Affirmed and Opinion Filed March 23, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01397-CV

PLANO PARKWAY OFFICE CONDOMINIUMS A/K/A PLANO PARKWAY OFFICE OWNERS ASSOCIATION, Appellant
V.
BEVER PROPERTIES, LLC, AND JESSE M. TAYLOR, D.D.S., P.A., Appellees

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-04855-2013

MEMORANDUM OPINION

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

In this case, we must decide whether a final judgment in a prior lawsuit between a condominium association and one of its members, which denied all relief, including an award for attorney's fees, bars the condominium association from later assessing those attorney's fees against the member. We conclude that it does and affirm the trial court's judgment.

Plano Parkway Office Condominiums a/k/a Plano Parkway Office Owners Association (PPOC) appeals from a final summary judgment dismissing its claims against Bever Properties, LLC and Jesse M. Taylor (collectively Bever). After several years of litigation regarding Bever's placement of a sign on the condominium property, the trial court in a prior lawsuit rendered judgment notwithstanding the verdict that Bever take nothing on its claims against PPOC and

denied all other relief. Afterwards and pursuant to the condominium declaration, a majority of the members of PPOC voted in favor of a special assessment against Bever to pay the attorney's fees and expenses incurred by PPOC and its largest owner, Jojo Cheung, in the prior lawsuit. When Bever refused to pay the assessment, PPOC notified Bever it intended to foreclose a lien on Bever's property for the assessment. Bever then filed this lawsuit against PPOC and Cheung on several causes of action and sought an injunction to prevent foreclosure. PPOC counterclaimed for breach of the contract created by the declaration and for fraudulent transfer of property. Bever raised several affirmative defenses, including res judicata, collateral estoppel, and excuse, and a claim to quiet title to its property.

Both parties filed motions for summary judgment on their claims and defenses. The trial court rendered summary judgment that PPOC take nothing on its breach of contract claim based on Bever's affirmative defenses of res judicata, collateral estoppel, and excuse. The court also rendered summary judgment that Bever take nothing on its claims against PPOC and Cheung. By a separate order, the trial court granted summary judgment that PPOC take nothing on its fraudulent transfer claim and declared PPOC's lien invalid.

In two issues, PPOC argues the trial court erred by dismissing its claims because Bever did not establish its affirmative defenses. We conclude that the summary judgment evidence establishes that PPOC's breach of contract claim is barred by the affirmative defense of res judicata and affirm the trial court's judgment.

BACKGROUND

Bever, Cheung, and Mary Ellen Kirwan are joint owners of offices in PPOC. Cheung owns approximately 37% of the project while Bever and Kirwan own slightly more than 31% each.[1]

[1] We discuss the lengthy background of the disputes between these parties only as necessary for this opinion. Additional details are discussed in our prior opinions. *See Bever Properties, LLC v. Jerry Huffman Custom Builder, L.L.C.*, No. 05-13-01519-CV, 2015 WL 4600347, at *1 (Tex. App.—Dallas July 31, 2015, no pet.) (*Bever Properties*

Article 2.9 of the condominium declaration, titled "Use and Occupancy Restrictions," lies at the heart of the disputes between the parties. Article 2.9(E)(4) provides that no sign can be displayed to public view on or from any unit or common elements without prior consent of the board of PPOC. Bever, however, purchased its unit with the desire to place prominent signage on the property to promote its business.

In 2004, after learning that the board would not approve its illuminated sign, Bever filed suit seeking a declaration that PPOC was not cognizable as a condominium association and could not control the use of the property. That suit was cause number 366-02512-04 in the 366th District Court of Collin County, Texas (the Prior Lawsuit). In the fall of 2004, the trial court granted Bever's motion for summary judgment and found the condominium association was invalid. Bever then installed a stand-alone illuminated sign on the property.

Also in 2004, PPOC filed a lawsuit against Bever seeking an injunction requiring it to remove certain signs from the condominium and prohibiting placement of additional signs without board approval. PPOC requested its attorney's fees incurred because of Bever's violation of the condominium declaration. PPOC's lawsuit was later consolidated with the Prior Lawsuit.

In *Bever Properties I*, we reversed the summary judgment and remanded for further proceedings. *See Bever Properties I*, 246 S.W.3d at 196–97. Afterwards, Bever removed the illuminated sign from the property.

The parties continued to litigate the remaining claims. In 2009 and 2010, the trial court granted partial summary judgments dismissing all of Bever's claims, denying PPOC's request for an injunction, and awarding PPOC attorney's fees. These summary judgments were made final in a March 11, 2010 final judgment. On appeal, we affirmed in part, reversed in part, and remanded

III); *Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878, 897 (Tex. App.—Dallas 2011, no pet.) (*Bever Properties II*); *Plano Parkway Office Condos. v. Bever Properties, LLC*, 246 S.W.3d 188, 195 (Tex. App.—Dallas 2007, pet. denied) (op. on reh'g) (*Bever Properties I*).

the case to the trial court. *See Bever Properties II*, 355 S.W.3d at 897.

On remand, after a nine-day trial, the jury returned a verdict for liability and damages in favor of Bever. However, on July 24, 2013, the trial court granted the defendants' motions for judgment notwithstanding the verdict and rendered judgment that Bever take nothing on its claims and denied all relief not expressly granted. We refer to this judgment as the JNOV. Important to this case is the fact that the JNOV did not award PPOC an injunction and attorney's fees as requested in its pleading. We affirmed the JNOV in *Bever Properties III*. *See Bever Properties III*, 2015 WL 4600347, at *15.

In November of 2013, Cheung and Kirwan, representing over 68% of PPOC, voted for a special assessment against Bever for over $425,000 in attorney's fees and expenses incurred by PPOC and Cheung in the Prior Lawsuit. The condominium declaration permits the association, with consent of 66.67% of the owners, to establish a special assessment on a unit to "secure the liability of the Owner of such Unit to the Association for any breach by such Owner of any of the provisions of this Declaration, which breach shall require an expenditure by the Association for repair or remedy."

Bever filed this lawsuit on December 4, 2013 seeking an injunction to prevent foreclosure and damages for breach of fiduciary duty. Bever later added claims for breach of contract, declaratory relief, and to quiet title to its unit. PPOC filed a counterclaim for breach of contract based on Bever's failure to pay the special assessment and for fraudulent transfers. Bever raised the affirmative defenses of res judicata, collateral estoppel, and excuse, among others.

Both parties moved for summary judgment on their claims and defenses. The parties submitted summary judgment evidence, which included PPOC's petition and the JNOV from the Prior Lawsuit, the declaration and bylaws of the association, the notice for and transcript of the special meeting about the assessment, and declarations by Cheung. The trial court granted Bever's

motion as to PPOC's claim for breach of contract on the affirmative defenses of res judicata, collateral estoppel, and excuse based on the final judgment in the Prior Lawsuit and granted PPOC's motion as to Bever's claims. The court denied all other relief requested in the motions. The trial court later granted Bever's amended motion for summary judgment on PPOC's fraudulent transfer claim and Bever's request to quiet title to its unit, making the judgment final.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 331 S.W.3d 419, 422 (Tex. 2010). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

When both parties move for summary judgment, each party bears the burden of establishing it is entitled to judgment as a matter of law. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). When the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both parties and determine all questions presented. *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

ANALYSIS

Res judicata precludes the relitigation of claims that have been finally adjudicated, as well as all related matters that with the use of diligence could or should have been litigated in the prior suit. *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 449 (Tex. 2007). For res judicata to apply, there must be: (1) a prior final judgment on the merits by a court of competent jurisdiction;

(2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action. *Id*.; *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). The doctrine seeks to bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. *Citizens Ins.*, 217 S.W.3d at 449; *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 629 (Tex. 1992).

Under the transactional approach followed in Texas, a subsequent suit is barred if it arises out of the same subject matter as the prior suit, and that subject matter could have been litigated in the prior suit. *Citizens Ins.*, 217 S.W.3d at 449; *Barr*, 837 S.W.2d at 631. "[A] final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose." *Barr*, 837 at 631 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)). Determining the scope of the "subject matter" or "transaction" of the prior suit requires "an analysis of the factual matters that make up the gist of the complaint, without regard to the form of action." *Id.* at 630. This should be done pragmatically, "'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage.'" *Id.* at 631 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982)). "Any cause of action which arises out of those same facts should, if practicable, be litigated in the same lawsuit." *Id.* at 630.

The first two requirements for res judicata are not disputed. The JNOV was a final judgment on the merits and both PPOC and Bever were parties to the Prior Lawsuit. Thus, we consider the third requirement, whether the second action is based on the same claims that were or could have been raised in the Prior Lawsuit.

PPOC contends the only basis for its breach of contract claim was Bever's refusal to pay

the special assessment. Therefore, PPOC argues, res judicata does not bar its breach of contract claim because that claim did not accrue until after the JNOV.

Bever argues that PPOC requested attorney's fees in the Prior Lawsuit, but the JNOV in that suit did not award PPOC attorney's fees and denied all relief not granted by the judgment.[2] Bever contends the special assessment could be levied only for a breach of the declaration and it is undisputed that the basis for the assessment was Bever's alleged breach of article 2.9 regarding signage, the same subject matter as in the Prior Lawsuit. According to Bever, PPOC's re-couching of its rejected claim for attorney's fees as a new claim for breach of contract is "mere sophistry."

We agree with Bever. PPOC's argument ignores the underlying basis for the special assessment and the transaction out of which it arose. Article 1.1(Q)(2) provides in part:

> The Association, after due notice and hearing, shall also have the authority to establish and fix a special assessment upon any Unit to secure the liability of the Owner of such Unit to the Association for any breach by such Owner of any of the provisions of this Declaration, which breach shall require an expenditure by the association for repair or remedy.

Under this article, before a special assessment may be levied, there must be a breach by an owner of a provision of the declaration and that breach must require the association to expend funds for repair or remedy.

The summary judgment evidence establishes that the special assessment was to reimburse PPOC and Cheung for attorney's fees and expenses incurred in the Prior Lawsuit with Bever. The notice of the special meeting provided that the purpose of the meeting was to determine whether Cheung should be reimbursed for the attorney's fees and expenses he paid on behalf of PPOC and himself in connection with the Prior Lawsuit and to determine the amount of a special assessment

[2] Bever also argues the jury found zero for PPOC's reasonable and necessary attorney's fees for enforcing the declarations that were the subject of that suit. Bever cites the jury verdict in the Prior Lawsuit in support of this argument. However, although Bever attached the jury verdict to its original petition in this lawsuit, the verdict was not included in either party's summary judgment evidence and is not part of the summary judgment record on appeal.

to the owners or any particular owner to pay the amounts approved. At the owners' meeting, Cheung stated that he spent over $425,000 to defend PPOC and himself in the Prior Lawsuit. He also stated:

> Bever Properties has repeatedly violated the declarations; for one, Article 2.9(E)(4), whereas they have put up signs without written consent from the Board.
>
> Also, Article 2.9(E)(6), they have constructed an LED sign without approval from the Board or written consent from the Board.
>
> And also, Article 2.9(E)(6), again, by removing a sign in the common area that is owned by the Association.

Whether article 2.9 was enforceable and whether Bever violated its provisions were part of the subject matter of the Prior Lawsuit. In particular, PPOC alleged in the Prior Lawsuit that Bever placed signs on the property without board approval in violation of article 2.9(E)(4) of the declaration. Further, our prior opinions make clear that the subject matter of the Prior Lawsuit was Bever's placement of signs on the property and the association's authority to approve or require removal of those signs. *See Bever Properties II*, 355 S.W.3d at 883 ("The genesis of the disputes was [Bever's] desire to construct prominent signage at the location of the office condominium."); *id*. (noting PPOC filed for an injunction to enjoin Bever from violating the use and occupancy restrictions in the declaration and sought its attorney's fees); *see also Bever Properties III*, 2015 WL 4600347, at *1, *3 (describing Taylor's desire when she purchased the condominium for "prominent signage" at the property to promote her brand); *id*. at *4 (noting that Bever installed an illuminated sign after the trial court's summary judgment invalidating the condominium regime, but removed the sign after we reversed the summary judgment in *Bever Properties I*, 246 S.W.3d at 196–97).

PPOC's pleading in the Prior Lawsuit for an injunction and for its attorney's fees incurred as a result of Bever's violation of the declaration establishes that PPOC's cause of action was in existence at the time and could have been litigated. Indeed, PPOC was awarded attorney's fees in

the summary judgment that this Court reversed in part in *Bever Properties II*, 355 S.W.3d at 895–97. We discussed PPOC's right to recover attorney's fees under the three theories raised in its motion for summary judgment: (1) section 82.161 of the uniform condominium act; (2) section 38.001(8) of the civil practice and remedies code; and (3) article 3.11 of the condominium declaration. *Id*. at 895. We addressed each theory and reversed the award of attorney's fees. *Id*. at 895–96. Further, because we reversed the summary judgment in favor of PPOC on a number of Bever's claims, we determined "the issue of [PPOC's] attorney's fees must be reversed and remanded to the trial court for reconsideration." *Id*. 355 S.W.3d at 897. However, the trial court's final judgment on remand, the JNOV, does not award PPOC attorney's fees. Because the issue of PPOC's attorney's fees was remanded to the trial court for determination and the trial court's final judgment does not award attorney's fees, we conclude the subject matter of PPOC's attorney's fees for Bever's breach of the declaration was or could have been litigated in the Prior Lawsuit. PPOC's attempt to recover those same fees through a breach of contract claim for the special assessment arises out of the same subject matter as the Prior Lawsuit.

PPOC may not by artful pleading recast its claim for an injunction and attorney's fees into a claim for breach of contract for failing to pay the special assessment for those same fees. The summary judgment record establishes that PPOC's breach of contract claim in this suit arises out of the same subject matter as the Prior Lawsuit and that subject matter could have been litigated in the Prior Lawsuit. *See Citizens Ins.*, 217 S.W.3d at 499. Accordingly, the trial court properly granted summary judgment on Bever's affirmative defense of res judicata.

Because the trial court's judgment can be affirmed on the ground of res judicata, we need not address collateral estoppel or excuse. *See* TEX. R. APP. P. 47.1. We overrule PPOC's first issue, which also disposes of its second issue.

CONCLUSION

"For any rational and workable judicial system, at some point litigation must come to an end, so that parties can go on with their lives and the system can move on to other disputes." *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017). We affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PLANO PARKWAY OFFICE CONDOMINIUMS A/K/A PLANO PARKWAY OFFICE OWNERS ASSOCIATION, Appellant

No. 05-16-01397-CV V.

BEVER PROPERTIES, LLC, AND JESSE M. TAYLOR, D.D.S., P.A., Appellees

On Appeal from the 366th Judicial District Court, Collin County, Texas
Trial Court Cause No. 366-04855-2013.
Opinion delivered by Justice Stoddart.
Justices Francis and Brown participating.

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

It is **ORDERED** that appellees BEVER PROPERTIES, LLC, AND JESSE M. TAYLOR, D.D.S., P.A. recover their costs of this appeal from appellant PLANO PARKWAY OFFICE CONDOMINIUMS A/K/A PLANO PARKWAY OFFICE OWNERS ASSOCIATION.

Judgment entered this 23rd day of March, 2018.