Affirmed and Opinion Filed December 5, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01008-CV

PROGRESSIVE CHILD CARE SYSTEMS, INC., Appellant/Cross-Appellee
V.
LEGACY VILLAGE LIMITED PARTNERSHIP, LEGACY VILLAGE ONE, L.C., SPY, INC., LEGACY VILLAGE ASSOCIATES, LTD., TEXAS FAMILY FITNESS 2 LLC, SC LEGACY INDEPENDENCE, LTD., SC LEGACY INDEPENDENCE ONE, LLC, AND L&B REALTY ACQUISITIONS, LLC., Appellees/Cross-Appellants

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-01220-2012

MEMORANDUM OPINION

Before Justices Francis, Stoddart, and Whitehill
Opinion by Justice Francis

Progressive Child Care Systems, Inc. appeals the trial court's judgment in favor of Legacy Village Limited Partnership, Legacy Village One, L.C., Spy, Inc., Legacy Village Associates, Ltd., Texas Family Fitness 2 LLC, SC Legacy Independence, Ltd., SC Legacy Independence One, LLC, and L&B Realty Acquisitions, LLC. In five issues, Progressive generally contends the trial court erred in granting summary judgment in favor of appellees, denying summary judgment in favor of Progressive, and in awarding Legacy attorney's fees. In a single issue on cross-appeal, Legacy contends the trial court erred in refusing to award it what

it characterized as other expenses of litigation in addition to attorney's fees. We affirm the trial court's judgment.

At the center of this case is a restrictive easement agreement (REA) between Progressive and the Legacy parties ("Legacy"). Legacy is the owner of a shopping center, adjacent to which Progressive owns and operates a day care center. Progressive and Legacy negotiated a non-exclusive easement over the common area of the properties covering such things as parking and vehicle and pedestrian passage. The REA also contained a series of restrictive covenants. The restrictive covenants at issue state,

> SECTION 6.3 . . . No use or operation will be made, conducted or permitted on or with respect to all or any part of the Shopping Center which use or operation is inconsistent with a first-class shopping center, including the following:
>
> . . . .
>
> (o) Any bar, tavern, dance hall, night club, disco or lounge, a restaurant whose annual gross revenues from the sale of alcoholic beverages exceeds fifty percent (50%) of gross revenues arising out of or resulting from such business;
>
> (p) Any health spa having gross floor area of more than 5,000 square feet or any health spa with its nearest demising wall located within 300 feet of the front door of the currently existing Kroger store.

In July 2010, Legacy entered into a lease with Texas Family Fitness under which TFF leased approximately 9,000 square feet of shopping center space for "fitness and related uses." Less than a year later, Legacy leased a portion of the shopping center to Spy, Inc. for the operation of a restaurant called "Deno's Bar and Grill." The name of the restaurant was later changed to "Deno's," but the restaurant still contained a full-service bar area. The lease between Spy and Legacy specified that Deno's was to be a "dine-in/take-out/delivery American/Greek restaurant . . . in which [Deno's] gross annual revenue from the sale of alcohol beverages (including but not limited to distilled spirits, mixed drinks, beer and wine) generated from the Demised Premises shall not exceed 50% of the total gross annual revenue generated by [Deno's] from the Demised Premises."

On March 30, 2012, Progressive filed this action contending Legacy's leases with TFF and Spy violated the restrictive covenants in the REA. Progressive requested a declaratory judgment, injunctive relief, and damages. TFF closed its facility in the shopping center in December 2013.

On October 15, 2014, Progressive filed a traditional and no evidence motion for partial summary judgment arguing, among other things, that Legacy's lease of space to Spy for the operation of Deno's violated the REA's prohibition on the presence of "any bar" in the shopping center as a matter of law. One week later, Legacy and TFF filed their own traditional and no evidence motion for partial summary judgment taking the opposite position that Deno's did not violate the terms of the REA.[1] The motion further argued there was no evidence that, as a matter of law, Progressive suffered any damages as a result of a breach by Legacy and the claims relating to TFF's operation of a fitness center should be dismissed because they were moot, waived, or barred by laches. Following a hearing, the trial court denied Progressive's motion for summary judgment and granted the motion filed by Legacy and TFF ordering that Progressive take nothing on its claims. The order further stated that Legacy was entitled to recover attorney's fees and expenses, the amount of which would be determined at trial.

At trial before the court, the only matter presented was what attorney's fees and expenses Legacy could recover. Section 7.3 of the REA stated that "[i]n the event of litigation by reason of this Agreement, the prevailing party in such litigation shall be entitled to recover reasonable attorneys' fees in addition to all other expenses incurred by such litigation." The parties stipulated that the reasonable and necessary attorney's fees incurred by Legacy in this suit through trial were $300,000. The parties also stipulated Legacy would likely incur an additional

[1] Although Spy filed responses to both Progressive's motion for partial summary judgment and the motion filed by Legacy and TFF, it did not file a motion for summary judgment on its own behalf. There were no claims alleged against Spy that were not also alleged against Legacy, TFF, or both.

$20,000 and $25,000 in fees for appeals to this court and the Supreme Court of Texas respectively.

Along with the attorney's fees, Legacy sought to recover payments made to Spy and TFF to settle claims those parties asserted and threatened to assert against Legacy based on the litigation brought by Progressive. Legacy contended those settlement payments were recoverable under section 7.3 as "other expenses incurred." The trial court disagreed, concluding the settlement payments made to resolve other potential litigation were not recoverable under section 7.3. The final judgment signed by the trial court incorporated the summary judgment ordering that Progressive take nothing by its claims and awarded Legacy the attorney's fees to which the parties had stipulated. Progressive brought this appeal challenging the judgment against it. Legacy cross-appealed contending the trial court erred in failing to award it the settlement amounts paid to TFF and Spy as recoverable expenses of litigation.

In its first two issues on appeal, Progressive contends the trial court erred in granting summary judgment on its claim that the lease of space to a restaurant containing a bar area violated the REA. When both parties move for summary judgment on the same issue and the trial court grants one motion and denies the other, we review both parties' summary judgment evidence and determine all questions presented. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Each party, however, bears the burden of establishing its entitlement to judgment as a matter of law. *See City of Santa Fe v. Boudreaux*, 256 S.W.3d 819, 822 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Both Progressive and Legacy moved for summary judgment on the issue of whether the lease with Spy for the operation of Deno's violated the REA's prohibition on "any bar" in the shopping center. The parties do not dispute that Deno's was a restaurant with a bar counter from which alcohol was served. Progressive does not contend that Deno's sales of alcohol exceeded

the amount permitted under the REA. Progressive contends only that the term "any bar" in the restrictive covenant was broad enough to encompass a bar fixture within a restaurant. We disagree.

Neither side contends the language of the covenant at issue is ambiguous and we conclude that it is not. The construction of an unambiguous contract is a question of law we review de novo. *See Matheson Tri-Gas, Inc. v. Atmel Corp.*, 347 S.W.3d 339, 343 (Tex. App.—Dallas 2011, no pet.). Our primary concern is to determine the intent of the parties as expressed in the terms of the agreement. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). When the language of the contract is plain, it must be enforced as written. *See Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 618 (Tex. App.—Dallas 1991, no writ). We do not consider the parties' present interpretation of the contract and we are not concerned with the parties' subjective intent. *See Matheson*, 347 S.W.3d at 343. Undefined words are given their plain, ordinary, and generally accepted meanings unless the agreement shows the parties used them in a technical or different sense. *Id*. Similarly, language in a contract should be accorded its plain grammatical meaning unless the parties definitely intended otherwise. *See Phillips*, 812 S.W.2d at 618.

The REA prohibits the use or operation of all or any part of the shopping center as "any bar, tavern, dance hall, night club, disco or lounge, a restaurant whose annual gross revenues from the sale of alcoholic beverages exceeds fifty percent (50%) of gross revenues arising out of or resulting from such business." Progressive contends that the language "any bar" is broad enough to prohibit bars in any form, including a bar fixture within a restaurant. This interpretation of the contract, however, takes the term "bar" out of context. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) (word meaning must be drawn from context in which it is used); *Green Ave. Apartments v. Chambers*, 239 S.W.2d 675, 685

(Tex. App.—Beaumont 1951, no writ) (meaning of word is controlled by those with which it is associated). Context is particularly important when determining the meaning of a word found in a list. *See Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015).

Section 6.3(o) lists types of establishments that are not permitted in the shopping center. Each of the listed establishments is modified by the term "any." This does not change the fact that they are all establishments. Progressive's suggested expansion of the term "bar" to mean not only an establishment, but also a fixture within an establishment, would make it disconsonant with the other terms on the list, none of which are capable of being expanded in the same manner. Taking the term "bar" out of context would lead to the absurd result of prohibiting bars in any form including those not associated with the service of alcohol, such as salad bars.

Progressive argues that other establishments listed in section 6.3(o) such as "dance hall[s], night club[s] and disco[s]" are "often incorporated into larger establishments." To the extent this may be possible, such incorporation would not change the fact that dance halls, night clubs, and discos are still distinct establishments that conduct unique activities and could never be mere fixtures. The "bar" incorporated into Deno's was not a distinct establishment, but only a counter used to conduct the specifically permitted restaurant activity of serving alcohol. None of the restrictive covenants address the physical features of a business or activity allowed to be conducted in the shopping center.

Progressive points to the term "lounge" to argue that section 6.3(o) was intended to encompass more than just establishments because, Progressive argues, a lounge "*cannot* operate as a single-purpose, stand-alone establishment." This argument is without merit. Lounges can, and do, operate as stand-alone establishments in the same manner as bars and taverns. *See e.g., T&R Assocs., Inc. v. City of Amarillo,* 601 S.W.2d 178, 179 (Tex. App.—Amarillo 1980, writ ref'd n.r.e.) (appeal from temporary restraining order prohibiting operation of lounge).

Progressive further contends that, because the REA uses both the terms "use" and "operation" disjunctively, the covenant must cover both the use of a bar fixture as well as the operation of a bar establishment. But the terms "use" and "operation" do not modify the individual restrictive covenants. Rather, those terms are in the prefatory paragraph and refer only to the "use" or "operation" of the shopping center itself. Indeed, many of the restrictive covenants address things that cannot be either used or operated such as objectionable noise and obnoxious odor.

Even if "use" and "operation" could be held to refer to the individual covenants, none of the other establishments with which "bar" is listed can be "used." They can only be operated. To interpret the term "bar" to include a fixture that may be used in addition to an establishment that may be operated would, once again, be out of context and disconsonant with the other terms on the list.

Finally, Progressive argues we must look at the drafting history of the REA to determine its meaning. *See Houston Exploration Co. v. Wellington Underwriting Agencies, LTD.*, 352 S.W.3d 462, 469–70 (Tex. 2011). In negotiating the restrictive covenant at issue, Progressive struck certain language from the draft agreement proposed by Legacy. The resulting edit was as follows:

> (o) Any bar, tavern, dance hall, night club, disco or lounge ~~or other establishment (including, if applicable~~, a restaurant~~)~~ whose annual gross revenues from the sale of alcoholic beverages exceeds fifty percent (50%) of gross revenues arising out of or resulting from such business[.]

Progressive argues that removing the phrase "or other establishment" broadened section 6.3(o) to prohibit more than just establishments. We agree that the effect of the edit was to broaden the scope of the covenant, but not in the manner suggested by Progressive. The language struck by Progressive changed the covenant to prohibit any bar, tavern, dance hall, night club, disco, or lounge without regard to what percentage of its annual gross revenue was derived from the sale

of alcohol. The revenue restriction was made applicable solely to restaurants. The deletion did not change the fact that the list prohibited only certain establishments and the term "bar" must be read in that context.

Progressive argues that its intent when it requested the deletion was to broaden the scope of the covenant to encompass more than establishments. Subjective intent, however, has no bearing on contract interpretation. *See Matheson*, 347 S.W.3d at 343. Karry Dunn, president of Progressive, stated in his summary judgment affidavit that he "insisted the phrase 'or other establishments' be removed from the [REA] so that the list of prohibited uses and operations in Section 6.3(o) is not defined as only establishments but can simply be part of a larger establishment." Nothing in this statement can be read to indicate that Dunn communicated his reason for making the deletion to Legacy. Accordingly, there is no summary judgment evidence of any negotiations that would require us to interpret section 6.3(o) in the manner urged by Progressive.

Based on the foregoing, we conclude the trial court correctly granted summary judgment in favor of Legacy on Progressive's claim that Legacy's lease with Spy for the operation of Deno's violated the REA. We resolve Progressive's first two issues against it.

In its third issue, Progressive contends the trial court erred in granting summary judgment in favor of Legacy and TFF on Progressive's claims that Legacy's lease with TFF violated the REA. Legacy moved for a no evidence summary judgment on Progressive's breach of contract claim arising out of TFF's lease arguing that Progressive had no evidence of any damages. Progressive does not dispute that it failed to present evidence of damages. Instead, it contends such evidence was not necessary for it to recover either injunctive or declaratory relief.

With respect to Progressive's requests for injunctive and declaratory relief on the TFF lease, Legacy moved for a traditional summary judgment arguing that, among other things, the

requests were moot because, during the pendency of the lawsuit, Legacy admitted the TFF lease violated the REA and the fitness facility was closed. Progressive concedes in its brief that its requests for declaratory and injunctive relief as to TFF "became unnecessary" when Legacy changed its position and terminated the lease. But it argues the trial court erred in dismissing its claim under the Uniform Declaratory Judgments Act because there was still a live controversy over the proper assessment of attorney's fees incurred in prosecuting the declaratory judgment action. In making this argument, Progressive appears to improperly conflate its request for declaratory relief with its request for attorney's fees. *See Tex. Dep't of Transp. v. Tex. Weekly Advocate*, No. 03-09-00159-CV, 2010 WL 323075, at *3 (Tex. App.—Austin Jan. 29, 2010, no pet.) (mem. op) (request for attorney's fees under UDJA is separate from underlying controversy).

Progressive relies on opinions from this Court and the Texas Supreme Court addressing whether a court has continuing jurisdiction over a declaratory judgment action once the subject matter of the suit becomes moot. *See Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005); *Hansen v. JP Morgan Chase Bank, N.A.*, 346 S.W.3d 769, 774–75 (Tex. App.—Dallas 2011, no pet.). These cases hold that a suit under the UDJA remains a live controversy, even if all requests for substantive declaratory relief become moot during the action's pendency, as long as a claim for attorney's fees under the UDJA remains pending. *See Hansen*, 346 S.W.3d at 774–75. Because the plaintiff could still be awarded attorney's fees for its prosecution of the suit, the case could not be dismissed in its entirety. *Id*. Nothing in these cases stands for the proposition that a trial court cannot dismiss a request for declaratory relief as moot simply because a party has requested fees under the UDJA. The cases merely hold that the fee request may survive dismissal of the substantive claim.

We agree that Progressive's claim for attorney's fees under the UDJA did not become moot simply because its request for declaratory relief with respect to the TFF lease became moot. *See id*. But there is nothing in the record to indicate the trial court dismissed Progressive's claim for attorney's fees as moot. Neither the trial court's summary judgment order nor its final judgment indicates why the court declined to award Progressive attorney's fees. The grant or denial of attorney's fees in a declaratory judgment action is within the trial court's discretion. *See SAVA Gumarska in Kemijska Industria d.d. v. Advanced Polymer Sciences, Inc.*, 128 S.W.3d 304, 323 (Tex. App.—Dallas 2004, no pet.). In the exercise of this discretion, the court may decline to award fees to either or both parties. *Id*. Progressive raises no issue and makes no argument to show how the trial court may have abused its discretion in denying its request for fees under the UDJA in this case.

As stated above, Progressive does not dispute it produced no evidence of damages caused by the TFF lease. Progressive also does not dispute that its request for declaratory and injunctive relief was rendered moot by Legacy's admission that the TFF lease violated the REA and the closure of the fitness facility. Because there is no indication in the record that the trial court improperly dismissed Progressive's claim for attorney's fees under the UDJA as moot rather than denying it as an exercise of discretion, we conclude Progressive has not shown the trial court erred in ordering that it take nothing by its claims arising out of the TFF lease. We resolve Progressive's third issue against it. Because of our resolution of Progressive's first three issues, it is unnecessary for us to address Progressive's remaining issues.

In a single issue on cross-appeal, Legacy contends the trial court erred in denying its request to recover settlement amounts it paid to TFF and Spy. Legacy sought this recovery under section 7.3 of the REA which states that,

> [i]n the event of litigation by reason of this Agreement, the prevailing party in such litigation shall be entitled to recover reasonable attorneys' fees in addition to all other expenses incurred by such litigation.

Legacy argues the phrase "all other expenses incurred by such litigation" is broad enough to include payments it made to resolve other threatened and asserted litigation caused by Progressive's suit. Again neither side contends the language at issue is ambiguous, and we conclude it is not, so we review the trial court's construction of the contract de novo. *See Matheson*, 347 S.W.3d at 343. We enforce the contract's plain language as written. *See Phillips*, 812 S.W.2d at 618.

Section 7.3 uses the word "litigation" three times. It is clear from the language of the section that each use of the word "litigation" references the *same* litigation. In other words, the litigation expenses the party seeks to recover must be incurred in the same litigation that was brought by reason of the REA and in which the party prevailed. Here, Legacy seeks to recover expenses from separate litigation in which it did not prevail.

In *Shenandoah Associates v. J & K Properties, Inc.*, 741 S.W.2d 470, 488 (Tex. App.—Dallas 1987, writ denied), this Court held that a contract provision allowing a party to recover "costs and expenses of suit" does not allow a party to recover anything other than the usual court costs and expenses ordinarily allowed under Texas law. Legacy cites no authority, and we have found none, allowing a party to recover money paid to resolve liabilities in a separate suit as an expense of litigation under Texas law.

Legacy argues that, unlike the contract at issue in *Shenandoah*, section 7.3 expressly authorized the recovery of the settlement expenses because it broadly allowed recovery of "expenses incurred by such litigation." The *Shenandoah* contract provided for recovery of "expenses of suit." The only real difference between the phrases "expenses incurred by such litigation" and "expenses of suit" is the use of the word "by" instead of the word "of."

Accordingly, Legacy's argument is essentially that the word "by" has a broader meaning than the word "of" in this case.

As relevant here, "by" is defined as "through the means or instrumentality of" or "with respect to." *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 307 (unabridged) (1993); THE AMERICAN HERITAGE DICTIONARY 120 (3rd Ed. 1994). "Of" is defined as indicating "the cause, motive, or reason by which a person or thing is actuated or impelled" or to mean "associated with," or "connected to." WEBSTER'S at 1565; AMERICAN HERITAGE at 578. In comparing the definitions of the two words, it is clear that the word "by" cannot be read to have a broader meaning than the word "of" for purposes of determining what litigation expenses may be recovered. Both words indicate that an expense must be with respect to, caused by, relate to, or be connected with the suit in which recovery is sought to fall within the scope of recoverable expenses. We have already held that this scope does not encompass anything more than the expenses ordinarily allowed under Texas law. *See Shenandoah*, 741 S.W.2d at 488. Settlement money to resolve separate litigation is not an expense ordinarily allowed under Texas law. We resolve this issue against Legacy.

Based on the forgoing, we affirm the trial court's judgment.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PROGRESSIVE CHILD CARE SYSTEMS, INC., Appellant

No. 05-15-01008-CV V.

LEGACY VILLAGE LIMITED PARTNERSHIP, LEGACY VILLAGE ONE, L.L.C., SPY, INC. LEGACY VILLAGE ASSOCIATES, LTD., TEXAS FAMILY FITNESS 2 LLC, SC LEGACY INDEPENDENCE, LTD., SC LEGACY INDEPENDENCE ONE, LLC, AND L&B REALTY ACQUISITIONS, LLC., Appellees

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-01220-2012.
Opinion delivered by Justice Francis.
Justices Stoddart and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered December 5, 2016.