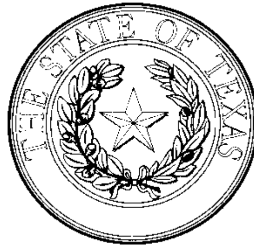
Opinion issued November 10, 2010



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00507-CV

YIGAL BOSCH AND TRANSAMERICA CORPORATION OF HOUSTON, Appellants

V.

OPEN PINES CONDOMINIUM OWNERS ASSOCIATION, INC., Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2007-75856

MEMORANDUM OPINION

Appellants, Yigal Bosch and Transamerica Corporation of Houston (collectively, "Bosch"), sued Open Pines Condominium Owners Association, Inc.

("Open Pines") for breach of contract. A jury found that Open Pines did not violate the Declaration of the Association by approving a special assessment to replace the siding of all condominiums in the complex and that Bosch voluntarily paid this special assessment. The trial court entered a judgment for Open Pines and ordered that Bosch take nothing on his claims. In two issues on appeal, Bosch argues that (1) Open Pines violated the Declaration of the Association when it approved the special assessment without prior written approval from 95% of the owners of the complex and (2) he did not pay the special assessment voluntarily.

We affirm.

BACKGROUND

Bosch has managed commercial real estate for approximately twenty-eight years. In 1992, Bosch, individually and through his corporation, Transamerica Corporation,[1] purchased eight condominium units in the Open Pines condominium complex, giving him approximately eighteen percent ownership of the complex. At the time that Bosch purchased these units, he was aware that he was bound by the Declaration of the Association ("the Declaration"). The Declaration provides for funding of the common expenses of maintaining the complex through both monthly assessments and special assessments. The Declaration defines common expenses as follows:

[1] Bosch is president of Transamerica Corporation.

> "Common Expenses" shall mean and include: (1) all sums assessed against the General Common Elements and Limited Common Elements by the Association; (2) expenses of administration and management, maintenance, repair, or replacement of the General Common Elements and Limited Common Elements; (3) expenses declared to be Common Expenses by the provisions of this Declaration or the ByLaws; and (4) expenses agreed upon as Common Expenses by the Owners.

The Declaration provides for monthly assessments in Section 14:

> 14. Assessments for Common Expenses.
> (a) The Managing Agent or Board of Managers, as the case may be, shall from time to time determine the cash requirements necessary to provide for the payment of all estimated expenses growing out of or connected with the ownership, maintenance, and operation of the Property. . . . After determining such cash requirements, the Managing Agent or Board of Managers shall establish monthly assessments based thereupon, which assessment shall be paid by each Owner as hereinafter provided.

The Declaration provides for special assessments in Section 21:

> 21. Reconstruction of General Common Elements. The Owners representing an aggregate ownership interest in the General Common Elements of ninety-five percent (95%) or more, may agree that the General Common Elements are obsolete and that the same should be renewed or reconstructed.

Bosch consistently paid maintenance fees for common expenses, such as lawn care and gate repair, through monthly assessments after he purchased the units. Bosch also paid special assessments as needed for roofing repairs and painting.

In March 2006, the Open Pines board met and discussed a special assessment for replacing the siding in the complex. The condominium unit owners

who attended this meeting did not object to the proposed special assessment. The board approved a plan to replace the siding of all units in the complex. The special assessment went into effect in May 2006. It is undisputed that the May 2006 special assessment did not have the prior written approval of the owners of the Open Pines complex.

Bosch did not pay the special assessment for the months of June through October of 2006. After Open Pines informed Bosch that it was pursuing foreclosure on his property due to his failure to pay the special assessment, Bosch paid the November 2006 special assessment.

Bosch sued, alleging that (1) Open Pines violated the Declaration when it approved the special assessment without the prior written approval of 95% of the owners of the complex and (2) he did not pay the special assessment voluntarily. He argued at trial that Section 21 of the Declaration required the prior written consent of 95% of owners to complete projects within the complex that were not basic monthly maintenance. Bosch also argued at trial that he did not pay the special assessments voluntarily, but he was forced to do so to avoid foreclosure on his units.

At trial, Bosch testified that the complex did not need new siding and it could have benefited to the same degree by completing a few repairs and painting. Bosch testified that his payment of the special assessment was not voluntary, that

he protested when he paid the assessment, that he sued because he did not want his units to be foreclosed upon, and that he felt filing a lawsuit was "the only way to defend himself." He further testified that he purposefully did not pay the assessments until he received foreclosure notices on his units.

Bruce Menzer, a member of the Open Pines Condominium Association, testified that he owned ten units in the Open Pines complex, purchased between 1988 and 2003, that he had served on the board of that Association "off and on" since becoming an owner, and that he served on the board in May 2006. He testified that Bosch was present at the March 7, 2006 board meeting during which the board discussed the special assessment for siding. He further testified that there was no opposition to the proposal for the special assessment, and he specifically testified that Bosch did not object. He testified that windows, balconies, and doors were falling off of units due to the fact that the siding was "rotted out in some places" and that recipients of government subsidization of housing costs through the Section 8 program[2] were being turned down for assistance to live at Open Pines because of the condition of "the exterior of the building."

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[2] The government provides partial or full subsidization of housing costs for individuals who qualify for the Section 8 program. Rental property must meet certain quality standards for owners to rent their property to Section 8 recipients.

The jury was asked to determine whether Open Pines violated the Declaration. The jury charge on this issue read:

> Did Open Pines Condominium Owners Association, Inc. fail to comply with the Condominium Declaration for the Open Pines Condominium Owners Association, Inc.?
>
> You are hereby instructed that the May 2006 special assessment is presumed reasonable unless you determine by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

The jury answered "no" to this question.

The jury was also asked to determine whether Bosch made the special assessment payments voluntarily. The jury charge on this issue read:

> Did Yigal Bosch and Transamerica Corp. of Houston voluntarily pay the May 2006 special assessment to Open Pines Condominium Owners Association, Inc.?
>
> You are instructed that a party cannot recover as damages money that it voluntarily paid with full knowledge of all the facts and without fraud, deception, duress, or coercion by the defendant. Coercion includes pressure to take action to avoid consequential harms before uncertainty as to contractual obligations can be resolved.

The jury answered "yes" to this question.

Thus, the jury found that Open Pines did not breach the contract as set forth in the Declaration and that Bosch paid the special assessments voluntarily. Bosch did not move for a new trial.

Violation of the Declaration

In his first issue, Bosch complains that Open Pines violated the Declaration when it approved the special assessment without prior written approval from 95% of the owners of the complex. We construe this as a challenge to the legal sufficiency of the evidence to support the jury's finding that Open Pines did not violate the Declaration by making the assessment to pay for the siding.[3]

With legal sufficiency complaints, the starting point for our analysis when, as here, there is no complaint of charge error, is the charge actually submitted to the jury. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

The jury was asked to determine whether Open Pines violated the Declaration:

> Did Open Pines Condominium Owners Association, Inc. fail to comply with the Condominium Declaration for the Open Pines Condominium Owners Association, Inc.?
>
> You are hereby instructed that the May 2006 special assessment is presumed reasonable unless you determine by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory.

The jury explicitly found that Open Pines did not fail to comply with the Declaration when it answered "no" to question one.

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[3] Bosch does not articulate a factual sufficiency challenge, and did not preserve an argument of factual sufficiency because he did not move for a new trial. *See* TEX. R. CIV. P. 324(b)(2).

A. Standard of Review

In reviewing a challenge to the legal sufficiency of the evidence, we determine whether the evidence would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In conducting this review, we credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id*.

We consider the evidence in the light most favorable to the finding under review and indulge every reasonable inference that would support this finding. *Id.* at 822. We hold that the evidence is legally insufficient only if (1) the record reveals a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810. If there is more than a scintilla of evidence to support the jury finding, the legal insufficiency challenge fails. *Appraisal Review Bd. of El Paso County Cent. Appraisal Dist. v. Fisher*, 88 S.W.3d 807, 815 (Tex. App.—El Paso 2002, pet. denied) (citing *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987)). Furthermore, "[w]hen a party attacks the legal sufficiency of an adverse finding on an issue on which [he] has the burden of proof, [he] must demonstrate on appeal

that the evidence establishes, as a matter of law, all vital facts in support of the issue." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). When reviewing evidence in a light favorable to the jury verdict, we assume "jurors made all inferences in favor of their verdict if reasonable minds could, and disregard all other inferences." *Wilson*, 168 S.W.3d at 821.

B. Analysis

Condominium owners are required to pay their pro rata share of "the expenses to administer the condominium regime and to maintain and repair the general common elements" of the condominium complex. TEX. PROP. CODE ANN. § 81.204(a)(1) (Vernon 2007). "Owners of condominium units accept the terms, conditions, and restrictions in the condominium declaration by accepting deeds to individual units." *Daly v. River Oaks Place Council of Co-Owners*, 59 S.W.3d 416, 418 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Owners implicitly delegate authority to the condominium association when they enter the condominium scheme. *Pooser v. Lovett Square Townhomes Owners' Ass'n, Inc.*, 702 S.W.2d 226, 231–32 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

In *Inwood North Homeowners' Association v. Harris*, the Texas Supreme Court held that maintenance assessments levied to repair and improve the common areas of a subdivision met the requirements of a restrictive covenant because they sufficiently touched and concerned the land, and that the Declaration evidenced the

intent of the parties to be bound and specifically bound the parties, their successors and assigns. *Inwood N. Homeowners' Ass'n v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987).

The Declaration in this case also evidences the intent of the parties to be bound and specifically binds the parties, their successors, and assigns; therefore, the assessments levied by Open Pines meet the requirements of a restrictive covenant.[4] *See id.*

Section 14 of the Declaration provides:

> 14. Assessments for Common Expenses.
> (a) The Managing Agent or Board of Managers, as the case may be, shall from time to time determine the cash requirements necessary to provide for the payment of all estimated expenses growing out of or connected with the ownership, maintenance, and operation of the Property. . . . After determining such cash requirements, the Managing Agent or Board of Managers shall establish monthly assessments based thereupon, which assessment shall be paid by each Owner as hereinafter provided.

A rational jury could have determined that the costs associated with repairing the siding were "expenses growing out of or connected with the ownership, maintenance, and operation of the Property" and thus that the board was permitted

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[4] Condominium Declaration for Open Pines, para. 4, reads: "NOW, THEREFORE, Developer does hereby publish and declare that the following terms, covenants, restrictions, limitations, conditions, easements, uses, and obligations shall constitute covenants to run with the land and shall be a burden and benefit to the Developer, its successors and assigns and any person acquiring or owning an interest in such property and improvements, together with their grantees, successors, heirs, executors, administrators, devisees and assigns."

by section 14 to "establish monthly assessments based thereupon." Furthermore, the jury could have concluded that replacement of the siding was a "common expense" based on the definition in the Declaration, which stated that common expenses included "expenses of . . . maintenance, repair, or replacement of the General Common Elements and Limited Common Elements." Section 14 does not contain any provisions requiring 95% of the owners to approve the assessment.

During trial, the jury heard evidence that the board of managers determined that the siding was in disrepair and needed to be replaced. The board subsequently approved the special assessment for the common expense of replacing the siding. Thus, there is more than a scintilla of evidence supporting the jury's finding that Open Pines did not violate the declaration. *See Wilson*, 168 S.W.3d at 810; *Fisher*, 88 S.W.3d at 815.

Bosch relies on section 21 of the Declaration in arguing that the Declaration required a vote and prior written approval of 95% of the condominium owners for a special assessment to fund major work on the common area. The Declaration provides for special assessments in Section 21:

> 21. Reconstruction of General Common Elements. The Owners representing an aggregate ownership interest in the General Common Elements of ninety-five percent (95%) or more, may agree that the General Common Elements are obsolete and that the same should be renewed or reconstructed.

Bosch argues that this section "clearly set[s] the requirement of a vote when a major replacement of the common area is to be done." We disagree. Section 21, by its plain language, applies to action taken by "[t]he Owners representing an aggregate ownership interest in the General Common Elements," not to actions taken by the board of managers.

Bosch also argues that Section 14, on which Open Pines relies, "does not delegate any authority to the board to impose special assessment[s]." As we have already discussed, Section 14 of the Declaration provides for the board to pay for "all estimated expenses growing out of or connected with the ownership, maintenance, and operation of the Property" through monthly assessments, and the jury could have reasonably concluded that the assessment for replacing the siding was such an expense.

Bosch further argues that the amount of the special assessment was unreasonable and that the high amount of the special assessment prevents the board from assessing these expenses without prior approval of the owners. Finally, he argues that that the special assessment was discriminatory. In his reply brief, Bosch notes that because two of the board members "live on property they are the ones to benefit from the expenditure, not the rest of the owners." Bosch argues that the special assessment did not increase the value of his property because the cost of repair exceeds the amount for which he can rent his units. The jury

impliedly found, by answering that Open Pines did not violate the Declaration, that the special assessment approved by the board was reasonable.

The "exercise of discretionary authority by a property owners' association . . . concerning a restrictive covenant is presumed reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory." TEX. PROP. CODE ANN. § 202.004(a) (Vernon 2007). Because the unobjected-to charge instructed the jury to presume that the special assessment was reasonable, Bosch had the burden of proof at trial to demonstrate that the special assessment was arbitrary, capricious, or discriminatory. *See id*; *Osterberg*, 12 S.W.3d at 55.

Regarding Bosch's argument that the assessment was unreasonable due to the high cost of the assessment, we observe that Section 14 does not set limitations on the size of monthly assessments and it specifically names "repairs and renovations" and "all other costs and expenses relating to such maintenance, ownership, and operation" as potential expenses that qualify as common expenses. *See Pooser*, 702 S.W.2d at 231 (holding that owners' "association was vested with considerable discretion . . . to determine the necessary expenses for the operation of the condominium project" and did not act unreasonably in requiring owners to pay past due assessments even when some offsets had not been satisfied); *San Antonio Villa Del Sol Homeowners Ass'n v. Miller*, 761 S.W.2d 460, 464 (Tex.

App.—San Antonio 1988, no writ) (holding that condominium board acted reasonably when it ordered pipes replaced and levied special assessment without prior membership approval).

Regarding Bosch's argument that the assessment was unreasonable because it was discriminatory, we observe that Mezner testified that windows, balconies, and doors were falling off of units due to the fact that the siding was "rotted out in some places." In addition, Mezner testified that Section 8 recipients were getting turned down for assistance to live at Open Pines because of the condition of "the exterior of the building." Based on Mezner's testimony, a rational jury could have found that the board's action to replace the siding was not discriminatory because it applied to every unit in the complex and affected each owner through the same pro rata interest-measuring scheme and that all owners, whether they lived in the complex or owned the units as investment properties, would benefit from improving the condition of the property.

A rational jury also could have disagreed with Bosch's argument that the replacement of the siding decreased the value of his units because, as Bosch testified, tenants living in the units would benefit and, as a result, would rent Bosch's units, indirectly benefiting Bosch. Although Bosch testified that he would have made a different business decision regarding whether to replace the siding or repair portions of the siding and repaint, the decision to replace the siding could

reasonably be understood as not discriminating against Bosch. *See Pooser*, 702 S.W.2d at 231 (affirming trial court's conclusion that "[s]o long as a condominium association or board of managers has acted reasonably in the exercise of its duties under the condominium declaration, a condominium owner is not entitled to recover damages, or to avoid maintenance assessments, because of his disagreement with the actions taken by the association or board."). A rational jury could have determined that the special assessment was reasonable by believing the testimony of Mezner and disbelieving the testimony of Bosch. *See Gabriel v. Lovewell*, 164 S.W.3d 835, 848 (Tex. App.—Texarkana 2005, no pet.) (holding that jury's verdict was based on legally sufficient evidence when it went against testimony of expert witness because credibility of this testimony was diminished by other witnesses' testimony and jury could "consider all . . . evidence in light of their own general experience and common sense").

These arguments failed to demonstrate that the evidence establishes, as a matter of law, all vital facts in support of Bosch's issue. *See Francis*, 46 S.W.3d at 241.

We overrule Bosch's first issue.

Payment of Special Assessments

Bosch argues, in his second issue, that he did not pay the special assessment voluntarily and is therefore entitled to recover the amount that he paid for the

assessment as damages. He argues that the fact that he did not pay the assessments until he was threatened with foreclosure and he protested paying the assessments demonstrates that the threat of foreclosure coerced him into paying the special assessments.

The jury was asked to determine whether Bosch made the special assessment payments voluntarily:

> Did Yigal Bosch and Transamerica Corp. of Houston voluntarily pay the May 2006 special assessment to Open Pines Condominium Owners Association, Inc.?
>
> You are instructed that a party cannot recover as damages money that it voluntarily paid with full knowledge of all the facts and without fraud, deception, duress, or coercion by the defendant. Coercion includes pressure to take action to avoid consequential harms before uncertainty as to contractual obligations can be resolved.

The jury explicitly found that Bosch paid the special assessments voluntarily by answering "yes" to this question. In doing so, the jury impliedly found that Bosch was not coerced into paying the special assessments, nor did he pay the assessments under duress.

In general, money "voluntarily paid with full knowledge of all the facts and without fraud, deception, duress[,] or coercion cannot be received back [even if] it was paid upon a void or illegal demand or upon a claim which had no foundation in fact. . . ." *Tyler v. Tyler*, 742 S.W.2d 740, 743 (Tex. App.—Houston [14th Dist.] 1987, writ denied); *see Spring Branch Bank v. Mengden*, 628 S.W.2d 130,

134 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). For a payment to be made under duress, the party demanding payment must (1) threaten an action that the demanding party does not have a legal right to do, (2) act in a manner that imposes an illegal exaction or some fault or deception, (3) the threat must be imminent, and (4) the threat must destroy the free agency of the party making the payment without the present means of protection. *Mengden*, 628 S.W.2d at 134. "It is never duress to threaten to do that which a party has a legal right to do." *Id.* at 134–35 (citing *Ulmer v. Ulmer*, 162 S.W.2d 944, 947 (Tex. 1942)); *see Ward v. Scarborough*, 236 S.W. 434, 437 (Tex. 1922). Whether duress exists is determined by reviewing the acts or conduct of the party accused of duress; the emotions of the paying party do not suffice to create duress. *Williams v. Jackson*, No. 01-07-00850-CV, 2008 WL 4837484, at *2 (Tex. App.—Houston [1st Dist.] Nov. 6, 2008, no pet.) (mem. op.).

Bosch testified that he was not misled as to the amount or purpose of the special assessment and penalties that he paid; therefore, neither fraud nor deception applies to this case. Furthermore, the evidence at trial indicated that Bosch had full knowledge of all the facts. Bosch testified to working in the commercial real estate industry for the past twenty-eight years and to owning more than one hundred properties in Houston. When questioned about paying the special assessment,

Bosch testified that he "filled out checks" himself for each individual unit, and dated, entered the amount, and signed each check.

Bosch argues that the threat of foreclosure constituted duress or coercion forcing him to pay the assessment. However, the evidence at trial showed that Bosch was on notice that foreclosure on his units was a potential, legally valid consequence of not paying the special assessment. Section 14 of the Declaration stated that "lien[s] for payment of common expenses . . . may be enforced by foreclosure in like manner as a mortgage on real property." Therefore, the threat of foreclosure in this case did not constitute duress or coercion. *See Mengden*, 628 S.W.2d at 134–35 (stating that "It is never duress to threaten to do that which a party has a legal right to do."); *see also Villa del Sol*, 761 S.W.2d at 464–65 (holding that association acted within its authority when it cut off owner's utilities because owner was in violation of declaration by not paying his monthly maintenance fee and declaration contained provision "permit[ting] the Association to take action that will abate a condition that is clearly contrary to the intent and meaning of the Bylaws"). Thus, Bosch has failed to establish as a matter of law all vital facts in support of this issue because he did not present any evidence that Open Pines threatened an action that it did not have a legal right to do or acted in a manner that imposed an illegal exaction or some fault or deception. *See Francis*, 46 S.W.3d at 241 (party who bears burden of proof at trial must demonstrate on

appeal that evidence establishes, as a matter of law, all vital facts supporting issue); *Mengden*, 628 S.W.2d at 134 (providing elements that claimant must establish to recover payment allegedly made under duress).

Thus, a rational jury could have found that Bosch understood the consequences of signing the checks, and chose to do so outside the force of coercion.

We overrule Bosch's second issue.

CONCLUSION

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Bland.