**Opinion issued November 9, 2021**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00836-CV**

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**MIKLOS KATO, Appellant**

**V.**

**MEDIA AND FINANCIAL CONSULTING GROUP, INC. D/B/A RELIANT MANAGEMENT, BIHN NGUYEN, JENNA TRAN, CARL RAPIER DAWSON P.C. D/B/A RYAN AND DAWSON, AND WILCREST PARK TOWNHOMES OWNERS ASSOCIATION, INC., Appellees**

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**On Appeal from the 164th District Court**
**Harris County, Texas**
**Trial Court Case No. 2020-42831**

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## MEMORANDUM OPINION

The issue in this appeal is whether appellant, a member of a townhome community and former member of its homeowner's association, has standing to

assert claims against the homeowner's association after his townhome was destroyed by fire and he settled all his claims with the homeowner's association. Because we hold that the settlement rendered the dispute between the parties moot, we affirm the trial court's dismissal of plaintiff's claims against the homeowner's association.

## BACKGROUND

### *The Parties*

The Wilcrest Park Townhomes Owners Association, Inc. ("the Association") was established in 1997 when the townhomes in the development were built. Appellant, Miklos Kato, owned a townhome in the development until it burned in 2014. He also served as President/Treasurer of the Association from 2014 to 2019. Bihn Nguyen is the current President/Treasurer, and Jeana Tran is the current Secretary of the Association. Media and Financial Consulting Group, Inc. d/b/a Reliant Management ("Reliant Management") is a company hired by the Association to manage the property. Carl Rapier Dawson is an attorney who represents Nguyen and the Association in a separate suit against Kato.

### *The Association's By-Laws*

The Bylaws for the Association provide that "[e]very owner shall be a member of the Association and shall continue to be a Member for so long as he owns an Apartment." The Bylaws further state that being a member of the Association is "appurtenant to, and may not be separated from, the ownership of an Apartment."

Another of the Association's governing documents provides that "[e]ach Owner . . . shall be a Member of the Association so long as he shall be an Owner, and such membership shall automatically terminate when such ownership ceases."

***Kato's Townhome Burns***

In 2014, Kato purchased a unit in Wilcrest Park, thereby becoming a member of the Association. Kato also joined the Association's board of directors, serving as its President/Treasurer. That same year, Kato's unit and two other units were destroyed by fire.

***The Confidential Settlement Agreement***

Although the Association received insurance proceeds to compensate for the fire loss, it decided not to rebuild the damaged units. Instead, On May 18, 2017, the Association entered into a Confidential Settlement Agreement ["CSA"] "to indemnify and relie[ve] the suffering of the Members affected by the loss of units 9004, 9008, and 9010 at 8323 Wilcrest Dr. Houston, TX, 77072, caused by a fire on July 18, 2014." In the CSA, the Association agreed to pay Kato $30,500 to compensate him for his losses arising from the fire. The CSA provided that "[t]he amount of Twenty Five Thousand Five Hundred Dollar[s] and Zero Cents ($25,500.00) will be paid as a lump sum, on or before May 12, 2017, and the remaining amount of Five Thousand Dollars and Zero cents ($5,000.00) will be

disburse[d] in monthly payments of variable amounts depending on the budget available to [the Association]."

Regarding Kato's continued membership in the Association, the CSA provided:

> The Members shall maintain all rights detailed in the By-Laws of [the Association]. On the other hand, the Members shall omit any responsibilities related to fees (such as maintenance fees) detailed by the By-Laws of [the Association]. When the settlement amount for each Member [has] been paid in full, the Members shall forfeit all rights and responsibilities[] granted by the By-laws, related to the units mentioned in the foregoing.

The CSA contained a confidentiality provision prohibiting, with certain exceptions, "disclos[ure] by any Party to any third-party without first obtaining the prior written consent of all other Parties, which consent may be granted or denied in such other Party's sole discretion."

The CSA was signed by Kato, as President of the Association, and the three affected homeowners, including Kato. Thus, Kato was both a transferor and transferee of the funds disbursed through the CSA.

***Kato Continues to Serve as President of the Association***

After the 2014 fire, Kato continued to serve as President and Treasurer of the Association, both before and after the CSA was entered. As President, he authorized the initial $25,500 payment to himself under the CSA, but he never authorized the payment to himself of the remaining $5,000. Thus, under the terms of the CSA, he

retained "all rights and responsibilities[] granted by the By-laws, related to the units mentioned in the foregoing."

***The Association Sues Kato for Theft***

In 2019, the Association and Nguyen sued Kato, alleging that, while serving as president of the Association he stole or misappropriated hundreds of thousands of dollars from the Association. The case was assigned to the 234th District Court of Harris County and is pending as Cause No. 2019-73573 ("the theft case"). In that suit, Kato sought to disqualify Dawson from representing both Nguyen and the Association, arguing that a conflict required disqualification. The trial court denied Kato's motion to disqualify Dawson, and the Fourteenth Court of Appeal denied a petition for writ of mandamus filed by Kato urging the same grounds. *See In re Kato*, No. 14-20-00380-CV, 2020 WL 3422342 (Tex. App.—Houston [14th Dist.] June 23, 2020, orig. proceeding) (mem. op.).

***Kato Removed as President/Treasurer and Replaced by Nguyen***

In January 2020, Nguyen replaced Kato as a director and as the President/Treasurer of the Association, and Tran became a director and the Secretary of the Association. In the pending theft case, the trial court issued a temporary injunction finding that Kato had been removed as an officer and director of the Association and enjoining him from holding himself out as an officer or director of the Association. Soon thereafter, the Association retained Reliant Management to

manage the townhomes. Nguyen had an ownership interest in Reliant Management, which he disclosed to the Association before it contracted with Reliant Management.

***Kato Sues the Association, its Officers, and Attorney***

On July 19, 2020, Kato filed the present suit against Reliant Management, Nguyen and Tran, Dawson (Nguyen's and the Association's attorney in the theft suit), and the Association. In his petition, Kato alleges two causes of action: (1) breach of fiduciary duty by Nguyen and Tran based on the Association's contracts with and payments to Reliant Management and Dawson, and (2) deceptive trade practices by Dawson while representing both the Association and Nguyen in the theft lawsuit. Kato also seeks injunctive relief to prohibit the Association from paying Reliant Management, entering, signing, or executing contracts on behalf of the Association, filing pleadings on behalf of the Association regarding foreclosures or bankruptcy, and paying Dawson.

***The Association Pays Kato Amount Due Under the CSA***

On September 10, 2020, the Association tendered to Kato the remaining $5,000 due him under the CSA. Kato refused to deposit the check.

***The Summary Judgments***

On September 24 and October 19, 2020, appellees filed motions for summary judgment, asserting that Kato had neither standing nor capacity to bring the claims he asserted. In short, appellees argued that (1) Kato's claims belong to the

Association, not to him personally, and (2) any claims that he might have had were extinguished under the terms of the CSA when the Association tendered payment of the remaining $5,000 due under the agreement.

After a non-evidentiary hearing, the trial court "[o]rdered that the motions for summary judgment are granted and all Plaintiff's [claims] against all Defendants are dismissed with prejudice.

This appeal followed.

## PROPRIETY OF SUMMARY JUDGMENT

In two issues on appeal, Kato contends that the trial court erred in granting appellees' motion for summary judgment and dismissing his claims against them.

### *Standard of Review*

A defendant can challenge the plaintiff's standing in a motion for summary judgment. *Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex. 2000). The summary-judgment movant must conclusively establish its right to judgment as a matter of law. *See MMP, Ltd. v. Jones,* 710 S.W.2d 59, 60 (Tex. 1986). Because summary judgment is a question of law, we review a trial court's summary judgment decision de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding,* 289 S.W.3d 844, 848 (Tex. 2009).

To prevail on a "traditional" summary-judgment motion asserted under Rule 166a(c), a movant must prove that there is no genuine issue regarding any material

fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Little v. Tex. Dep't of Criminal Justice,* 148 S.W.3d 374, 381 (Tex. 2004). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson,* 168 S.W.3d 802, 816 (Tex. 2005).

To determine if there is a fact issue, we review the evidence in the 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 City of Keller,* 168 S.W.3d at 827. We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Sw. Elec. Power Co. v. Grant,* 73 S.W.3d 211, 215 (Tex. 2002). When the trial court's summary judgment order does not state the basis for the trial court's decision, we must uphold the order if any of the theories advanced in the motion are meritorious. *Provident Life & Acc. Ins. Co. v. Knott,* 128 S.W.3d 211, 216 (Tex. 2003).

***Applicable Law***

Standing is a necessary component of subject-matter jurisdiction and cannot be waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 445 (Tex. 1993). If a party lacks standing, the trial court does not have jurisdiction to hear the case. *See Bland,* 34 S.W.3d at 553–54. Standing "requires that the controversy adversely affect the party seeking review." *McAllen Med. Ctr., Inc. v. Cortez,* 66

S.W.3d 227, 234 (Tex. 2001). In a standing analysis, we focus on whether the "party has a sufficient relationship with the lawsuit so as to have a 'justiciable interest' in its outcome." *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Tex. Ass'n of Bus.*, 852 S.W.2d at 446.

***Analysis***

In two issues on appeal, Kato contends that the trial court's dismissal of his claims against the defendant must be reversed. Specifically, Kato argues (1) there were substantive defects in appellees' motions for summary judgment, and (2) he had "standing and capacity to bring suit." Because standing implicates our subject-matter jurisdiction, we address it first. *See Abbott v. Anti-Defamation League Austin, Southwest and Texoma Regions*, 610 S.W.3d 911, 917 (Tex. 2020).

*Standing*

Both capacity and standing are necessary to bring a lawsuit. *Pike v. Tex. EMC Mgmt.*, LLC, 610 S.W.3d 763, 775 (Tex. 2020); *see Coastal Liquids Transp., L.P. v. Harris Cty. Appraisal Dist.*, 46 S.W.3d 880, 884 (Tex. 2001). "A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority; a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy." *Coastal Liquids*, 46 S.W.3d

at 884 (quoting *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996)).

For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). If a controversy ceases to exist—"the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"—the case becomes moot. *Id.* If a case becomes moot, the parties lose their standing to maintain their claims. *Id.*

Kato contends that, as an owner and a member of the Association, he has standing to pursue the claims in this suit against the Association and other appellees. However, the By-Laws state that "[e]very owner shall be a Member of the Association and shall continue to be a Member for so long as he owns an Apartment" and that membership shall be "appurtenant to, and may not be separated from, the ownership of an Apartment." The governing documents also define "Owner" as "any person, firm, corporation, or other entity which owns, of record title to an Apartment in the Project." Another clause in the governing documents provides that "[e]ach Owner . . . shall be a Member of the Association so long as he shall be an Owner, and such membership shall automatically terminate when such ownership ceases." The hallmarks of ownership are the right to possess, use, or convey a property. *See Owner*, Black's Law Dictionary (11th ed. 2019) ("Someone who has the right to

possess, use, and convey something"). Undoubtedly, Kato was an Owner, even after his unit burned, until he agreed to relinquish his all rights in the Association rather than require the Association to rebuild his unit.

But, the undisputed summary judgment evidence shows that Kato entered the CSA with the Association, under which, in return for $30,500, he agreed to relinquish "any and all claims, disputes, actions, and causes of action[.]" And, while the CSA permitted him to retain his membership in the Association until he received the final $5,000 payment, once he did so, he was no longer an "Owner" because he had no property to use or enjoy and no rights to transfer to a purchaser, and, per the terms of the CSA, he was no longer even a "Member" of the Association.

As such, there is no longer a "live dispute" because Kato lacks a "legally cognizable interest in its outcome." His only interest in the Association is the recovery of the $30,500 he contracted with it for. Once he recovered that amount, his dispute with the Association over its current management practices is moot because he would not be entitled to any part of a recovery based on the claims asserted.[1]

Even though Kato agrees that the Association has tendered the entire $35,500 due him under the CSA, he argues that summary judgment is nonetheless improper

[1] We note that, even though Kato retained membership in the Association until he was paid in full under the CSA, he was not required to make any payments to the Association during that period.

because the "confidential $5,000 check" that was attached to Dawson's motion for summary judgment to prove the Association's compliance with the CSA, was disclosed to Dawson (a non-party) in violation of the confidentiality provision of the CSA. We find this argument unpersuasive for two reasons: First, Kato did not object to Dawson's summary judgment evidence or obtain a ruling on it. *See* TEX. R. APP. P. 33.1. Second, Kato's own summary judgment response contains a copy of the CSA and a March 12, 2020 email that he sent to Dawson attaching the CSA he now contends was wrongfully disclosed to Dawson. And, the same $5,000 check that Kato contends was improperly disclosed to Dawson was also attached as summary judgment evidence to Nguyen's motion for summary judgment and is, in fact, signed by Nguyen as President of the Association. Thus, the trial court properly considered the CSA and the $5,000 check tendered thereunder when ruling on the motions for summary judgment.

Kato also argues that the trial court should not have considered the evidence of the $5,000 check he received from the Association because he has not cashed it. However, a valid "tender" of payment is an unconditional offer by an obligor to pay a sum not less than what is due his obligee. *Baucum v. Great Am. Ins. Co. of N.Y.*, 370 S.W.2d 863, 866 (Tex. 1963). It is uncontroverted that the Association tendered to Kato the full amount due him under the CSA.

Because the Association has tendered Kato the full amount owed him under the CSA, he is no longer an "owner" of a townhome in the development or a "member" of the Association. Thus, there is no longer a "live dispute" because Kato is not "personally aggrieved" by appellees' actions and lacks a "legally cognizable interest in its outcome." *See Williams*, 52 S.W.3d at 184. Accordingly, the trial court properly determined that, because the case was moot, Kato lacked standing and dismissed his claims for lack of subject-matter jurisdiction.

We overrule issue two.

*Defects in Motions for Summary Judgment?*

In issue one, Kato contends that, because the motions for summary judgment "were challenging the capacity for Appellant/Plaintiff Miklos Kato to bring suit," appellees were required to file verified pleadings. *See* TEX. R. CIV. P. 93(1) (requiring verified petition if asserting "[t]hat the plaintiff has not legal capacity to sue or the defendant has not legal capacity to be sued")

We have held above that the motions for summary judgment were properly granted because, after the terms of the CSA were met, Kato was no longer "personally aggrieved" by the appellees' actions, i.e., he had no standing. Thus, Rule 93(1), which applies to capacity, and not standing, is not applicable.

Accordingly, we overrule issue one.

## CONCLUSION

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.