AFFIRM; and Opinion Filed June 5, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01519-CV

HOPE HILL INVESTMENTS, INC., Appellant
V.
RICHARDSON INDEPENDENT SCHOOL DISTRICT, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. TX-15-02103

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Boatright

This appeal arises from a tax foreclosure suit involving real property owned by appellant Hope Hill Investments, Inc. Appellee Richardson Independent School District, the plaintiff, alleged that Hope Hill was personally liable for unpaid taxes imposed on the property prior to Hope Hill's ownership. Hope Hill filed a counterclaim that sought a declaration that it was not personally liable for these taxes. The District subsequently conceded this point, but not until trial. Following the trial, the court rendered judgment in rem, i.e., against the property, in the amount of the taxes owed. Hope Hill contends that the court should have awarded (i) the declaratory relief that it requested in its counterclaim, and (ii) its attorney's fees as the prevailing party on the counterclaim. Hope Hill also urges that the court erred by not rendering judgment on its affirmative defense of laches, which was predicated on RISD's seven-year delay in filing suit. We affirm.

BACKGROUND

Section 32.07(a) of the Tax Code provides that "property taxes are the personal obligation of the person who owns or acquires the property on January 1 of the year for which the tax is imposed." TEX. TAX CODE ANN. § 32.07 (West 2016). The unpaid taxes at issue were imposed in 2007, and the owner of the property on January 1 of that year was Jack Seeley. Hope Hill subsequently acquired the property from Seeley through a foreclosure sale. Hope Hill has paid all taxes imposed since it took ownership, but a $1,246.60 balance remains with respect to the 2007 taxes, which became delinquent as of January 2008.

RISD sued Hope Hill in October 2015 to collect on the delinquent taxes. Seeley was not named as a defendant in the case. The District's petition alleged that Hope Hill currently owns the property "and/or" owned the property on January 1, 2007, though RISD has since conceded that the latter allegation was incorrect. The District sought (i) a personal judgment against "such Defendant(s) who owned the property" on January 1, 2007, and (ii) a foreclosure and order of sale of the property. Hope Hill denied RISD's allegations and asserted the affirmative defense of laches. It also filed a counterclaim that urged laches as a basis for removing the cloud on its title to the property. On August 1, 2016, Hope Hill amended its counterclaim to additionally assert that it was not personally liable for the unpaid taxes. Three days later, on August 4, RISD sent an e-mail to Hope Hill stating that, after further review, it would amend its petition to "include . . . Seeley and hold Hope Hill . . . as an In Rem Defendant Only." However, the District did not at that time amend its petition. It also did not file an answer to Hope Hill's counterclaim.

The case was tried before the court on September 29, 2016. At the commencement of the trial, RISD's counsel "freely admit[ted] that Hope Hill . . . was not the January 1 owner at the time the taxes were assessed for 2007." RISD represented to the court that it would submit a judgment

"dropping the in personam relief and . . . seeking relief in rem only." Hope Hill then offered evidence of its attorney's fees, and it asked the court to award it the fees that it incurred defending the District's "baseless" in personam claim. Hope Hill also urged that RISD's delay in filing suit barred the court from rendering judgment in rem, and it requested that the court remove the lien from the property based on the District's delay. After trial, the court rendered judgment in rem and ordered that the property be sold to satisfy the unpaid taxes. The judgment denied all relief sought by any party that had not been expressly granted.

Hope Hill thereafter filed a motion for new trial and a motion for sanctions. The court held a single hearing on both motions. At the hearing, Hope Hill renewed its request for attorney's fees and offered additional evidence of the fees incurred up to that point. The court overruled both motions and signed findings of fact and conclusions of law. Pertinent to this appeal, the court's findings state that Hope Hill offered no proof for its laches defense, nor was there a contractual or statutory basis for awarding attorney's fees to Hope Hill. This appeal followed.

ANALYSIS

The gravamen of Hope Hill's appeal is that (i) it prevailed on its declaratory judgment counterclaim, (ii) it should have been awarded attorney's fees on such claim, and (iii) its laches defense precluded the rendition of an in rem judgment. It raises three issues for our review.

Declaratory relief

Hope Hill first contends that the trial court erred by refusing to render judgment on Hope Hill's counterclaim, specifically, its request for a declaration that it was not personally liable for the delinquent 2007 taxes. Hope Hill urges that section 37.004(a) of the Texas Civil Practice and Remedies Code, entitled it to obtain a declaration of its rights under section 32.07 of the Tax Code. We disagree under the circumstances at issue because RISD's abandonment of its in personam claim rendered moot Hope Hill's counterclaim that it was not personally liable for the unpaid taxes.

At that point, there was no live controversy with respect to the counterclaim, and the Declaratory Judgments Act does not empower a trial court to determine a hypothetical question, *OHBA Corp. v. City of Carrollton*, 203 S.W.3d 1, 6 (Tex. App.—Dallas 2006, pet. denied), or to render an advisory opinion, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993). Thus, the trial court did not err by refusing to declare that Hope Hill was not personally liable for the delinquent 2007 taxes. We overrule Hope Hill's first issue.

Attorney's fees

In its third issue, Hope Hill urges three reasons that the court erred by refusing to award it attorney's fees.

Declaratory Judgments Act

Hope Hill urges that the Texas Declaratory Judgments Act mandated a fee award because Hope Hill "prevailed" on its counterclaim. The Act provides that "the court may award . . . reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE Ann. § 37.009 (West 2015). The interpretation of statutory terms is a legal question that we review de novo. *Tex. West Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). Hope Hill cites *Bocquet v. Herring* for the proposition that statutes providing that a party "may recover," "shall be awarded," or "is entitled to" attorney's fees are mandatory. 972 S.W.2d 19, 20 (Tex. 1998). However, section 27.009's provision that the court "*'may' award"* attorney's fees "affords the trial court a measure of discretion in deciding whether to award . . . fees or not." *Id.* (emphasis added). In short, "[t]he Declaratory Judgments Act does not require an award of attorney's fees to the prevailing party." *Preston State Bank v. Willis*, 442 S.W.3d 428, 440 (Tex. App.—Dallas 2014, pet. denied).

In addition, the question of whether Hope Hill was personally liable for the delinquent taxes was already at issue in RISD's petition. In this regard, the counterclaim presented no new

controversy, as is necessary to justify an award of attorney's fees under the Act. *John Chezik Buick Co. v. Friendly Chevrolet Co.*, 749 S.W.2d 591, 594–95 (Tex. App.—Dallas 1988, writ denied). For each of these reasons, Hope Hill has not shown that the trial court's denial of fees was an abuse of discretion.

Motion for sanctions

Hope Hill also argues that the trial court erred in denying its motion requesting attorney's fees as a sanction. RISD responds that Hope Hill did not appeal the denial of its sanctions motion. We disagree with the District's contention. Hope Hill did not specifically limit the scope of this appeal in its notice of appeal from the final judgment, and we therefore have jurisdiction over all parts of this case. *Muthukumar v. Santa Rosa Apartments*, No. 05-11-00151-CV, 2011 WL 2937443, at *1 (Tex. App.—Dallas July 22, 2011, no pet.) (mem. op.).[1] We also disagree with the District's complaint that Hope Hill did not brief the sanctions issue; its brief on its face reflects the contrary. We will therefore consider Hope Hill's contention on its merits under an abuse of discretion standard of review. *Low v. Henry*, 221 S.W.3d 609, 614 (Tex. 2007). We examine the entire record, including any findings of fact and conclusions of law, and we review "conflicting evidence in the light most favorable to the trial court's ruling and drawing all reasonable inferences in favor of the court's judgment." *Zeifman v. Michels*, No. 03-12-00114-CV, 2013 WL 4516082, at *6 (Tex. App.—Austin Aug. 22, 2013, no pet.) (mem. op.).

[1] Hope Hill's motion for sanctions was untimely, but in the context of this case we may nonetheless consider the trial court's ruling on the grounds raised in the motion. Specifically, the motion was in substance a motion to modify the judgment, *see Lane Bank Equip. Co. v. Smith S. Equip., Inc*., 10 S.W.3d 308, 313 (Tex. 2000) (holding that timely post-judgment motion to incorporate sanctions into a new final judgment qualifies as a motion to modify), and in this case the motion was untimely because it was filed forty-one days after judgment, *see* TEX. R. CIV. P. 329b(a), (d) (providing that motion to modify must be filed within thirty days after judgment). A trial court's order overruling an untimely motion to modify cannot be the basis of appellate review, even if the trial court acts within its plenary power period. *See Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003) (holding same with respect to untimely motion for new trial); *In re Estate of Bendtsen*, 230 S.W.3d 823, 831 n.9 (Tex. App.—Dallas 2007, pet. denied) (concluding that *Moritz* applies to both motions for new trial and motions to modify). However, during the trial, and in its timely filed motion for new trial, Hope Hill requested attorney's fees on the same grounds that it subsequently raised in its untimely motion for sanctions. The court overruled Hope Hill's timely requests, and we may consider these rulings on appeal. *Cf. In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 754 n.4 (Tex. 2013) (concluding that consideration of timeliness of amended motion for new trial was unnecessary because trial court's order on such motion relied solely on arguments already made in original motion).

Hope Hill urges that RISD's petition violated Chapters 9 and 10 of the Civil Practice and Remedies Code[2] and Rule 13 of the Texas Rules of Civil Procedure[3] because the petition pled in the alternative that Hope Hill was personally liable for the unpaid 2007 taxes, notwithstanding that section 32.07 of the Tax Code precluded such liability. *See Low*, 221 S.W.3d at 615 ("Pleading in the alternative does not permit alleging a claim with no reasonable basis in fact or law 'in the alternative' of a claim that does have support."). It is undisputed that RISD, before filing its suit, did not search the public title records to determine whether Hope Hill owned the property on January 1, 2007. The District's conduct was contrary to the rule that an attorney's signature on a pleading constitutes a certificate that—to the best of his belief *"formed after reasonable inquiry"*—the pleading is not groundless. TEX. R. CIV. P. 13 (emphasis added). However, Hope Hill bore the burden of overcoming the presumption that RISD's pleadings were filed in good faith. *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 361 (Tex. 2014). The lack of a pre-suit investigation by the District did not itself overcome this presumption. *See Shilling v. Gough*, 393 S.W.3d 555, 562 (Tex. App.—Dallas 2013, no pet.) (trial court's finding that plaintiff failed to make independent investigation did not by itself overcome presumption of good faith).

Hope Hill also points to its July 29, 2016 amended answer as evidence that the District knew by that date that its personal liability claim against Hope Hill was false. Upon receiving notice that Hope Hill may not have owned the property when the 2007 taxes were imposed, the District was obligated to make a reasonable inquiry before pursuing the claim further. *See Nath*, 446 S.W.3d at 370 ("[I]f a party later learns through discovery that no factual support for the contention exists and still pursues litigation, such conduct might be sanctionable."); *Zeifman*, 2013 WL 4516082, at *8 ("A party acts in bad faith if he has been put on notice that his understanding

[2] TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001–.014 (West. 2002); *id.* §§ 10.001–.006 (West 2002).

[3] TEX. R. CIV. P. 13.

of the facts may be incorrect and he does not make reasonable inquiry before pursuing the claim further."). Related to this point, RISD represented in its August 4, 2016 e-mail that it would amend its petition to include Hope Hill as an "in rem" defendant only. Although the District did not make good on its commitment until the trial, we cannot say that the foregoing evidence overcame the presumption of good faith. We therefore conclude that the trial court did not abuse its discretion in denying Hope Hill's motion for sanctions.

Amount of fees

In addition, Hope Hill claims that it presented uncontroverted evidence that established as a matter of law the amount of attorney's fees that it incurred. As support, it cites *Ragsdale v. Progressive Voters League*, in which the Texas Supreme Court held that the amount of attorney's fees may be established as a matter of law "where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon." 801 S.W.2d 880, 882 (Tex. 1990) (per curiam). *Id*. However, the supreme court's "subsequent invocation of *Ragsdale* has been limited to issues regarding the amount, rather than the availability of, attorney's fees." *Med. Specialist Grp., P.A. v. Radiology Assocs., L.L.P.*, 171 S.W.3d 727, 736 (Tex. App.—Corpus Christi 2005, pet. denied) (citing *Brown v. Bank of Galveston, Nat'l Ass'n*, 963 S.W.2d 511, 515–16 (Tex. 1998), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W .2d 32, 45–46 (Tex. 2007)). We conclude that Hope Hill has not established its entitlement to attorney's fees simply by proving their amount. We overrule Hope Hill's third issue.

Laches

It is undisputed that RISD filed suit within the statute of limitations, but Hope Hill's second issue contends that the equitable doctrine of laches barred the trial court from rendering judgment

for the District on its in rem claim due to the District's seven-year delay in filing suit. Laches should not bar an action on which limitations has not run unless allowing the action "'would work grave injustice.'" *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Text. 1998) (quoting *Culver v. Pickens*, 176 S.W.2d 167, 170 (Tex. 1943)). "'[I]n the absence of some element of estoppel or such extraordinary circumstances as would render inequitable the enforcement of petitioners' right after a delay, laches will not bar a suit short of the period set forth in the limitation statute.'" *Id.* (quoting *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834, 840 (Tex. 1968)).

Hope Hill claims that it made a diligent effort to locate Seeley, the original property owner, but he could not be found due to RISD's delay in filing suit. Had the District named Seeley as a defendant, Hope Hill contends that it could have asserted a cross-claim against him. However, Hope Hill's lost ability to seek contribution or indemnity from other parties due to RISD's delay does not, without more, raise a claim of "estoppel" or "extraordinary circumstances." *Brewer v. Nationsbank of Texas, N.A.*, 28 S.W.3d 801, 806 (Tex. App.—Corpus Christi 2000, no pet.). In sum, a court's decision on laches is reviewed for an abuse of discretion. *Transportation League, Inc. v. Morgan Exp., Inc.*, 436 S.W.2d 378, 388 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.). Hope Hill bore the burden of proving the defense, *Helsley v. Anderson*, 519 S.W.2d 130, 133 (Tex. Civ. App.—Dallas 1975, no writ), and it did not meet its burden. We overrule Hope Hill's second issue.

CONCLUSION

We affirm the judgment of the trial court.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

HOPE HILL INVESTMENTS, INC., Appellant

No. 05-16-01519-CV V.

RICHARDSON INDEPENDENT SCHOOL DISTRICT, Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. TX-15-02103.
Opinion delivered by Justice Boatright.
Justices Bridges 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 appellee RICHARDSON INDEPENDENT SCHOOL DISTRICT recover its costs of this appeal from appellant HOPE HILL INVESTMENTS, INC.

Judgment entered this 5th day of June, 2018.