Affirmed and Memorandum Opinion filed January 4, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00772-CV

DR. THEODORE M. HERRING, JR. AND CARMEN DAWSON, Appellants

V.

HERON LAKES ESTATES OWNERS ASSOCIATION, INC., Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2006-74019

MEMORANDUM OPINION

Theodore Herring, Jr. and Carmen Dawson appeal from a final judgment entered by the trial court following the court's granting of a partial summary judgment in favor of appellee Heron Lakes Estates Owners Association, Inc. and a subsequent bench trial. In two issues, Herring and Dawson argue that the trial court erred in granting the partial summary judgment in favor of the Association on its breach of contract claim based on a Rule 11 settlement agreement and in awarding attorney's fees to the Association after the bench trial. We affirm.

BACKGROUND

Herring and Dawson own property that the Association alleged was governed by a Declaration of Covenants, Conditions, and Restrictions ("CCRs"). According to the Association's original petition, Herring and Dawson were violating the CCRs by constructing a house with features not authorized by the Association's Architectural Control Committee. Namely, Herring and Dawson were installing an unapproved red tile roof and a wrought iron fence, and they had failed to submit to the Committee for approval a description of the color of the exterior of the house and the driveway. The Association initially sued Herring and Dawson and sought injunctive relief to force Herring and Dawson to comply with the CCRs. Herring and Dawson countersued for a declaration that they were not bound by the CCRs and for tortious interference with contract and slander of title.

Immediately before the court was to hold a temporary injunction hearing, the parties entered into negotiations to settle the lawsuit. According to uncontroverted summary judgment evidence, the negotiations were attended by Herring, Dawson, Bruce Turner (counsel for Herring and Dawson), James Leeland (counsel for the Association), and representatives of the Association. Instead of holding a hearing on the temporary injunction, the court held a "Settlement Agreement" hearing under Rule 11 of the Texas Rules of Civil Procedure.[1] At the hearing, the court announced, "Put your agreement on the record." Turner and Leeland then dictated a number of terms that the parties had allegedly agreed upon. One of these terms was that Herring and Dawson "will ratify the CCRs and that ratification will be done when we reach a settlement on this."

When Herring and Dawson later refused to ratify the CCRs or to comply with other terms of the alleged settlement agreement, the Association amended its petition to add a breach of contract claim and then moved for summary judgment on that claim. The trial court awarded partial summary judgment and ordered Herring and Dawson to sign

[1] The parties do not dispute that the discussion took place "in open court" and that a transcript of the hearing was "entered of record," as required by Rule 11. *See* Tex. R. Civ. P. 11.

the CCRs and comply with other provisions of the settlement agreement, including paying the Association $700 in assessment fees and moving the wrought iron fence. The court then held a bench trial on the remaining issues, including the issue of attorney's fees and Herring and Dawson's tortious interference claim. The court awarded the Association $71,804 in attorney's fees with additional appellate attorney's fees, rendered a take-nothing judgment on Herring and Dawson's tortious interference claim, and issued an injunction directing Herring and Dawson to complete the construction of their house and eventually remove a chain link fence that they had installed. This appeal followed.

PARTIAL SUMMARY JUDGMENT

In their first issue, Herring and Dawson argue that the trial court erred in granting summary judgment for two reasons: (1) the transcript of the settlement hearing shows that no contract was formed as a matter of law because the parties did not intend to enter into a presently-binding agreement, such that the parties had a mere agreement to agree;[2] and (2) the Association was not entitled to judgment as a matter of law because Herring and Dawson's consent was necessary for the court to render a judgment enforcing the settlement agreement. The Association responds that no genuine issue of material fact was raised by the summary judgment evidence and that Herring and Dawson's repudiation of the settlement agreement did not preclude the court from entering summary judgment against them.

A. Standard of Review

We review de novo the granting of summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). The Association bears the burden of showing that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. *See id.* (citing Tex. R. Civ. P. 166a(c)). If the

[2] This argument attempts to prove too much. To reverse a traditional summary judgment, we would need to hold only that there was a genuine issue of material fact as to whether the parties intended to be presently bound. We address Herring and Dawson's argument under the appropriate standard of review.

Association satisfies this burden, then the burden shifts to Herring and Dawson to present evidence raising a fact issue. *See Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). We must view the evidence in the light most favorable to Herring and Dawson, crediting evidence favorable to them if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort*, 289 S.W.3d at 848.

B. There was no genuine issue of material fact regarding whether the parties intended to be presently bound.

Contract law governs agreements made in open court pursuant to Rule 11. *Ronin v. Lerner*, 7 S.W.3d 883, 886 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Parties may enter into a binding settlement agreement even if the parties contemplate that a more formal document memorializing the agreement will be executed at a later date. *See Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 745–46 (Tex. 1998); *see also McLendon v. McLendon*, 847 S.W.2d 601, 606–07 (Tex. App.—Dallas 1992, writ denied) ("[T]he attempts by the parties to reduce the rule 11 stipulations to writing do not affect the nature and effect of the stipulations dictated at the [hearing in open court]."). But if the parties do not intend to be bound until other terms are negotiated or until a formal document is executed, then "there is no binding contract, but only an agreement to agree." *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 29 S.W.3d 291, 300 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *accord Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000); *Foreca*, 758 S.W.2d at 745–46. The key question is whether the parties intended for a formal document to be executed as a condition precedent to being bound by contract. *Foreca*, 758 S.W.2d at 745–46. S*ee generally* Williston on Contracts § 4:11 (4th ed. 2007).

As a general rule, because intent to be bound is a question of fact, summary judgment would not be appropriate. *Gaede v. SK Invs., Inc.*, 38 S.W.3d 753, 757 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *see Foreca*, 758 S.W.2d at 746; *Fort Worth Indep. Sch. Dist.*, 22 S.W.3d at 846–47; *see also* Williston on Contracts § 4:11 ("Ultimately, the question is one of fact as to the intention of the parties."). But in some

cases, the intentions of the parties may be determined as a matter of law. *WTG Gas Processing, L.P. v. ConocoPhillips Co.*, 309 S.W.3d 635, 643 (Tex. App.—Houston [14th Dist.] 2010, pet. filed) (citing *Foreca*, 758 S.W.2d at 746). We may determine this issue as a matter of law if an unambiguous writing shows that the parties intended to be bound by contract. *Hardman v. Dault*, 2 S.W.3d 378, 380 (Tex. App.—Austin 1999, no pet.) (citing *Padilla v. LaFrance*, 907 S.W.2d 454, 461–62 (Tex. 1995)); *see Gilbert v. Pettiette*, 838 S.W.2d 890, 893 (Tex. App.—Houston [1st Dist.] 1992, no writ); *Henry C. Beck Co. v. Arcrete, Inc.*, 515 S.W.2d 712, 716 (Tex. Civ. App.—Dallas 1974, no writ). Whether a contract is ambiguous is a question of law, and a contract is ambiguous if it is reasonably susceptible to more than one meaning. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983).

Accordingly, summary judgment is proper in this case only if the unambiguous language of the contract establishes the material terms, including that the parties intended to enter into a presently-binding contract. In *Foreca*, the Texas Supreme Court held that a handwritten document created a fact issue as to the parties' intentions because the document, although it included many essential terms, included the phrase "subject to legal documentation contract to be drafted by [one of the party's attorneys]." 758 S.W.2d at 745–46. The court held that this language was ambiguous, and the jury could resolve its meaning. *Id.* at 746. Relying on *Foreca*, this court held in *Martin v. Black*, 909 S.W.2d 192 (Tex. App.—Houston [14th Dist.] 1995, writ denied), that the phrase in a mediation term sheet "subject to securing documentation satisfactory to the parties" also created a fact issue concerning the parties' intentions. *Id.* at 196.

Distinguishing the "subject to" language in *Foreca*, the San Antonio Court of Appeals held that the phrase in a written settlement agreement "final documents to be signed by 1-1-97" did not create a fact issue because it was unambiguous that the parties did not view the signing of future documents to be a condition precedent to creation of a binding contract. *Hardman*, 2 S.W.3d at 380–81. Thus, summary judgment was proper. *Id.* at 381. Similarly,

in *McLendon*, the Dallas Court of Appeals upheld the trial court's oral judgment after a Rule 11 settlement hearing even though one of the attorneys described the settlement hearing as "dictat[ing] the general parameters and terms" and explained to the client "you understand that each of you will be required to execute documents in order to effectuate the purposes of this agreement." 847 S.W.2d at 606–07. The court considered these statements in light of the other statements made at the hearing, such as "you agree to execute all documents which your counsel believes to be reasonable and necessary to accomplish the purposes of this settlement agreement, and to reduce it all to proper form." *Id.* at 606. There was no fact issue concerning the parties' intentions—they intended to enter into a binding contract. *Id.* at 606–07.

Here, the trial court began the hearing with the following statement: "You guys can proceed. Put your agreement on the record." Soon thereafter, Turner explained,

> So, the agreement that we've reached today is that, number one, my client will ratify the CCRs and that ratification will be done when we reach a settlement on this because—which is in the next week or so, and that—and that assessments under those CCRs will begin, prospective only, when we enter into the settlement agreement going forward. They will not be retrospective.

Herring and Dawson argue that the following phrases indicate that the parties did not intend to enter into a settlement agreement at the hearing: "when we reach a settlement" and "when we enter into the settlement agreement." They also point to Leeland's statement: "[W]e will prepare the appropriate settlement documents to be agreed upon between the parties to support our settlement agreements."

At oral argument in this case, appellate counsel for Herring and Dawson incorrectly asserted that the transcript contained the conditional statement "*If* we reach an agreement." The actual transcript of the settlement hearing does not support the argument that Herring and Dawson make on appeal. It is clear and unambiguous from the context of the settlement hearing that the word *when* was used to express a duration of time rather than a condition precedent to the formation of a contract. In this context, *when* is fundamentally different from

the word *if* or other conditional expressions, such as the *subject to* language found in *Foreca* and *Martin*. Use of the word *if* may have created a fact issue precluding summary judgment, but the word *when* does not in this case. *When* is a sequential term: after the parties complete certain actions, assessments would begin to accrue.[3]

Viewing the transcript as a whole, there is only one reasonable interpretation: the partied intended to enter into a binding settlement agreement, and the numerous terms dictated into the record were not conditioned on any future negotiations or execution of formal settlement documents. In addition to the agreement to ratify the CCRs and pay assessments in the future, the parties agreed to many other terms, including that (1) the house could have a red tile roof; (2) Herring and Dawson could have a circular driveway with stones earthen in color; (3) the house could be made of stucco and synthetic brick, with the stucco white in color and the brick earthen tones; (4) the wrought iron fence could remain the same size but could not extend past the front plane of the house; (5) Herring and Dawson would submit a scheme for the fence to the Association for approval within a few weeks; (6) portions of the fence would be removed when the certificate of occupancy was granted; (7) if Herring and Dawson wished to change any colors for the house, they would submit proposals to the Association for review and approval; (8) the parties would pay their own attorney's fees; (9) the Association would withdraw its request for a temporary injunction; and (10) all causes of action by both parties would be dismissed when the certificate of occupancy was issued, which the parties expected to take about two to three months. Because no essential terms were missing, no further negotiations were necessary. Every issue raised in the Association's original petition was addressed. The transcript unambiguously shows that the parties intended to be presently bound.

[3] *See* Restatement (Second) of Contracts § 227 cmt. b ("[U]nder a provision that a duty is to be performed 'when' an event occurs, it may be doubtful whether it is to be performed only if that event occurs . . . ."). The transcript shows that Turner was particularly concerned about when assessments would begin to accrue, further highlighting the distinction between *when* and *if*. There is no ambiguity in the transcript: Herring and Dawson agreed to ratify the CCRs, and assessments would begin prospectively.

At oral argument, appellate counsel for Herring and Dawson urged us to consider Herring's affidavit attached to the response to the Association's motion for summary judgment. Counsel suggested that the affidavit raises a genuine issue of material fact because Herring stated, "At no time did I agree to ratify the Declarations of Heron Lakes. I explicitly communicated to Mr. Turner that I would not ratify the Declarations." Assuming that this argument was not waived,[4] we nonetheless may not consider extrinsic evidence contradicting the unambiguous language of a contract. *Nat'l Union Fire Ins. Co. of Pitts., Penn. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520–22 (Tex. 1995). Herring's affidavit contradicts an unambiguous term: "my client will ratify the CCRs." Accordingly, the affidavit may not be used to raise a genuine issue of material fact.[5]

C. The Association was entitled to judgment as a matter of law even though Herring and Dawson repudiated the settlement agreement.

When a party enters into a Rule 11 settlement agreement but then later repudiates the agreement, a court may enter a judgment against that party for breach of contract. *See, e.g.*, *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). Such a judgment is not a consent judgment, but rather a judgment by the court for breach of contract. A party's

[4] This argument is not presented in Herring and Dawson's appellate brief, and ordinarily we do not consider issues raised for the first time at oral argument. *See Poland v. Willerson*, No. 01-07-00198-CV, 2008 WL 660334, at *5 (Tex. App.—Houston [1st Dist.] Mar. 13, 2008, pet. denied) (mem. op., not designated for publication); *French v. Gill*, 206 S.W.3d 737, 743 (Tex. App.—Texarkana 2006, no pet.); *Ajibade v. Edinburge Gen. Hosp.*, 22 S.W.3d 37, 40 (Tex. App.—Corpus Christi 2000, pet. struck); *see also* Tex. R. App. P. 39.2 ("Oral argument should emphasize and clarify the *written arguments in the briefs*." (emphasis added)).

[5] We do not intend to say this affidavit could *never* raise a fact issue. We recognize that extrinsic evidence is generally admissible to show the nonexistence of a contract. *Baker v. Baker*, 143 Tex. 191, 198, 183 S.W.2d 724, 728 (1944); *Bellaire Kirkpatrick Joint Venture v. Loots*, 826 S.W.2d 205, 213 (Tex.App.—Fort Worth 1992, writ denied); 29A Am. Jur. 2d Evidence § 1119 (2008). For example, extrinsic evidence may raise a fact issue about whether an attorney lacked actual or apparent authority to bind his or her client to a settlement agreement. *See Breceda v. Whi*, 187 S.W.3d 148, 152–53 (Tex. App.—El Paso 2006, no pet.); *City of Roanoke v. Town of Westlake*, 111 S.W.3d 617, 628–29 (Tex. App.—Fort Worth 2003, pet. denied); *Ebner v. First State Bank of Smithville*, 27 S.W.3d 287, 300 (Tex. App.—Austin 2000, pet. denied). But Herring and Dawson made no such argument in the trial court or in this court, and we cannot reverse on this ground. *See* Tex. R. Civ. P. 166a(c); Tex. R. App. P. 38.1(i); *see also Breceda*, 187 S.W.3d at 152–53 (affirming summary judgment for breach of a settlement agreement because the client did not rebut the presumption that the attorney had authority to settle).

revocation of consent to a settlement agreement "does not preclude the court . . . from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement." *Id.* Accordingly, Herring and Dawson's revocation of consent after entering into a binding Rule 11 agreement did not preclude the court from granting summary judgment.

Herring and Dawson's first issue is overruled.

ATTORNEY'S FEES

In their second issue, Herring and Dawson argue that the trial court erred in awarding attorney's fees for two reasons: (1) the Association was precluded from obtaining attorney's fees under the Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2008), because attorney's fees were otherwise unavailable;[6] and (2) the Association waived its right to recover attorney's fees under an express term of the contract providing that "there will be no attorneys' fees awarded on either side."[7] The Association responds that (1) the trial court properly awarded attorney's fees on the breach of contract claim, *see* Tex. Civ. Prac. & Rem. Code Ann. § 38.001 (West 2008), rather than under the Declaratory Judgment Act, and (2) the language from the settlement hearing does not preclude an award of attorney's fees.

A. The trial court was authorized to award attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code.

In its first amended petition, the Association requested attorney's fees under both the Declaratory Judgment Act and section 38.001 of the Texas Civil Practice and Remedies

[6] *See MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 670 (Tex. 2009) ("But when a claim for declaratory relief is merely tacked onto a standard suit based on a matured breach of contract, allowing fees under Chapter 37 would frustrate the limits Chapter 38 imposes on such fee recoveries."); *City of Houston v. Texan Land & Cattle Co.*, 128 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("More specifically, a party may not use a declaratory judgment action to seek the same relief afforded under another of its causes of action in an effort to obtain otherwise impermissible attorney fees.").

[7] Herring and Dawson also argue in their brief that the trial court erred in calculating attorney's fees from the inception of the lawsuit, prior to the breach of the settlement agreement. Because the record does not support their argument, they conceded this alleged error at oral argument

Code. A party may recover attorney's fees under section 38.001 on a breach of contract claim "in addition to the amount of a valid claim and costs." *Id.* The Texas Supreme Court has construed this statute to require that a prevailing party recover at least some damages to also recover attorney's fees. *Intercon. Group P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (2009); *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 666 (Tex. 2009). Here, the trial court awarded $700 to the Association as a maintenance assessment fee for the year 2007 based on the partial summary judgment ruling that Herring and Dawson agreed at the settlement hearing to begin paying assessments for the year 2007. Accordingly, the Association was entitled to recover attorney's fees under section 38.001. *See MBM*, 292 S.W.3d at 666; *see also Janicek v. 2016 Main Owners Ass'n, Inc.*, No. 01-96-00599-CV, 1997 WL 414951, at *6 & n.8 (Tex. App.—Houston [1st Dist.] July 24, 1997, no pet.) (not designated for publication) (modifying attorney's fees award, resulting in $10,912.70 of attorney's fees on a damages award of $125.50 for recovery of condominium maintenance fees). Because attorney's fees were authorized under section 38.001, we need not address whether attorney's fees were also authorized under the Declaratory Judgment Act. *See* Tex. R. App. P. 47.1

B. The contract did not preclude an award of attorney's fees.

Herring and Dawson rely primarily on cases dealing with consent judgments to argue that the trial court erred by awarding attorney's fees in direct conflict with the language of the settlement agreement. But as we explained above, the final judgment rendered by the court against Herring and Dawson was not a consent judgment. *See Padilla*, 907 S.W.2d at 461 (noting the difference between a consent judgment and a judgment rendered for breach of a settlement agreement). Herring and Dawson seem to argue that the Association waived its statutory right to attorney's fees as a matter of law. But to waive this right in a contract, the waiver must "*specifically* preclude [a] statutory claim to an award of attorney's fees under Section 38.001." *Nat'l Bank v. Sandia Mortg. Corp.*, 872 F.2d 692 (5th Cir. 1989) (interpreting Texas law); *see also Bank of Am., N.A.*

v. Hubler, 211 S.W.3d 859, 865 (Tex. App.—Waco 2006, pet. granted, judgm't vacated w.r.m.) (holding that the claimant did not waive her statutory right to attorney's fees because the contract provision that the bank would not be liable "for attorney's fees incurred," was "too general to apprise [the claimant] of what right she [was] relinquishing, namely her statutory right to attorney's fees under Chapter 38"). The contract provision at issue in this case did not specifically preclude a statutory award of attorney's fees for a breach of the settlement agreement itself. Rather, the parties agreed that the parties would bear their own attorney's fees incurred in the negotiation and settlement, not that the Association waived attorney's fees incurred to enforce the settlement agreement. Accordingly, the trial court did not err in awarding attorney's fees accruing from the point when Herring and Dawson breached the agreement.

Herring and Dawson's second issue is overruled.

CONCLUSION

The transcript of the Rule 11 settlement hearing in this case unambiguously shows that the parties intended to enter into a presently-binding contract. Herring and Dawson's repudiation of that agreement did not preclude the trial court from entering a judgment against them for breach of contract. Further, attorney's fees were authorized by section 38.001 of the Texas Civil Practice and Remedies Code, and fees were not precluded by a specific waiver in the contract. Having overruled both of Herring and Dawson's issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justice Jamison and Senior Justice Mirabal.[*]

[*] Senior Justice Margaret Garner Mirabal sitting by assignment.