Opinion issued November 17, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00913-CV

DONALD L. CHILDRESS, Appellant

V.

CASA DEL MAR ASSOCIATION, INC., Appellee

On Appeal from the County Court at Law Number 2
Galveston County, Texas
Trial Court Case No. 61,153

MEMORANDUM OPINION

Appellant Donald Childress, a unit owner of the Casa Del Mar Condominiums, sued appellee Casa Del Mar Association, Inc. and individual members of its board for declaratory and injunctive relief against the enforcement

and validity of a special assessment levied by the Association. In two issues, Childress argues that the trial court (1) erred by granting the Association's motion for summary judgment, and (2) abused its discretion by dismissing his remaining claims for want of prosecution.

We affirm.

BACKGROUND

Casa Del Mar Condominiums are located in Galveston County. The Association, made up of all condominium unit owners, operates according to an ownership agreement: the Condominium Declaration.

A. General Declaration Provisions Governing Special Assessments for Common Area Repairs

Article V of the Declaration, entitled "Maintenance Assessments," sets forth the general rules governing the procedures and calculations for imposing the initial, monthly, and special assessments on owners. With regard to special assessments, it provides:

> 5.6 SPECIAL ASSESSMENTS FOR IMPROVEMENTS: In addition to the annual assessments authorized above, at any time the Association may levy in any calendar year a special assessment applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, repair or replacement of improvements upon the Common Area, including the necessary fixtures and personal property related thereto, provided that any such assessment shall be approved by a two-thirds (2/3) vote of the quorum of Owners voting in person or by proxy at a meeting duly called for this purpose.

B. Provisions Governing Repair Costs Due to Fire or Other Disasters

Article VI, entitled "Destruction or Obsolescence of Improvements," also contains provisions dealing with special assessments when the condominium suffers severe damage from certain natural disasters. If insurance proceeds are insufficient to fund the repairs and the damage to the Common Elements is less than 66 2/3% of the total value of the Common Elements, then the Declaration provides that any deficient amount shall be collected as a special assessment from each unit owner according to his or her proportionate interest. In relevant part, it states:

> b. Repair and reconstruction of the improvement(s) . . . means restoring the improvement(s) to substantially the same condition in existence prior to the damage. . .
>
> (1) In the event of damage or destruction due to fire or other disaster, the insurance proceeds, if sufficient to reconstruct the improvement(s), shall be applied by the Association, as Attorney-In-Fact, to such reconstruction, and the improvement(s) shall be promptly repaired and reconstructed.
>
> (2) If the insurance proceeds are insufficient to repair and reconstruct the improvement(s), and if such damage is not more than sixty-six and two-thirds percent (66-2/3%) of all the Common Elements, not including land, such damage or destruction shall be promptly repaired and reconstructed by the Association, as Attorney-In-Fact, using the proceeds of insurance and the proceeds of an assessment to be made against all of the Owners and their Condominium Units. Such deficiency assessment shall be a special assessment made pro rata according to each owner's proportionate interest and shall be due and payable within thirty (30) days after written notice thereof.

C. Hurricane Ike Damage to Casa Del Mar

When Hurricane Ike struck the Galveston coast in 2008, Casa Del Mar suffered extensive damage and required repairs that totaled approximately $2.8 million. It is undisputed that these needed repairs totaled less than 66 2/3 % of the total value of the Common Elements. Out of about $4.5 million submitted in insurance claims, the Association actually received only $950,000 in insurance proceeds. The Association hired an insurance-adjusting firm to help it navigate the process to maximize its recovery.

On May 30, 2009, the Association conducted a vote of the owners on a special assessment of $10,000 to cover the costs of Hurricane Ike repairs that had not been reimbursed through insurance, with the representation that any additional insurance proceeds collected would be refunded back to the owners. A majority of the owners who voted, but less than 2/3 of those owners, voted in favor of this $10,000 assessment. The Association then called another meeting on June 27, 2009 to vote on a reduced special assessment of $5,000 (to be paid in two installments) for the same purpose and with the same understanding that the assessment would be refunded if insurance proceeds were forthcoming. This $5,000 special assessment was approved by a 2/3 majority.

THIS LAWSUIT

On July 8, 2009, Childress filed his original petition against the Association seeking (1) a declaratory judgment that the "June 29, 2009 assessment of the Plaintiff's unit in the amount of $5,000.00 is unreasonable, illegal, and void, and that the [Association]'s purported lien on the Plaintiff's unit for its collection and enforcement is improper, unenforceable, and null and void for all purposes," (2) a temporary restraining order "to prevent the [Association] from enforcing an assessment against the condominium unit at issue in this suit," (3) a temporary injunction, (4) a permanent injunction, and (5) an award of attorneys' fees.

The following day, on July 9, 2009, the trial court issued Childress's requested temporary restraining order and scheduled a hearing on Childress's request for injunctive relief. Before the hearing, Childress filed a motion to certify the suit as a class action. The Association filed a general denial and a counterclaim for attorneys' fees under the Declaration, as well as under TEX PROP. CODE § 5.006 and TEX. CIV. PRAC. & REM. CODE §§ 37.009, 38.001.

On August 31, 2009, the day of the temporary injunction hearing, Childress filed his second amended petition adding claims against five of the Association's board of directors as individual defendants for allegedly committing ultra vires acts.

A. The Temporary Injunction Hearing

At the hearing, Childress sought to demonstrate that there were irregularities in the vote approving the $5,000 assessment. In response, the Association's President, Thomas Martin, testified that the board was empowered under section 6.1(b)(2) of the Declaration to impose the $5,000 special assessment—*without* a vote of the owners—to defray the repair costs caused by Hurricane Ike because the insurance proceeds were insufficient to cover the repairs. He explained that the special assessment vote was nonetheless called because it is the board's general philosophy that special assessments should be made with input from the owners. For this reason, in addition to disputing that there were voting irregularities, the Association argued that no improprieties in voting procedures could justify an injunction against imposition of an assessment that was not required to be voted upon in the first instance. At the close of the hearing, the court stated that it did "not hear any evidence about irregularities in the election." While it posited that the process for determining who casts votes for commercial spaces at Casa Del Mar is "vague as to how it's been done," the court ultimately concluded that the issue was "moot" because the vote "didn't have to happen to have the assessment." That fact, according to the court, was as "clear as it can be in the declaration." The court then orally announced that the temporary restraining order was dissolved and "this lawsuit is dismissed." When Childress's attorney pointed out that he had

"other claims not related to this specific issue" pending, the court clarified that "[a]ll these issues are dismissed."

The court signed an order denying a temporary injunction, dissolving the temporary restraining order, and dismissing Childress's declaratory judgment action with prejudice.

B. The Partial Summary Judgment

On March 25, 2010, the Association filed a traditional summary judgment motion on its counterclaim seeking a declaration "consistent with [the court's] ruling at the Temporary Injunction hearing, that the assessment made the basis of this suit is valid and enforceable," and an award of $42,265 in trial attorneys' fees, as well as conditional appellate fees, "pursuant to Civil Practice & Remedies Code Ann, Section 37.001 et seq and Section 5.006 of the Texas Property Code."

Childress responded by arguing that section 5.006 of the Texas Property Code, which states the prevailing party shall be awarded attorneys' fees in an action "based on breach of a restrictive covenant pertaining to real property," is not applicable because there was no breach of restrictive covenant involved in this action. Childress further contended that the court should exercise its discretion to decline to award attorney's fees or, alternatively, hold that fact issues existed about whether the fees sought under the Declaratory Judgment Act were "reasonable, necessary, equitable, and just." On May 17, 2010, without specifying the grounds,

the court granted the Association's motion for summary judgment, awarding $20,000 in trial attorney's fees, and additional, conditional appellate fees.

C. Dismissal for Want of Prosecution

In a letter dated May 15, 2010, the court notified Childress of its intent to dismiss the remainder of his claims for want of prosecution on June 30, 2010 at 11:00 a.m., stating: "Unless you file a Motion to Retain and Appear IN PERSON to show reason why this case should be retained, this case will be **Dismissed for Want of Prosecution**." In response, Childress filed a third amended petition and a motion to retain on the day of the dismissal hearing. This amended petition, which was filed at 10:14 a.m.—about 45 minutes before the dismissal hearing—dropped the only remaining unlitigated claims against individual board members and added claims against the Association for "declaratory relief that obtaining emergency loans for Hurricane Ike related repairs were ultra vires acts," and for money damages "based on improper loans." The motion to retain filed at 11:48 a.m.—after the dismissal hearing—alleged as "cause why this case should not be dismissed for want of prosecution":

> As Plaintiff has timely filed a third amended pleading asserting new claims against Defendant which have not yet been litigated, and this amended pleading is Plaintiff's live pleading in this case at the time of dismissal hearing, the court should not dismiss this case for want of prosecution.

After the dismissal hearing, the trial court dismissed the case without prejudice for want of prosecution in an order signed July 2, 2010.[1] Childress timely filed a Verified Motion to Reinstate, but his attorney did not appear at the hearing on the motion, and the court denied the motion. Childress's motion for rehearing was denied and he timely appealed the dismissal and summary judgment ruling. He does not challenge on appeal the trial court's denial of his motion to reinstate.

SUMMARY JUDGMENT

In his first issue, Childress contends the trial court erred by granting the Association's motion for summary judgment. Specifically, he argues that a fact issue exists as to whether the Association waived its right to impose a special assessment unilaterally by conducting a vote when one was not required. He further asserts that, if the vote was necessary because the Association waived its right to forego the vote, a fact issue exists as to whether the vote was "improper in that [the Association] double counted its own votes in order to obtain the necessary two-third majority" by voting the common, commercial units in favor of the assessment. He thus asks us to reverse the trial court's summary judgment and "reverse and remand these claims to the trial court for a full hearing."

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[1] We do not have a record of the hearing on the dismissal, but Childress's attorney stated in later filings that the case was dismissed for want of prosecution "due to the failure of plaintiff's attorney to file a motion to retain prior to the hearing on the Court's motion to dismiss this case for want of prosecution."

In response, the Association argues that the trial court's summary judgment was proper because the trial court correctly concluded that the Association was empowered under section 6.1 of the Declaration to levy the special assessment without a vote, such that any alleged irregularities in the vote would be irrelevant. The Association also contends that the waiver argument Childress advances here was waived by his failure to ever "argue[] in the trial court that the Association waived its right to levy the assessment at issue without conducting a vote of the membership." Moreover, the Association insists that it cannot waive the right to levy an assessment for repairs that it is required to make under the Declaration. Allowing such a waiver, it asserts, would lead to an untenable situation in which the Association is required to repair Common Elements, but lacks the ability to collect money for those required repairs.

A. Applicable Law

We review a trial court's summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In a traditional motion for summary judgment, the movant must establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). To determine if a fact issue exists, we review the evidence in a light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence

unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). When, as here, the trial court's summary judgment order does not state the basis for its ruling, we must uphold the order if any of the theories advanced in the motion are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

"The elements of waiver are: (1) an existing right, benefit, or advantage; (2) actual or constructive notice of its existence; (3) an actual intent to relinquish that right." *Hourani v. Katzen*, 305 S.W.3d 239, 256 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). "The affirmative defense of waiver can be asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right." *Tenneco Inc. v. Enter. Prods., Co.*, 925 S.W.2d 640, 642 (Tex. 1996). A waivable right may spring from law or a contract. *Id*. Waiver can be shown by express renunciation of a known right or by silence or inaction "for so long a period as to show an intention to yield the known right." *Id*.

Waiver is an affirmative defense that must be pleaded. TEX. R. CIV. P. 94. A nonmovant for summary judgment must raise an affirmative defense in its summary judgment response if the nonmovant seeks to rely upon that affirmative defense to defeat summary judgment. *Alashmawi v. IBP, Inc.*, 65 S.W.3d 162, 169 (Tex. App.—Amarillo 2001, pet. denied). "Issues not expressly presented to the

trial court in writing shall not be considered on appeal as grounds for reversal." *Id.* (citing TEX. R. CIV. P. 166a(c)).

B. Application

Childress's argument that the Association waived its right under section 6.1 of the Declaration to levy a special assessment without a vote was not presented to the trial court. We may not consider grounds for reversal of a summary judgment that were not expressly presented to the trial court by written response to the motion. *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 117 (Tex. App.—Houston [14th Dist.] 2007, no pet.); TEX. R. CIV. P. 166a(c). Childress's waiver argument was thus waived.

Childress's argument that summary judgment was improper because there were irregularities in the vote is dependent upon his waived argument that the Association's right to levy the assessment without a vote was waived. We overrule Childress's first issue.

DISMISSAL FOR WANT OF PROSECUTION

In his second issue, Childress argues the trial court abused its discretion by dismissing his remaining claims for want of prosecution. Specifically, he argues dismissal was not warranted because the Supreme Court's disposition time standards had not yet lapsed, and because he exercised diligence in prosecuting his case.

In response, the Association argues that Childress's failure to attend the motion to reinstate hearing and his failure to request a record from that hearing defeats his argument that the trial court abused its discretion because this Court must presume that "the trial judge reviewed and found all necessary facts to support the order." In addition, the Association argues that the trial court's dismissal was in compliance with Texas Rule of Civil Procedure 165a(2)'s provisions providing for the disposition of nonjury cases within a year, and in compliance with Galveston County Local Rule 3.16(B) requiring cases be dismissed if no motion to retain is filed within 30 days of a notice of intent to dismiss. Finally, the Association contends that the trial court properly dismissed Childress's case pursuant to its inherent powers because Childress completely failed to prosecute his case against the individual board members.

A. Applicable Law

The trial court's authority to dismiss for want of prosecution stems from Rule 165a of the Texas Rules of Civil Procedure and the court's inherent power. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628 (Tex. 1999). A trial court may dismiss a case for want of prosecution (1) when a party fails to appear at a hearing or trial, (2) when the case has not been disposed of within the Supreme Court's time standards under its Administrative Rules, and (3) under the court's expressed or inherent power to dismiss when the case has not been prosecuted with

due diligence. TEX. R. CIV. P. 165a; *City of Houston v. Robinson*, 837 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("Rule 165a(4) quite clearly states that the dismissal procedure described therein is 'cumulative of the rules and laws governing any other procedures available.'"). The Rules of Judicial Administration provide that non-family-law civil jury cases should be brought to trial or final disposition within 18 months after the appearance date, and civil nonjury cases within 12 months after the appearance date.

We review a dismissal for want of prosecution for lack of diligent prosecution under a clear abuse of discretion standard; the central issue is whether the appellant exercised reasonable diligence. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997). A trial judge abuses his discretion when he acts arbitrarily or unreasonably, or without reference to guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). The trial court may consider the entire history of the case, including the length of time the case was on file, the amount of activity in the case, the request for a trial setting, and the existence of reasonable excuses for delay. *Robinson*, 837 S.W.2d at 264. No single factor is dispositive. *Id.*

When determining whether or not the trial court committed a clear abuse of discretion, we must look at the record in its entirety. *City of Houston v. Thomas*, 838 S.W.2d 296, 297 (Tex. App.—Houston [1st Dist.] 1992, no writ). When the

record does not contain findings of facts or conclusions of law, and the trial court did not specify the standard of dismissal used, we must affirm on the basis of any legal theory supported by the record. *Id.*

B. Application

According to Childress, the court's dismissal was pursuant to Rule 165a(2), which provides, "Any case not disposed of within time standards promulgated by the Supreme Court under its Administrative Rules may be placed on a dismissal docket." *See* TEX. R. CIV. P. 165a(2). This assertion is not supported by the record, as neither the notice of intent to dismiss nor the dismissal order specify a ground for dismissal. Rather, the dismissal notice states that the case is set "on the dismissal docket for Wednesday, July 30, 2010, at 11:00 a.m.," and admonishes that "[u]nless you file a Motion to Retain and Appear IN PERSON to show reason which this case should be retained, this case will be **Dismissed for Want of Prosecution**." The dismissal order likewise makes no reference to Rule 165a(2), instead stating that the "Court set this matter for its June 30, 2010 dismissal for want of prosecution hearing docket, and the Court, after considering the pleadings on file with the Court and the arguments of counsel finds that this case should be dismissed for want of prosecution." Because the trial court did not specify the ground upon which it was dismissing Childress's claims, we must affirm on any legal ground supported by the record. *Thomas*, 838 S.W.2d at 297.

Childress filed suit July 8, 2009, and the Association made its appearance on August 3, 2009. After Childress filed his second amended petition adding claims against individual board members on August 31, 2009, we have before us no evidence of activity towards prosecuting those claims during the ten months between filing and the dismissal hearing. On the morning of the July 2, 2010 hearing, Childress dropped all his live claims and substituted for them a new claim against the Association. Although Childress had been admonished that the case would be dismissed if no motion to retain was filed before the dismissal hearing, he nonetheless failed to file a motion to retain before the hearing. And, while Childress asserts that he "presented evidence that he diligently prosecuted this case" at the hearing, no record of that hearing has been brought forth on appeal. *See Herrera v. Rivera*, 281 S.W.3d 1, 6 (Tex. App.—El Paso 2005, no pet.) ("[S]ince there is no record before us of the motion to dismiss for want of prosecution hearing, we indulge every presumption in favor of the trial court's findings and presume that the evidence before the trial court was adequate to support its decision."); *Allen v. Bentley Labs., Inc.*, 538 S.W.2d 857, 861 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.) ("We have no statement of facts of the hearing at which the trial court sustained the motions to dismiss for want of prosecution, and therefore, must presume that appellants offered no reasonable excuse . . . .").

Although less than twelve months passed between the Association's appearance in this case and the trial court's dismissal of Childress's remaining claims, we cannot conclude on this record that the trial court abused its discretion in dismissing Childress's remaining claims under its inherent powers. *See Douglas v. Douglas*, No. 01-06-00925-CV, 2008 WL 5102270, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2008, pet. denied) (mem. op.) (holding no abuse of discretion when trial court dismissed suit after eight months of no substantial activity); *Fox v. Wardy*, 225 S.W.3d 198, 200 (Tex. App.—El Paso 2005, pet. denied) (holding no abuse of discretion for dismissing suit after seven months); *Bard v. Frank B. Hall & Co.*, 767 S.W.2d 839, 843 (Tex. App.—San Antonio 1989, writ denied) (although substantial activity for two years, no abuse of discretion for dismissal after case lay dormant for seven months).

We overrule Childress's second issue.

CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.