**Opinion issued July 19, 2022**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-21-00514-CV**

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**WESTERN INTERNATIONAL GAS & CYLINDERS, INC., Appellant**
**V.**

**H&H LAND, L.P., Appellee**

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**On Appeal from the 333rd District Court**
**Harris County, Texas**
**Trial Court Case No. 2019-43321**

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## MEMORANDUM OPINION

Appellant, Western International Gas & Cylinders, Inc. ("Western"), challenges the trial court's summary judgment in favor of appellee, H&H Land, L.P. ("H&H"), in Western's suit against H&H for a judgment declaring the parties' rights

under a purchase option in three commercial leases.[1] In two issues, Western contends that the trial court erred in construing the lease provisions at issue and in awarding H&H attorney's fees.

We reverse and remand.

## Background

Western is an acetylene gas wholesaler that operates facilities throughout the United States. H&H owns various real properties in Austin County, Texas. In 2010 and 2011, Western leased from H&H certain properties located in Bellville and Sealy for the operation of an acetylene manufacturing plant, rail loading and storage facilities, and corporate housing.

The parties executed three commercial leases pertinent to this appeal: (1) the Bellville Plant Lease Agreement ("Bellville Lease"), (2) the Sealy Lease Agreement ("Sealy Lease"), and (3) the Extended Lease Agreement ("Extended Lease") (collectively, the "Leases").[2] The Bellville Lease described the Leased Premises as "the current tracts of land, and any improvements existing or hereafter constructed thereon, in Austin County, Texas," as described in an attached exhibit. The Sealy Lease also described the Leased Premises as "the current tracts of land, and any improvements existing or hereafter constructed thereon, in Austin County, Texas,"

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1 *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a).

2 The Lease of the fourth property, the Bellville House, is not at issue in this appeal. The Lease states that the "Purchase Option" was "Intentionally Deleted."

as described in an attached exhibit. The Extended Lease described the Leased Premises as "the current tracts of land totaling approximately 27.414 acres, and any improvements existing or hereafter constructed thereon, in Austin County, Texas."

The terms at issue in each of the Leases are otherwise materially identical. Section 2 of the Leases, which governed the construction of "improvements" on the Leased Premises described therein, provided, in pertinent part:

> 2. **Leased Premises**. . . . . Tenant may construct alterations or make changes to the Leased Premises only after obtaining the prior written consent of Landlord . . . . Any improvements constructed by Tenant on the Leased Promises shall be the property of Landlord. . . .

Section 9 of the Leases, which governed repairs and maintenance of the Leased Premises, provided, in pertinent part:

> 9. **Repairs and Maintenance**.
>
> . . . .
>
> (b) **Tenant's Obligation**. Tenant at its expense, will perform all maintenance on all portions of the Leased Premises, without limitation, including the roof, foundation, load bearing, and other walls, parking areas, sidewalks, driveways on the Leased Premises, electrical, plumbing and heating and air conditioning equipment and systems in the Leased Premises as necessary to maintain the Leased Premises in its present condition, normal wear and tear excepted. The obligation to repair shall include the obligation to replace when necessary. . . .

Section 10 of the Leases, which addressed removable trade fixtures, provided:

> 10. **Surrender of the Leased Premises**. Upon the expiration or termination of the Lease or upon the termination of Tenant's right to possession of the Leased Premises, if earlier, Tenant will surrender and

> deliver up to Landlord the Leased Premises and all improvements thereon broom-clean and in substantially the same condition in which the Leased Premises existed on the Commencement Date plus any additional improvements made or constructed by Tenant or Landlord, excepting only normal wear and tear or acts of God. *Prior to the end of the Lease Term or upon the termination of Tenant[']s right to possession of the Leased Premises, Tenant will remove from the Leased Premises all "Removable Trade Fixtures," as defined below (excluding, however, ducts, conduits, wiring, pipes, paneling, or other wall covering or floor covering and, at Landlord's discretion, replacements and improvements made by Tenant with Landlord's written consent). The phrase "Removable Trade Fixtures" means the following: all of Tenant's signs, counters, tables, desks, chairs, furnishings, coolers, gondolas, all office equipment, and acetylene equipment.* The removal must be made not later than thirty (30) days following the date this Lease has expired or been terminated and be performed without damage to the Leased Premises, other than minor damage reasonably anticipated in such removal operations and Tenant shall pay all costs of clearing and removing debris censed by or resulting from the removal. Landlord shall not be responsible or liable for any damage to or other loss of such Removable Trade Fixtures, notwithstanding Landlord's possession of the Leased Premises at the expiration or upon the termination of this Lease. Upon the expiration of the Term of the Lease (notwithstanding any exercise of any Renewal Option) or such earlier termination thereof, all improvements on the Leased Premises, whether constructed by Tenant, Landlord or otherwise, shall remain the property of Landlord. *All fixtures, equipment, and personal property not removed by Tenant within thirty (30) days following the expiration or termination of this Lease shall, at Landlord's election either (i) without compensation to Tenant, become the property of Landlord, or (ii) be removed by Landlord at Tenant's expense which shall include reimbursement to Landlord for the costs of such removal plus the costs of restoring the Leased Premises.*

(Emphasis added.)

Section 22 of the Leases granted Western an option to purchase the Leased Premises, as follows:

> 22. **<u>Purchase Option</u>**. At any time during the Term of this Lease or any Extension Term thereof, Tenant may notify Landlord in writing of its interest in purchasing the Leased Premises. Following the provision and receipt of such notice, *Landlord' and Tenant shall each engage an Independent appraiser who shall, in turn, appoint a third appraiser to determine the fair market value of the Leased Premises less the fair market value of any of any material improvements installed within or constructed upon the Leased Premises by Tenant during the Term of this Lease other than those required to be made by Tenant pursuant to Section 9(b) of the Lease (the "Appraised Price").* . . . [W]ithin thirty . . . days of Landlord and Tenant's receipt of the third appraiser's report, both parties shall execute an agreement of sale containing all of the customary representations, warranties, covenants and conditions precedent to the completion of the sale of the Leased Premises from Landlord to Tenant for an amount equal to (a) the Appraised Price, plus (b) the total of the Rent payments that would have been payable during the remaining Term; provided, however, that, if Tenant exercises its option to purchase the Leased Premises during any Extension Term, then the purchase price shall be only the Appraised Price. . . .

(Emphasis added.)

During the ten-year term of each Lease, Western occupied the Leased Premises, constructed various improvements, and installed removable trade fixtures, such as acetylene equipment, necessary to operate its business.

In 2018, Western notified H&H that it wished to exercise the Purchase Options. Pursuant to Section 22, the parties selected an appraiser and toured the properties to determine the purchase prices. A dispute arose, however, regarding the proper method for determining the prices. Namely, H&H contended that Western's Removable Trade Fixtures were to be included in each valuation. Western contended that they were not. Rather, Western argued that it was absurd to require

it, in order to exercise its Purchase Option, to again pay for its own Removable Trade Fixtures. Subsequently, Western filed the instant declaratory action, asking the trial court to determine the proper method, under the terms of the Leases, for calculating the purchase price of each Leased Premises.

H&H moved for a summary judgment, arguing that it was entitled to a dismissal of Western's suit because there were no genuine issues of material fact. It noted that neither party asserted that the Lease terms at issue were ambiguous. It asserted that the Purchase Option in Section 22 provided that an appraiser was to determine the fair market value of the Leased Premises and to subtract the fair market value of any improvements installed or constructed by Western, excepting those constituting repairs or maintenance under Section 9(b). H&H asserted that Section 22 did not state that Removable Trade Fixtures were to be subtracted from the valuation of the Leased Premises. Instead, the term "Removable Trade Fixtures" was contained in Section 10, which governed "Surrender of the Leased Premises" and did not apply to Western's exercise of the Purchase Option. H&H noted: "Neither H&H nor Western are asking this Court to identify specific improvements, fixtures, or equipment to be included in the valuation, that is the job of . . . the parties' designated appraiser."

In its summary-judgment response, Western argued that H&H, "[b]y attempting to require Western to pay to purchase the removable trade fixtures that

the [Leases] acknowledge Western already own[ed], H&H [was] acting directly contrary to the rules of contract construction, as well as the policy in Texas favoring retention by Western, the tenant, of its trade fixtures." Western asserted that, when read as a whole, as required, each Lease defined the "Leased Premises" to include "the current tracts of *land*, and any *improvements* existing or hereinafter constructed thereon." (Emphasis added.) The Purchase Option, Section 22, provided that the appraiser was to determine the fair market value of the Leased Premises, thus, of the "land" and "improvements," and then to subtract the fair market value of the improvements that Western had constructed. That is, Western was to receive a credit against the purchase price for its own improvements.

Western asserted that nothing in Section 22, or in any other provision, made its Removable Trade Fixtures part of the Leased Premises. To the contrary, Section 10 required Western to "remove from the Leased Premises all 'Removable Trade Fixtures'" when the Lease ended. Section 10 defined "Removable Trade Fixtures" as including: Western's signs, counters, tables, desks, chairs, furnishings, coolers, gondolas, all office equipment, and acetylene equipment. Western argued that if these items actually belonged to H&H, "certainly Western would not be required to remove" them, regardless of the circumstances. It argued that, because the Leases contemplated that Western was "already the rightful owner of the removable trade

fixtures," it was illogical that it would have to essentially repurchase these items from H&H in order to exercise its right to purchase the Leased Premises.

On October 20, 2020, the trial court rendered a summary judgment for H&H, stating as follows:

> In rendering this decision, the Court has considered: (1) neither party alleges the agreement is ambiguous; and (2) the Court is construing the unambiguous language of the Lease Agreement and, more specifically, Section 22 regarding the "Purchase Option.["]
>
> The Court notes that: (1) Section 22 does not reference Section 10 regarding "Removable Trade Fixtures,["] but does expressly reference Section 9.3; and (2) Section 12 explicitly references Section 10's "Removable Trade Fixtures" language, but Section 22 does not.
>
> Applying ordinary rules of contract construction and interpretation, the Court concludes that, if the parties had intended to incorporate Section 10 into Section 22, then they could and would have done so in Section 22 by expressly referencing Section 10 as they did [in] Section 9.3, or by referencing Section 10's "Removable Trade Fixtures" language as they did in Section 12. Having done neither, the Court declines to read into the parties' agreement a construction they could have expressly achieved but did not.

Subsequently, H&H moved for attorney's fees, and the matter was tried to the bench. On August 25, 2021, the trial court issued a Final Judgment, awarding H&H "judgment totaling $39,532.50," plus attorney's fees contingent on appeal.[3]

**Summary Judgment**

In its first issue, Western argues that the trial court erred in concluding that "the purchase price for [each] Leased Premises include[d] the value of Removable

[3] Although H&H initially filed counterclaims, it later nonsuited them.

Trade Fixtures" because "Texas law requires that the parties' intent be construed from the contract as a whole, and the [Leases] indicate[d] in multiple provisions that the Removeable Trade Fixtures [were] Western's property." Western asserts that "forcing [it] to purchase what it already owns before it may exercise its contractual rights [to purchase the Leased Premises] is an absurd result that cannot have been intended by the parties."

***Standard of Review and Legal Principles***

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.*

In a traditional motion for summary judgment, the movant has the burden to establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). A defendant moving for summary judgment must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). 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).

Only after the movant meets its burden does the burden shift to the non-movant to present evidence raising a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *see also McConnell v. Southside Indep. Sch. Dist*., 858 S.W.2d 337, 342 (Tex. 1993) ("[T]he non-movant's failure to except or respond cannot supply by default the . . . summary judgment proof necessary to establish the movant's right."). Evidence raises a genuine issue if reasonable people could differ in their conclusions in light of all of the evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Declaratory judgments rendered by summary judgment are reviewed under the same standards that govern summary judgments generally. *Hourani v. Katzen*, 305 S.W.3d 239, 248 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The Declaratory Judgments Act provides that a person interested under a written contract, or whose rights, status, or other legal relations are affected by a contract, may have determined any question of construction or validity arising under the contract and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE § 37.004(a).

"A written instrument that can be given a certain or definite legal meaning or interpretation is not ambiguous and will therefore be construed as matter of law."[4] *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd*., 574 S.W.3d 882, 889 (Tex. 2019). Our primary objective in construing a contract is to effectuate the parties' intent. *Id.* at 888. We interpret contract language according to its plain, ordinary, and generally accepted meaning unless the contract directs otherwise. *Id*. We consider the writing as a whole to harmonize and give effect to all the provisions so that none will be rendered meaningless. *Id*. at 889. "Contract terms cannot be viewed in isolation . . . because doing so distorts meaning." *Id*. "Consistent with our long-established precedent," "[n]o one phrase, sentence, or section should be isolated from its setting and considered apart from the other provisions." *Id*.

***Analysis***

At the center of the parties' competing contentions is Section 22 of the Leases, the Purchase Option, which provided the method for determining the "Appraised Price" of the Leased Premises governed by each Lease:

> . . . Landlord and Tenant shall each engage an independent appraiser who shall, in turn, appoint a third appraiser to *determine the fair market value of the* ***Leased Premises*** *less the fair market value . . . of any material* ***improvements*** *installed within or constructed upon the Leased Premises by Tenant during the Term of this Lease other than those required to be made by Tenant pursuant to Section 9(b) of the Lease (the "Appraised Price"*). . . .

[4] Western states in its brief that "H&H admits and Western agrees that the [Leases] are unambiguous."

(Emphasis added.)

Thus, Section 22 first required the appraiser to determine the fair market value of the Leased Premises. The Leases define each of the subject Leased Premises, respectively, as (1) "the current tracts of *land*, and any *improvements existing or hereafter constructed* thereon, in Austin County, Texas," (2) "the current tracts of *land*, and any *improvements existing or hereafter constructed* thereon, in Austin County, Texas," as described in an attached plat containing only property boundaries, and (3) "the current tracts of *land* totaling approximately 27.414 acres, and any *improvements existing or hereafter constructed* thereon, in Austin County, Texas." (Emphasis added.) This is consistent with Section 2, which provided that "[a]ny *improvements* constructed by [Western] on the Leased Promises shall be the property of [H&H]." (Emphasis added.) Section 22 then required the appraiser to subtract the fair market value of any material improvements installed or constructed by Western, excepting those constituting repairs or maintenance under Section 9(b). Section 9(b) required Western to maintain and repair the Leased Premises, including the roof, foundation, walls, parking areas, sidewalks, driveways, electrical, plumbing and heating and air conditioning equipment, and included making replacements. Thus, Section 22 expressly included land and certain improvements in the Appraised Price.

In its motion for summary judgment, H&H argued that nothing in Section 22 *subtracted*, or excepted, Removable Trade Fixtures from the valuation. The trial court likewise concluded that Section 22 does not reference Section 10 or "Removable Trade Fixtures." We agree that it does not. However, we disagree regarding the effect.

Section 10 defines the term "Removable Trade Fixtures" and distinguishes them from "improvements," as follows:

> 10. **Surrender of the Leased Premises**. Upon the expiration or termination of the Lease or upon the termination of Tenant's right to possession of the Leased Premises, if earlier, ***Tenant will surrender*** and deliver up to Landlord *the Leased Premises and* ***all improvements*** thereon broom-clean and *in substantially the same condition* in which the Leased Premises existed on the Commencement Date plus any additional improvements made or constructed by Tenant or Landlord, excepting only normal wear and tear or acts of God. Prior to the end of the Lease Term or upon the termination of Tenant[']s right to possession of the Leased Premises, ***Tenant will remove*** *from the Leased Premises* ***all "Removable Trade Fixtures,"*** *as defined below (excluding, however, ducts, conduits, wiring, pipes, paneling, or other wall covering or floor covering and, at Landlord's discretion, replacements and improvements made by Tenant with Landlord's written consent). The phrase* ***"Removable Trade Fixtures" means*** *the following: all of Tenant's signs, counters, tables, desks, chairs, furnishings, coolers, gondolas, all office equipment, and acetylene equipment*. The removal must be made not later than thirty (30) days following the date this Lease has expired or been terminated and be performed without damage to the Leased Premises . . . . *Upon the expiration of the Term of the Lease (notwithstanding any exercise of any Renewal Option) or such earlier termination thereof,* ***all improvements*** *on the Leased Premises, whether constructed by Tenant, Landlord or otherwise,* ***shall remain the property of Landlord***. ***All fixtures***, ***equipment***, ***and personal property not removed by Tenant*** *within thirty (30) days following the expiration or termination of this*

> *Lease shall, at Landlord's election either (i) without compensation to Tenant, become the property of Landlord, or (ii) be removed by Landlord at Tenant's expense which shall include reimbursement to Landlord for the costs of such removal plus the costs of restoring the Leased Premises*.

(Emphasis added.)

Although the Leases do not define the term "improvements," the parties' use of the term without providing a definition unique to the Leases suggests an intent to "employ the well-established definitions and concepts set out in case law." *See C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P.*, 295 S.W.3d 748, 755 (Tex. App.—Austin 2009, no pet.). "An improvement includes all additions to the freehold *except for trade fixtures* which can be removed without injury to the property." *Sonnier v. Chisholm–Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995) (emphasis added); *see also Reames v. Hawthorne–Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied) ("The class of improvements is considered to be broader than that of fixtures, which are items of personalty that have become permanent parts of the realty to which they are affixed. Therefore, although all improvements are not necessarily fixtures, any fixture, unless it is a trade fixture, is considered an improvement."). The general rule is that improvements become part of the land and belong to the landowner. *Travis Cent. Appraisal Dist. v. Signature Flight Support Corp.*, 140 S.W.3d 833, 838 (Tex. App.—Austin 2004, no pet.).

The term "trade fixture" has also been "defined many times by the courts":

> It is now well settled that, as between a landlord and his tenant, the term "trade fixtures" refers to and means such articles as may be annexed to the realty by the tenant to enable him properly or efficiently to carry on the trade, profession, or enterprise contemplated by the tenancy contract or in which he is engaged while occupying the premises, and which can be removed without material or permanent injury to the freehold.

*Boyett v. Boegner*, 746 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1988, no writ.). A trade fixture does not lose its character as personalty because the intent of its annexation is to further the purposes of the tenant's trade, not to improve the realty. *Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 110 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see also Jim Walter Window Components v. Turnpike Distib. Ctr.*, 642 S.W.2d 3, 5 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (noting that "[i]mprovements made by a vendor, mortgagor or ancestor are made to enhance the value of the estate, and to be permanent; while those made by the tenant are temporary and made for purposes of his trade"). Thus, a tenant generally may remove and take away trade fixtures at the end of the lease, unless there is a contract term to the contrary. *Eun Bok Lee*, 411 S.W.3d at 110. Here, there is not.

Section 10 expressly states that, when a Lease ended, Western was to "surrender" the Leased Premises and "all improvements," and it was to "remove" "all 'Removable Trade Fixtures.'" The parties agreed that if Western did not timely

remove all Removable Trade Fixtures, H&H could then take possession of such items or remove them at Western's expense.

The language of the Leases, read as a whole, demonstrates the parties' intent that all Removable Trade Fixtures belonged to Western. Nothing in Section 22, or in any other provision of the Leases, expressly *included* Western's Removable Trade Fixtures as part of any "Leased Premises" or *included* their market value in any part of the "Appraised Price." And, nothing in the language of the Leases expressly included Removable Trade Fixtures within the term "improvements." *See, e.g.*, *Boyett*, 746 S.W.2d at 28; *Erly Juice, Inc. v. Lacy Petroleum, Inc.*, No. 01-91-01080-CV, 1992 WL 258595, at *3 (Tex. App.—Houston [1st Dist.] Oct. 8, 1992, writ denied) ("Trade fixtures are not included within the term 'improvements,' unless the lease specifically states that they are included."); *see also Sonnier*, 909 S.W.2d at 479 ("An improvement includes all additions to the freehold except for trade fixtures . . . .").

Taking as true all evidence favorable to Western and indulging every reasonable inference and resolving any doubts in its favor, we conclude that H&H did not conclusively establish its right to judgment. *See Dorsett*, 164 S.W.3d at 661; *Cathey*, 900 S.W.2d at 341; *see also City of Keller*, 168 S.W.3d at 816. We hold that the trial court erred in granting summary judgment for H&H. *See* TEX. R. CIV. P. 166a(c).

We sustain Western's first issue. Accordingly, we do not reach its second issue, in which it challenges the trial court's award of attorney's fees.

## Conclusion

We reverse the trial court's judgment and remand for further proceedings.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.