Affirmed, in Part, and Reversed and Rendered, in Part, and Memorandum Opinion filed November 12, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00646-CV

LEE SHAFER AND PAMELA SHAFER, Appellants

V.

JOEL GULLIVER AND MARYANNE GULLIVER, Appellees

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Trial Court Cause No. 06-CCV-029325

MEMORANDUM OPINION

Appellants, Lee and Pamela Shafer, appeal from the trial court's judgment entered after a bench trial in favor of appellees, Joel and Maryann Gulliver, on their claim for breach of contract. The trial court awarded the Gullivers specific performance, interest damages, and attorney's fees. The Shafers challenge the trial court's judgment in three issues. We affirm, in part, and reverse and render, in part.

BACKGROUND

The Shafers and the Gullivers are neighbors in Fort Bend County. The Shafers, who were in need of cash, offered to sell a piece of undeveloped land that was contiguous to both the Shafers' and Gullivers' residences and was part of the Shafers' homestead.

The Shafers and Gullivers executed an earnest money contract on January 21, 2005, for the sale of the property for $53,000. The Gullivers wrote a check payable to Lee Shafer in the amount of $5,000 for earnest money on January 21, 2005, and the Shafers agreed to deliver a general warranty deed at closing in exchange for the purchase price. The closing date in the contract was September 30, 2005. The Shafers represented in the contract that as of the closing date there would be no liens on the property that could not be satisfied out of the proceeds of the sale. Lee Shafer explained that the closing date was for nine months after the contract date because he thought he could have the liens against the property released by that time.

By the September 30, 2005 closing date, there were still two liens on the property totaling approximately $115,000 that could not be satisfied by the sales price. Because the Shafers had not obtained releases of the liens by September 30, 2005, closing was not scheduled and did not take place.

Lee Shafer asked Joel Gulliver if they wanted to still purchase the property; Gulliver said they did. Lee Shafer testified that this conversation took place in October 2005. Joel Gulliver testified that this conversation took place before September 30, 2005. On December 28, 2005, Lee Shafer delivered copies of the releases of the liens to the Gullivers. One release of lien was file stamped, while the other was not. A week later, Maryann Gulliver told the Shafers that they would have the money and close in two weeks. The Gullivers did not tender the money in those two weeks. Although the Gullivers did not initially intend to close through a title company, they changed their minds after only one of the releases was file stamped. In March 2006, Maryann Gulliver called the Shafers and told them that they were going to close at Stewart Title, which was the title company chosen by the Shafers in the contract.

Title was opened at Stewart Title on March 14, 2006. The Shafers gave the Gullivers a file-stamped copy of the second release of lien on either March 24 or 25, 2006. Closing was scheduled for March 31, 2006, but the parties did not close on that

date. Another closing was scheduled for April 6 or 7, 2006, but that closing was cancelled. After Stewart Title informed Lee Shafer that the closing was scheduled for April 10, 2006, he said he was not going to go forward with selling the property. The Gullivers attended the April 10, 2006 closing; the Shafers did not. The Gullivers signed the closing documents, left a cashier's check in the amount of $48,000 payable to the Shafers with Stewart Title, and gave Stewart Title a check in the amount of $1,100.95 for closing fees. By letter dated April 7, 2006, the Shafers wrote the Gullivers, returning the earnest money and advising that they were terminating the contract.[1] The letter, which was sent by certified mail, was not mailed until April 11, 2006—after the April 10, 2006 closing. The Gullivers were not at home when two attempts were made to deliver the letter, and they did not pick up the letter from the post office. The Gullivers ultimately found out about the Shafers' letter and check from Stewart Title.

The Gullivers sued the Shafers on April 26, 2006, for breach of contract, seeking specific performance, actual and consequential damages, attorney's fees, and pre- and post-judgment interest.[2] The Shafers raised the affirmative defenses of statute of frauds, estoppel, rescission, waiver, failure to meet conditions precedent, and failure of consideration, and also sought attorney's fees.[3]

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[1] The April 7, 2006 letter states:

> All objections to the closing of the land transaction were met on or about January 4, 2006. Pursuant to paragraph 15, closing was to take place on or before January 19, 2006.
>
> Because you have failed to close as called for by the Earnest Money Contract, we elect to terminate the Earnest Money Contract. According to the terms of the Earnest Money Contract, we have a right to keep the Earnest Money, but we are electing to return it to you.

[2] In their fourth amended petition filed on April 22, 2009, the Gullivers added claims with regard to the earnest money for breach of fiduciary duty, breach of constructive trust, breach of the duty of good faith and fair dealing, and malice.

[3] This is the second time this case has been before this court. *See Gulliver v. Shafer*, No. 14-07-00217-CV, 2008 WL 123872 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (mem. op.). The trial court granted summary judgment in favor of the Shafers. *Id.* at *1. On appeal, this court reversed the judgment and remanded the case to the trial court. *Id.* at *5.

After a bench trial, the trial court found that the Shafers had breached the contract both on September 30, 2005, and April 10, 2006, and ordered specific performance. The trial court also awarded interest damages in the amount of $13,020.69, i.e., interest in the amount of: (1) $264.97 on the $1,100.95 closing fees; (2) $1,203.37 on the $5,000 earnest money; and (3) $11,552.35 on the $48,000 paid at closing, and attorney's fees in the amount of $30,838.91.

In this appeal, the Shafers contend that the judgment awarding specific performance, interest damages, and attorney's fees should be reversed because the evidence is legally and factually insufficient and the conclusions of law are erroneous. The Shafers also contend that the trial court erred in admitting testimony of interest damages and attorney's fees for failure to disclose.

WAIVER

As an initial matter, the Gullivers argue that, by approving and requesting entry of the findings of fact and conclusions of law, the Shafers have waived their arguments and objections to such findings and conclusions. The Gullivers argue that the now challenged findings of fact and conclusions of law were discussed at length with the trial court and were not signed by the trial court as simply accepting those submitted by the Gullivers. On May 29, 2009, the trial court held a hearing on a motion to enter findings of fact and conclusions of law. A review of the reporter's record of the hearing reflects that while there was some give and take regarding certain language in the proposed findings and whether certain proposed findings and conclusions were findings of fact or conclusions of law, it does not show that the Shafers waived their right to challenge those findings of fact and conclusions of law that they have challenged on appeal.

It is generally true that a party cannot appeal from a judgment to which it has consented or agreed absent an allegation and proof of fraud, collusion, or misrepresentation. *Chang v. Linh Nguyen*, 81 S.W.3d 314, 316 n.1 (Tex. App.—Houston

[14th Dist.] 2001, no pet.). A party's consent to a trial court's entry of judgment waives any error in the judgment, except jurisdictional error. *Id.* To have a valid consent judgment, each party must explicitly and unmistakably give its consent. *Id.* This court has held that the phrase "approved as to form and substance" standing alone does not transform a judgment into a consent judgment. *Id.* In order for a judgment to be a consent judgment, the body must suggest, for instance, that the case had been settled or that the judgment was rendered by consent. *Id.* In *Chang*, we held that the appellant had not waived her appeal where her attorney approved a take nothing judgment as to "form and substance" and there was nothing more in the record to show that the parties had settled or entered the judgment by consent or the like. *Id.* Similarly, the language "approved and entry requested" does not demonstrate that the Shafers have waived their right to challenge the findings of fact and conclusions of law on appeal. Moreover, as in *Chang*, there is nothing in this record to show that the parties entered into a consent or an agreed judgment.

STANDARD OF REVIEW

Findings of fact entered in a case tried to the court are of the same force and dignity as a jury's verdict on jury questions. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). We apply the same standards in reviewing the legal and factual sufficiency of the evidence supporting the trial court's fact findings as we do when reviewing the legal and factual sufficiency of the evidence supporting a jury's answer to a jury question. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam).

In reviewing the legal sufficiency of the evidence, we view the evidence in the light favorable to the fact finding, crediting favorable evidence if reasonable persons could, and disregarding contrary evidence unless reasonable persons could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005). We may not sustain a legal sufficiency, or "no evidence," point unless the record demonstrates (1) a complete absence of a vital fact, (2) the court is barred by the rules of law or of evidence from

giving weight to the only evidence offered to prove a vital fact, (3) the evidence to prove a vital fact is no more than a scintilla, or (4) the evidence established conclusively the opposite of the vital fact. *Id.* at 810.

To evaluate the factual sufficiency of the evidence to support a finding, we consider all the evidence and will set aside the finding only if the evidence supporting the finding is so weak or so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

Unchallenged findings of fact are binding on the appellate court unless the contrary is established as a matter of law, or if there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986).

We review the trial court's conclusions of law de novo. *Busch v. Hudson & Keyse, LLC*, 312 S.W.3d 294, 299 (Tex. App.—Houston [14th Dist.] 2010, no pet.). We review conclusions of law to determine whether the conclusions drawn from the facts are correct. *Zagorski v. Zagorski*, 116 S.W.3d 309, 314 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (op. on reh'g).

BREACH OF CONTRACT

In their first issue, the Shafers assert that they did not breach the contract on September 30, 2005, because time was of the essence and the Gullivers did not timely tender actual performance. The Shafers also contend that they did not breach the contract on April 10, 2006, because the contract expired on September 30, 2005, and any attempted oral extension of the contract was barred by the statute of frauds. The Shafers challenge the legal and factual sufficiency of the following findings of fact with regard to the Gullivers' breach of contract claim:

7. that closing did not take place on September 30, 2005 because [the Shafers] could not obtain release of two outstanding liens and, therefore, could not provide a policy of title insurance.

8. On September 30, 2005, [the Gullivers] had timely performed all conditions precedent to consummation of the Contract.

* * *

10. On September 30, 2005, [the Shafers] breached the Contract.

11. After September 30, 2005, the parties jointly and orally waived the September 30, 2005 closing, in order to allow [the Shafers] to clear the liens against the Property.

* * *

20. On April 10, 2006, [the Shafers] breached the Unimproved Property Contract dated January 21, 2005, which was executed by all parties, by failing to convey the property subject of [sic] the Contract to [the Gullivers].

21. [The Gullivers] are entitled to Specific Performance under the terms of the Contract.

* * *

42. Time was not of the essence in this matter.

The Shafers challenged the following conclusions of law with regard to the Gullivers' breach of contract claim:

1. Texas Business and Commerce Code Section §26.01 did not apply and the Parties were not required to reduce to writing an agreement for extending the time for performance of the contract.

* * *

5. On September 30, 2005, [the Shafers] breached the Contract.

6. On September 30, 2005, [the Gullivers were] not in breach of the Contract.

7. On April 10, 2006, [the Shafers] breached the Contract.

8. Constructive tender was effective on September 30, 2005.

9. Specific Performance is the proper remedy pursuant to the Contract.

A legally enforceable contract consists of (1) an offer, (2) acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding. *Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 72 (Tex. App.—Houston [14th Dist.] 2010, pet. filed). To recover for breach of contract, a plaintiff must show (1) the existence of a valid contract, (2) the plaintiff performed or tendered performance, (3) the defendant breached the contract, and (4) the plaintiff suffered damages as a result of the defendant's breach. *Id.*

September 30, 2005 Breach

The Shafers contend that time was of the essence in the sale of the property. Therefore, according to the Shafers, when the Gullivers did not tender actual performance on September 30, 2005, the contract expired, and the Gullivers were not entitled to specific performance.

In an ordinary contract for the sale of land, where the sale is to be consummated on a future day, time is not of the essence unless such an intention is clearly manifested. *Builders Sand, Inc. v. Turtur*, 678 S.W.2d 115, 118 (Tex. App.—Houston [14th Dist.] 1984, no writ). The designation of a particular date for performance is some indication that time is of the essence, but it is not dispositive. *Kennedy Ship & Repair, L.P. v. Pham*, 210 S.W.3d 11, 19 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Cadle Co. v. Castle*, 913 S.W.2d 627, 637 (Tex. App.—Dallas 1995, writ denied). The contract must expressly make time of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence. *Kennedy Ship & Repair, L.P.*, 210 S.W.3d at 19; *Mun. Admin. Servs. Inc. v. City of Beaumont*, 969 S.W.2d 31, 36 (Tex. App.—Texarkana

1998, no pet.). A time of the essence provision may be waived. *Kennedy Ship & Repair, L.P.*, S.W.3d at 20; *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 255 (Tex. App.—Dallas 2002, pet. denied). "A waiver of time of performance of a contract will result from any act that induces the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon." *Laredo Hides Co. v. H & H Meat Prods. Co.*, 513 S.W.2d 210, 218 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.).

The Shafers admit that the contract does not specifically state that time is of the essence, but assert that the purpose of the sale and the circumstances surrounding the sale made it apparent that time was of the essence. Section 9A of the contract stated that "[t]he closing of the sale will be on September 30th, 2005, or within 7 days after objection to matters disclosed in the Commitment or by the survey have been cured, whichever date is later (Closing Date)." The Shafers also contend that the evidence showed that the Gullivers knew that they needed to sell the property quickly due to their financial problems.

The Gullivers assert that time was not of the essence. The Gullivers also argue that the Shafers waived any claim that time was of the essence by their actions. Although the parties entered the contract on January 21, 2005, the Shafers did not set the closing until September 2005, because they could not convey clear title as required by the contract. At that point, the parties agreed to continue with the sale of the property, and the Shafers continued in their efforts to clear the liens on the property. The Shafers notified the Gullivers in early January 2006, that they had cleared the liens. Closings on the property were scheduled in March and April 2006. Lee Shafer testified that he never scheduled or pressed for a closing and never said to the Gullivers anything to the effect of "Hey, guys, let's get this deal done." Under these facts, we conclude that time was not of the essence.

Notwithstanding that time was not of the essence, the Shafers further assert that the Gullivers are not entitled to specific performance because they did not tender the actual purchase price on September 30, 2005.[4] The Gullivers argue that actual tender was impossible on September 30, 2005, and therefore, constructive tender was all that was required. We agree with the Gullivers' position.

Specific performance is an equitable remedy committed to the trial court's discretion. *Bell v. Rudd*, 144 Tex. 491, 191 S.W.2d 841, 843 (1946); *Chapman v. Olbrich*, 217 S.W.3d 482, 491 (Tex. App.—Houston [14th Dist.] 2006, no pet.). A party seeking specific performance of a contract must prove that he has diligently and timely performed, or tendered performance of, all obligations under the contract. *Chapman*, 217 S.W.3d at 491; *Riley v. Powell*, 665 S.W.2d 578, 581 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.). Generally, it is a prerequisite to specific performance that the buyer of land shall have made an actual tender of the purchase price—an unconditional offer to pay a sum not less than what the contract requires. *Wilson*, 715 S.W.2d at 822. "Because the proceeding is equitable in nature, this requirement is forgiven and a constructive tender will suffice when the acts of the defendant or the situation of the property is such that an actual tender would have been a *useless act*, an *idle ceremony*, or *wholly nugatory*." *Id.* (emphasis in original).

Where the contract requires a deed to be delivered upon tender of the purchase price, the purpose of a tender is two-fold. *Roundville Partners, LLC v. Jones*, 118 S.W.3d 73, 79 (Tex. App.—Austin 2003, pet. denied); *Wilson*, 715 S.W.2d at 821. First, the valid tender of the purchase price invokes the seller's obligation to convey and places him in default if he fails to do so. *Roundville Partners, LLC*, 118 S.W.3d at 79; *Wilson*, 715 S.W.2d at 821. Second, the tender satisfies the fundamental prerequisite of specific performance, i.e., that the buyer demonstrate he has done or offered to do, or is then

[4] When time is of the essence, the buyer must make an actual tender of the price and demand of the deed within the time allowed by the contract. *Wilson v. Klein*, 715 S.W.2d 814, 822 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

ready and willing to do, all the essential and material acts which the contract requires of him. *Roundville Partners, LLC*, 118 S.W.3d at 79; *Wilson*, 715 S.W.2d at 821.

Pamela Shafer testified that they did not close on September 30, 2005, because the liens on the property had not been released. Lee Shafer similarly testified that they "couldn't produce clear title" on September 30, 2005. Furthermore, the Shafers do not challenge the trial court's finding that "[o]n September 30, 2005, liens against the property exceeded funds from closing and, therefore, could not have been satisfied out of the proceeds of the sale." Lee Shafer also testified that he was not at home on September 30, 2005, and that he did not leave a signed deed with Pamela Shafer with which to close and, therefore, they could not have closed on that date even if the title had been cleared. Lee Shafer further testified that he did not schedule a closing on September 30, 2005, and did not advise the Gullivers that he could not clear title on that date. Moreover, Maryann Gulliver testified that they had the funds to close available in their bank account on September 30, 2005. We conclude that because the evidence shows that actual tender would have been a useless act, constructive tender by the Gullivers was all that was required on September 30, 2005.

The Shafers further challenge the trial court's finding that the Gullivers had performed all conditions precedent. The Gullivers respond that they satisfied the sole condition precedent to the contract, i.e., payment of the earnest money on January 21, 2005. We agree. Lee Shafer acknowledged that the Gullivers paid the earnest money on January 21, 2005, and the Shafers do not challenge the trial court's finding that the Gullivers "timely paid the required earnest money to" the Shafers. The Shafers suggest that the Gullivers were required to provide notice that they stood ready to perform. However, there is no provision in the contract requiring the Gullivers to provide written notice that they are able to perform. Moreover, this court already concluded that the only condition precedent in the contract was the payment of the earnest money. *See Gulliver*, 2008 WL 123872, at *4 n.2.

The Gullivers were not required to tender actual performance on September 30, 2005, because such tender would have been a useless act. In addition, the Gullivers satisfied the only condition precedent in the contract by paying the earnest money on January 21, 2005. Accordingly, we conclude that the evidence is legally and factually sufficient to support the finding that the Shafers breached the contract on September 30, 2005.

April 10, 2006 Breach

The Shafers also contend that they did not breach the contract on April 10, 2006, because the contract expired on September 30, 2005. The Shafers assert that, when the closing did not take place on September 30, 2005, the contract expired, and the parties' oral agreement to extend the contract for the sale of the property is unenforceable because it was required to be in writing pursuant to the statute of frauds. Under the statute of frauds, a contract for the sale of real estate must be in writing and signed by the party charged with compliance with its terms. TEX. BUS. & COM. CODE ANN. § 26.01(a)(4) (West 2009). As an exception to the general rule against oral modification of contracts covered by the statute of frauds, the parties to a written contract may agree orally to extend the time of performance, so long as the oral agreement is made before the expiration of the written agreement. *Dracopoulas v. Rachal*, 411 S.W.2d 719, 721 (Tex. 1967); *Aguiar v. Segal*, 167 S.W.3d 443, 451 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); *Triton Commercial Props., Ltd. v. Norwest Bank Tex., N.A.*, 1 S.W.3d 814, 818 (Tex. App.—Corpus Christi 1999, pet. denied); *Troutman v. Interstate Promotional Printing Co.*, 717 S.W.2d 428, 429 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.).

The Shafers contend that, because the parties orally agreed to extend the contract in October 2005, after the September 30, 2005 closing date, the statute of frauds requires that it be in writing. The Gullivers contend that no additional writing was necessary because section 9A of the contract contained the following disjunctive "or" clause: "The closing of the sale will be on or before September 30, 2005, or within 7 days after

objections to matters disclosed in the Commitment or by the survey have been cured, whichever date is later (Closing Date)." Therefore, the Gullivers contend that this clause allowed the contract to extend beyond the September 30, 2005 closing date, based upon the Shafers' inability to provide clear title, and the parties continued the contract pursuant to this clause. We agree. Approximately $115,000 in liens against the property existed on September 30, 2005, and therefore, the liens could not have been satisfied out the proceeds of the sale. Because no title commitment had been requested, the disjunctive provision of the contract had not been invoked on September 30, 2005. Thus, the contract, by its own terms, extended the closing date beyond September 30, 2005, and no agreement was necessary to extend the time for performance.[5]

The Gullivers also argue that the contract could not have expired on September 30, 2005. The Gullivers assert that, as the buyers, it was their option to terminate the contract. In section 19 of the contract, "Seller represents that as of the Closing Date (a) there will be no liens . . . against the property which will not be satisfied out of the sales proceeds. . . . If any representation of Seller in this contract is untrue on the Closing Date, Buyer may terminate this contract and the earnest money will be refunded to Buyer." Under section 15, if the seller defaults, "Buyer may (a) enforce specific performance."

The Gullivers argue that, notwithstanding the breach on September 30, 2005, the parties agreed to re-affirm the contract post-breach and continue the contract pursuant to its terms.[6] As explained above, the contract, by its own terms, could be extended beyond

[5] The Shafers also argue that an agreement for the extension of time for performance of a contract should be supported by separate and distinct consideration, but there is no evidence that any additional consideration was provided to support an extension of the contract. As explained above, the contract, by its own terms, extended the time for performance beyond September 30, 2005. Therefore, we do not need to address this argument.

[6] "'It is a fundamental proposition of contract law that when one party breaches its contract, the other party is put to an election of continuing or ceasing performance, any action indicating an intention to continue will operate as a conclusive choice, not depriving the injured party of his cause of action for the breach which has already taken place, depriving him only of any excuse for ceasing performance on his own part.'" *Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 858 (Tex. App.—Dallas 2005,

September 30, 2005. The Gullivers wanted to go forward with the sale and refused return of the earnest money. Therefore, the parties continued the contract to allow the Shafers to clear the liens against the property.[7] Lee Shafer testified that he "thought the contract had been extended," intended to sell the property to the Gullivers, and was "prepared to sell" the property on January 20, February 15, March 1, March 15, and April 1, 2006.[8]

Section 6D of the contract provides: "Within 10 days after Buyer receives the Commitment, Exception Documents and the survey, Buyer may object in writing to (1) defects, exceptions or encumbrances to title: . . . disclosed in the Commitment . . . ." Stewart Title issued the title commitment on March 27, 2006. The Gullivers received the final title commitment from Stewart Title at closing on April 10, 2006. The Gullivers made no objection subsequent to receiving the Commitment.

A closing was scheduled for March 31, 2006, but was cancelled, and another closing was scheduled for April 6 or 7, 2006. On April 5, 2006, Stewart Title notified Lee Shafer the April 6 or 7 closing was cancelled and was rescheduled for April 10, 2006. Lee Shafer advised Stewart Title that he was not going to sell the property because the contract had expired. Similarly, when Maryann Gulliver called Lee Shafer on April 7, 2006, he told her that they were not going to sell the property. The Gullivers appeared at the April 10, 2006 closing and tendered the purchase price, which invoked the Shafers' obligation to convey the property and placed them in default for failure to do so. *See Roundville Partners, LLC*, 118 S.W.3d at 79; *Wilson*, 715 S.W.2d at 821.

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pet. denied) (quoting *Cox, Colton, Stoner, Starr & Co., P.C. v. Deloitte, Haskins & Sells*, 672 S.W.2d 282, 287 (Tex. App.—El Paso 1984, no writ)).

[7] Section 19 of the contract provided that "[i]f any representation of Seller in this contract is untrue on the Closing Date, Buyer *may* terminate this contract and the earnest money will be refunded to Buyer." (Emphasis added). The liens against the property could not be satisfied out of the sale proceeds on September 30, 2005.

[8] The Shafers do not challenge the trial court's finding that they "intended to sell the property at issue during the period from September 30, 2005 through April 1, 2006 by virtue of [Lee Shafer's] express testimony."

The Shafers wrote a letter dated April 7, 2006, to the Gullivers advising them that because the Gullivers had failed to close on January 19, 2006, they were electing to terminate the contract and were returning the earnest money. However, the Shafers did not mail the letter until April 11, 2006—the day after closing.[9] Moreover, there is no provision in the contract allowing for rescission or revocation after acceptance. Nor was there rescission by mutual understanding because the Gullivers intended to proceed with the sale. *See March v. Orville Carr Assocs., Inc.*, 433 S.W.2d 928, 931 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.) (explaining that rescission of contract by mutual consent does not require formal agreement, but may result from any act or any course of conduct of parties which clearly indicates their mutual understanding that contract is abrogated or terminated, or from acquiescence of one party in its explicit repudiation by other).

We conclude that the evidence is legally and factually sufficient to support the trial court's finding that the Shafers breached the contract on April 10, 2006. Accordingly, the Shafers' first issue is overruled.

INTEREST DAMAGES

In their second issue, the Shafers challenge the legal sufficiency of evidence of the following findings of fact with respect to the trial court's judgment on interest damages and attorney's fees:

> 33. Reasonable attorney fees and costs incurred by [the Gullivers], and proven at trial are $30,838.91.
>
> 34. Interest on the $5,000 earnest money payment of [the Gullivers], from April 10, 2006 through May 15, 2009 amounts to $1,203.37 and was proven at trial.

[9] The Shafers do not challenge the trial court's findings that they mailed a "putative rescission letter" dated April 7, 2006, to the Gullivers on April 11, 2006, the day after the scheduled closing on April 10, 2006, at Stewart Title's office; or that the Shafers never sent the Gullivers "any writing purporting to rescind the offer to sell the Property prior to April 11, 2006"; or that the Gullivers never accepted the Shafers' offer to return the earnest money.

> 35. Interest on the $1,100.95 closing fees paid by [the Gullivers], from April 10, 2006 through May 15, 2009 amounts to $264.97 and was proven at trial.
>
> 36. Interest on the $48,000 closing payment tendered paid by [the Gullivers], from April 10, 2006 through May 15, 2009 amounts to $11,552.35 and was proven at trial.
>
> 37. Total lost interest on the sums of $5,000 and $48,000 and $1,100.95 at the legal rate from April 10, 200[6] through May 15, 200[9] is $13,020.69.

The Shafers contend that the Gullivers are not entitled to interest damages because they did not show that they incurred any expenses as a result of the Shafers' late performance. The general rule is that damages constitute an alternative remedy available only where specific performance either is not sought or not available. *Foust v. Hanson*, 612 S.W.2d 251, 253 (Tex. Civ. App.—Beaumont 1981, no writ). In appropriate circumstances, the court may order, in addition to specific performance, payment of expenses incurred by the plaintiff as a result of the defendant's late performance. *Id.* When specific performance of a contract to convey real property is granted, the court will enforce the equities of the parties in such a manner as to put them as nearly as possible in the position they would have occupied had the conveyance been made when required by the contract. *Heritage Hous. Corp. v. Ferguson*, 674 S.W.2d 363, 366 (Tex. App.—Dallas 1984, writ ref'd n.r.e.). That date having passed, the court, in order to relate the performance back to the contract date, equalizes any losses occasioned by the delay. *Id.*

In *Foust*, the defendant agreed to construct, and the plaintiffs agreed to purchase, a house to be completed on or before October 1, but it was not completed until December. 612 S.W.2d at 252. The contract required the plaintiffs to obtain a mortgage loan for thirty years at the prevailing rate. *Id.* at 254. The commitment obtained by the plaintiffs expired on October 4, and the plaintiffs obtained another commitment at a higher interest rate. *Id.* The plaintiffs produced evidence of the difference in the monthly mortgage rate

for the life of the loan due to the higher interest rate, and court of appeals affirmed the award. *Id.*

In *Heritage Housing Corp.*, the jury found that the plaintiff had contracted to purchase a house that was to be finished by a certain time, but it was not. 674 S.W.2d at 366. The court of appeals affirmed the award of rental value from the date the plaintiff tendered the balance of the purchase price and demanded specific performance, but reversed the award for rental value prior to the time the plaintiff tendered performance as part of the accounting between the parties incidental to the grant of specific performance. *Id.*

In *Claflin v. Hillock Homes, Inc.*, the court of appeals affirmed the award to the vendor for its carrying charges—the interest paid by the vendor on its interim building financing between the date of the breach and the lawsuit—on the original construction loan. *See* 645 S.W.2d 629, 635–36 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The vendor had planned on paying off the interim construction loan with the proceeds of the sale to the defendant. *Id.* at 632. The vendor had presented evidence that it was virtually impossible to rent the home because there was no rental market for the residence. *Id.* at 636.

Here, unlike *Foust*, *Heritage Housing*, and *Claflin*, the Gullivers did not present any evidence to show they were entitled to interest damages such as having to pay a higher mortgage, rent, or carrying charges as a result of the Shafers' breach of the contract. Lost interest from what they should have earned on their money does not fall within those categories of damages a party may recover in addition to specific performance. Therefore, the Gullivers are not entitled to interest damages. The Shafers' second issue regarding interest damages is sustained.[10]

[10] With respect to their no-evidence challenge to the trial court's finding on reasonableness of attorney's fees and costs, the Shafers have not provided any argument, authorities, or citations to the

ATTORNEY'S FEES

In their third issue, the Shafers contend that, because the Gullivers failed to disclose the amount and method of calculating attorney's fees in response to the Shafers' requests for disclosure, evidence of attorney's fees should not have been admitted.[11] The Shafers served the Gullivers with requests for disclosure pursuant to Rule 194 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 194. In their May 2, 2009 response to the Shafers' request for "[t]he amounts and any methods of calculating economic damages," the Gullivers responded: "Reasonable and necessary attorney fees and costs both through trial and if necessary through appeal."

The admission or exclusion of evidence rests within the sound discretion of the trial court. *Bay Area Healthcare Group, Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007) (per curiam). A trial court abuses its discretion in admitting or excluding evidence if it acts without reference to any guiding rules or principles or if the act complained of is arbitrary and unreasonable. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002). To reverse a judgment based on a claimed error in admitting or excluding evidence, the appellant must show that the error probably resulted in an improper judgment. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). If there is a legitimate basis for the trial court's evidentiary ruling, the appellate court must uphold the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

Rule 194.2(d) provides that a party may request disclosure of "the amount and any method of calculating economic damages." TEX. R. CIV. P. 194.2(d). Comment 2 to

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record. *See* TEX. R. APP. P. 38.1(i). The Shafers have waived their second issue regarding attorney's fees and, therefore, it is overruled.

[11] The Shafers also assert that the Gullivers failed to disclose the amount and method of calculating the interest damages in response to the Rule 194 request for disclsoure. Because we have concluded that the Gullivers are not entitled to interest damages in addition to specific performance, we need not address this argument.

Rule 194 provides that Rule 194.2(d) is "intended to require disclosure of a party's basic assertions, whether in prosecution of claims or in defense." TEX. R. CIV. P. 194 cmt. 2. "A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed . . . unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties." TEX. R. CIV. P. 193.6(a)(1), (2). "The burden of establishing good cause or the lack of unfair surprise or unfair prejudice is on the party seeking to introduce the evidence." TEX. R. CIV. P. 193.6(b).

The attorney's fees incurred by the Gullivers for prosecuting their breach of contract claim against the Shafers are not economic damages. Attorney's fees are not recoverable in Texas unless allowed by statute or by contract. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992); *see also Metro. Life Ins. Co. v. Haney*, 987 S.W.2d 236, 243–44 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (op. on reh'g) ("Attorney's fees . . . are not recoverable on tort claims."). Thus, Texas law differentiates between attorney's fees and damages.

Recovery of attorney's fees is dependent upon a party first prevailing on a claim which allows the recovery of attorney's fees. *See, e.g.*, *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997) ("To recover attorney's fees under Section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover *damages*.") (emphasis added). Rule 194.2(d) specifically refers to "damages." TEX. R. CIV. P. 194.2(d). Therefore, the Gullivers were not required to disclose the method of calculating attorney's fees pursuant to Rule 194.2, and the trial court did not

abuse its discretion by admitting testimony by the Gullivers' counsel on attorney's fees.[12] The Shafers' third issue is overruled.[13]

CONCLUSION

In summary, we find that (1) the evidence is legally and factually sufficient to support the trial court's findings that the Shafers breached the contract on September 30, 2005, and April 10, 2006, and the Gullivers are entitled to specific performance; and (2) the trial court did not abuse its discretion by admitting evidence of the Gullivers' attorney's fees. We affirm those portions of the trial court's judgment awarding specific performance and attorney's fees. We further find that the Gullivers are not entitled to interest damages. We reverse that portion of the judgment awarding the Gullivers interest damages and render judgment that they take nothing on their claim for interest damages. Accordingly, we affirm, in part, and reverse and render, in part.

/s/ Leslie B. Yates
Justice

Panel consists of Chief Justice Hedges and Justices Yates and Sullivan.

[12] The Shafers rely on *C.A. Walker Construction Company v. J.P. Southwest Concrete, Inc.*, in support of their contention that the Gullivers were required to disclose the method of calculating their attorney's fees. *See* No. 01-07-00904-CV, 2009 WL 884754 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, no pet.) (mem. op.). In that case, the court held that post-trial requests for damages and attorney's fees violated Rule 194.2(d) because J.P. Southwest Center failed to disclose the amount and method of calculating economic damages. *Id.* at *7. That case, however, is distinguishable because J.P. sought recovery of the attorney's fees it paid to a third party in a separate lawsuit. *Id.* at *2, *7.

[13] Relators do not raise any complaint about the failure to disclose attorney's fees with regard to the disclosure of the Gullivers' testifying expert on attorney's fees. *See* TEX. R. CIV. P. 194.2(f).