suggest that the trial court took the amount of the attorney's fees into consideration in calculating the amount of the bond that

would protect the Homeowners' interest. The Homeowners never requested that the trial court consider the attorney's fees in making its calculation, and the trial court never suggested that it was doing so. Instead, in its informal memorandum, the trial court focused on the cost to restore the property, which would increase on an incremental basis during the progress of the appeal.[4] And contrary to EIS's argument, the Homeowners presented sufficient evidence to support the trial court's finding that a bond of at least $250,000 was necessary to protect their interests. True, their evidence would support a bond much higher than that amount. But the fact that the trial court selected a lesser amount does not mean that the trial court abused its discretion, particularly when the trial court was focused on a graduated bond amount that might, or might not, increase over the life of the appeal depending how aggressively EIS pursues the development.[5]

EIS also contends that the Homeowners' evidence on the cost to restore is speculative because before all 73 houses could be built, several intermediate steps would be necessary, including some that require third party approvals--such as obtaining financing from banks or permits from governmental units. We disagree. The fallacy with this argument is the assumption that all 73 houses would need to be built before the Homeowners are harmed. But the trial court recognized that even the first intermediate steps in the development might harm the Homeowners,

[4] EIS also contends that, despite the entry of its informal memorandum, the trial court "offered no explanation" for how it arrived at its calculation in setting the bond amount. However, EIS never requested any findings of fact or conclusions of law, and since none were entered, we must uphold the trial court's decision setting the bond amount if it can be upheld on *any* legal theory that is supported by the evidence. *See Pharo v. Chambers County*, 922 S.W.2d 945, 948 (Tex.1996) (in reviewing a trial court's decision where no findings of fact or conclusions of law are filed or requested, we will imply all necessary findings of fact to support the trial court's decision); *Sullivan v. Microsoft Corp.*, 618 S.W.3d 926, 929 (Tex.App.--El Paso 2021, no pet.) (when a trial court does not make findings of fact or conclusions of law in support of an order or judgment, a court will affirm the trial court's decision if it can be upheld on *any* legal theory that is supported by the evidence).

[5] In its motion, EIS contends that at least one of the Homeowners' expert witnesses who provided testimony on this subject "did not have sufficient qualifications or expertise to qualify as an expert in connection with the costs of restoration of the Property." However, EIS provides no substantive argument to support this contention, and we therefore do not consider it in our analysis.

and it sought to set a bond amount to address the impact of the first steps, leaving for additional consideration an increase in the bond if later steps occurred that resulted in more lots being sold and developed. And there was no reason to believe that EIS did not intend to begin the development process if the judgment was superseded. EIS's counsel confirmed at the first hearing that if the trial court set the bond at only $500, EIS anticipated that it would in fact go forward with the development.[6]

Finally, EIS contends that the "future cost of restoration" is not a proper measure of damages for setting a supersedeas bond. EIS, however, has not cited any authority in support of that claim, nor has it suggested any other reliable method of calculating the damages that the Homeowners would face in the event that offending structures were built on the property. Nor is this method an improper measure of damages. As the Waco Court of Appeal has recognized, the "correct measure of damages" for injury to land, where the injury is only temporary and the premises can be substantially restored to their former condition at a reasonable cost, is the "cost of restoration." *Burlington-Rock Island R. Co. v. Newsom*, 239 S.W.2d 734, 737 (Tex.App.--Waco 1951, no writ); *see also Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 479 (Tex. 2014) (recognizing the "notion that the ordinary measure of damages" for temporary injuries to property is the "cost to restore the property" when possible).

Accordingly, having found sufficient evidence in the record to support the trial court's decision to set the bond amount at $250,000, we reject EIS's contention that the trial court abused its discretion in doing so.

[6] In addition, we note that EIS's manager testified that he did not anticipate having any issues with obtaining approval from the county to begin its development.

C. The Trial Court Correctly Declined to Set a Counter Bond

EIS also contends that the trial court failed to set a counter-supersedeas bond to protect its interests if it prevails on appeal. Specifically, EIS contends that if the trial court has set a bond in an "appropriate" amount, it would have paid the bond, thereby suspending the enforcement of the entire judgment. And in turn, EIS appears to believe that because the trial court set the bond in an "excessive" amount, it justifiably failed or refused to pay the bond amount, which in turn has prevented it from going forward with its proposed development. EIS concludes that it will therefore suffer significant economic losses from its inability to develop the property, and that if successful on appeal, it will not be able to recoup those losses from the Homeowners in the absence of a counter-supersedeas bond.

As the Homeowners point out, however, Rule 24.2 does not provide for the issuance of a counter-supersedeas bond under these circumstances. Instead, Rule 24.2 provides that a "trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper." TEX.R.APP.P. 24.2(3). In other words, the Rule attempts to protect both parties from potential harm by providing for either the issuance of a supersedeas bond to protect the appellees' interest if the judgment is superseded during the pendency of an appeal, or a counter-supersedeas bond to protect the appellants' interest if the judgment is not superseded, but not both. *See EMF Swiss Ave., LLC*, 2017 WL 5150954, at *4 (recognizing that the rule protects both parties' interests, and that if a trial court does not give an appellant the opportunity to supersede a judgment, it must set a counter-supersedeas bond to protect the appellant's interests during the pendency of the appeal); *see also Five Star Glob., LLC*

v. Hulme, No. 05-20-00940-CV, 2021 WL 791426, at *2 (Tex.App.--Dallas Mar. 2, 2021, no pet.) (recognizing same principle). Here, the trial court set a supersedeas bond superseding the judgment, which, upon the posting of the bond, will allow EIS to go forward with its proposed development during the pendency of the appeal, thereby eliminating the potential that it will be damaged if it is successful in its appeal.

Accordingly, we reject EIS's argument that the trial court abused its discretion in failing to set a counter-supersedeas bond.

III. CONCLUSION

For the reasons set forth above, we affirm the trial court's issuance of the supersedeas bond in the amount of $250,000, as well as its refusal to issue a counter-supersedeas bond. We further lift the stay order granted by the 10th Court of Appeals.

JEFF ALLEY, Justice

February 25, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.