

**Affirmed in Part; Reversed and Remanded in Part; and Memorandum Opinion
filed August 17, 2017.**



In The

Fourteenth Court of Appeals

NO. 14-16-00636-CV

WILLIARD CAPITAL CORPORATION, Appellant

V.

FRANCES L. JOHNSON, Appellee

**On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2016-21165**

M E M O R A N D U M O P I N I O N

Appellee Frances L. Johnson filed suit against appellant Williard Capital Corporation (“WCC”) for declaratory relief, deceptive trade practices, temporary restraining order and temporary injunction. WCC counter-claimed against appellee for negligent misrepresentation, fraud, and fraud in the inducement based upon alleged representations made to obtain a loan of more than \$85,000 for appellee’s

condominium.¹ This appeal arises solely from the trial court's order granting the temporary injunction. For the reasons stated below, we affirm in part and reverse and remand in part.

BACKGROUND

The record reflects appellee filed suit after WCC posted notice that it was seeking to perform a non-judicial foreclosure sale on her condominium at Regency Square Court. The foreclosure sale was scheduled for April 5, 2016.

According to appellee's pleadings, the condominium is protected from foreclosure as her homestead. Following a hearing, the trial court granted appellee's application for a temporary injunction and set a bond of \$37,000. Trial was set for April 3, 2017. The trial court amended its order on July 25, 2016, altering the bond amount to \$740. From that order, WCC filed a timely notice of appeal.

WCC brings two points of error claiming the trial court erred in granting appellee's application for a temporary injunction and in setting an insufficient bond. We address each in turn.

THE TEMPORARY INJUNCTION

The applicant for a temporary injunction must plead and prove: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204, (Tex. 2002); *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.). In its first issue, WCC challenges only the second requirement.

¹ Williard named appellee's husband, Fred Wiggins, as a third-party defendant. He is not a party to this appeal.

Standard of Review

The purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation pending a trial on the merits. *Butnaru*, 84 S.W.3d at 204 (Tex. 2002). A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Id.* At a temporary injunction hearing, the trial court considers whether the applicant has shown a probability of success and irreparable injury; the parties do not present the underlying merits of the controversy. *EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 658 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Whether to grant or deny a request for a temporary injunction is within the trial court's discretion, and we will not reverse its decision absent a clear abuse of discretion. *Butnaru*, 84 S.W.3d at 204; *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). An abuse of discretion does not occur when the trial court bases its decision on conflicting evidence. *LasikPlus of Texas, P.C. v. Mattioli*, 418 S.W.3d 210, 216 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We may not substitute our judgment for that of the trial court by vacating or modifying an injunction simply because we would have decided the issue differently. *Landry's Seafood Inn & Oyster Bar—Kemah, Inc. v. Wiggins*, 919 S.W.2d 924, 926 (Tex. App.—Houston [14th Dist.] 1996, no writ). We may not reverse the trial court's order granting a temporary injunction unless its decision was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru*, 84 S.W.3d at 204.

The trial court does not abuse its discretion if the applicant pleads a cause of action and presents some evidence tending to sustain that cause of action. *RP&R, Inc. v. Territo*, 32 S.W.3d 396, 402 (Tex. App.—Houston [14th Dist.] 2000, no pet.). As the reviewing court, we must draw all legitimate inferences from the evidence in the light most favorable to the trial court's order granting a temporary injunction. *EMSL Analytical, Inc. v. Younker*, 154 S.W.3d 693, 696 (Tex. App.—Houston [14th

Dist.] 2004, no pet.). When, as here, no findings of fact or conclusions of law are filed, the trial court's determination of whether to grant or deny a temporary injunction must be upheld on any legal theory supported by the record. *EMS USA*, 309 S.W.3d at 657.

*The Evidence*²

The record reflects appellee has owned the condominium since October 1982. She lived there from that time until March 1998 when she purchased a home on Lawrence Street. Appellee moved into the Lawrence Street property and rented out the condominium. In March 2002 and again in March 2007, appellee executed affidavits designating the Lawrence Street property as her homestead and disavowing that her homestead was the condominium.

In 2008, appellee hired Steven Williard, owner of WCC, as her attorney in an action by the condominium association to foreclosure on her unit for failure to pay dues. A Deed of Trust granting a lien on the Lawrence Street property to the Williard Law Firm, L.P., was executed to secure payment of Williard's attorney fees. Two months later, a modification of the deed of trust was executed that increased the lien on the Lawrence Street property.

In 2009, appellee again hired Williard to represent her in an action by her lender to foreclose on the Lawrence Street property. Later, Williard withdrew as appellee's counsel in this matter. The suit against appellee by her lender was subsequently resolved.

Appellee moved into the condominium in January 2010 and leased the Lawrence Street property. Williard was aware appellee had moved into the condominium to try and install a paying tenant. In April 2012, the Lawrence Street

² We limit our discussion of the evidence to that relating to the claimed homestead protection.

property was subjected to foreclosure. Appellee notified her utility company, bank, the post office, and her mortgagor of her change of address before the WCC loan and deed of trust on the condominium in favor of WCC was executed in April 2010. The funds from that loan were paid to the holder of a lien on the condominium, the Williard Law Firm, and WCC. Williard prepared the loan documents.

Subsequently, appellee executed an Application for Residence Homestead Exemption with the Harris County Appraisal District. It provides the start date of her occupation of the condominium as her homestead was March 1, 2010.

Analysis

The question we confront is whether appellee established a probable right to claim homestead protection for the condominium. The crux of WCC's argument is that appellee abandoned the condominium as her homestead when she moved into the Lawrence Street property and there is insufficient evidence that she claimed the condominium as her homestead before the loan and deed of trust were executed. Essentially, WCC is arguing, in essence, that appellee's acts could not constitute the establishment of a new homestead.

Appellee expressly does not contend her Application for Residence Homestead Exemption created her homestead claim. Rather, her overt acts of occupying the condominium, along with her intentions to make it her homestead, form the basis of appellee's claim.

Homestead property is constitutionally protected and cannot be forcibly sold to satisfy a judgment debt. *See* Tex. Const. art. XVI, § 50 (providing for certain enumerated exceptions); *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 660 (Tex. 1996); *Hearne v. Khera Interest, Inc.*, No. 14-15-00613-CV, 2016 WL 6090894, at *3 (Tex. App.—Houston [14th Dist.] Oct. 4, 2016, no pet.) (mem. op.). To sustain a

homestead claim, there must be proof of overt acts of homestead usage and intent on the part of the owner to claim the property as homestead. *Id.* (citing *Almanza v. Salas*, No. 14-12-01114-CV, 2014 WL 554807, at *3 (Tex. App.—Houston [14th Dist.] Feb. 11, 2014, no pet.) (mem. op.)). Occupancy does not, in and of itself, make the property a homestead. *Farrington v. First Nat’l Bank of Bellville*, 753 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1988, writ denied). “Intention in good faith to occupy the premises is the prime factor in establishing the homestead status of property.” *Lifemark Corp. v. Merritt*, 655 S.W.2d 310, 316 (Tex. App.—Houston [14th Dist.] 1983, writ ref’d n.r.e.)

Appellee’s intent to claim the condominium as her homestead is evidenced by her changes of address with the post office, utility companies, and her mortgagor, as well as her driver’s license. Appellee’s actual residence being the condominium is an overt act of homestead usage. *See Norman v. First Bank & Trust, Bryan*, 557 S.W.2d 797, 801–02 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref’d n.r.e.) (holding that removal to a different residence and use and occupancy of it as a homestead, unaccompanied by any act evidencing an intention to return to former home, is evidence that a new homestead has been acquired and the old one abandoned).

The applicant for a temporary injunction is not required to establish that he or she will prevail on final trial; rather, the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits. *Sonwalkar v. St. Luke’s Sugar Land P’ship, L.L.P.*, 394 S.W.3d 186, 194 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (citing *Walling*, 863 S.W.2d at 58). The status quo is the last actual, peaceable, non-contested status which preceded the pending controversy. *RP&R, Inc.* 32 S.W.3d at 402.

Appellee produced evidence that the condominium is protected from foreclosure as her homestead. Thus she met her burden to establish a probable right to the relief sought. And, although not challenged by WCC, we have recognized the potential loss of rights in real property is a probable, imminent, and irreparable injury which qualifies a party for a temporary injunction. *See also Kelley v. Ivey*, No. 14-14-00686-CV, 2015 WL 4387941, at *1 (Tex. App.—Houston [14th Dist.] July 16, 2015, no pet.) (mem. op.); *see also Stewart Beach Condo. Homeowners Ass’n, Inc. v. Gili N Prop Inv., LLC*, 481 S.W.3d 336, 345 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (quoting *Franklin Sav. Ass’n v. Reese*, 756 S.W.2d 14, 15–16 (Tex. App.—Austin 1988, no writ)) (“The harm of losing one’s home ‘is obvious’; a homeowner would ‘probably be injured if the property were foreclosed and sold.’”).

Accordingly, we conclude the trial court did not abuse its discretion in preserving the status quo pending trial on the merits by granting the temporary injunction. *See LasikPlus of Tex.*, 418 S.W.3d at 216 (holding when a trial court bases its decision on conflicting evidence, an abuse of discretion does not occur). We overrule appellant’s first issue.

BOND AMOUNT

WCC asserts that in the event temporary injunction is dissolved after trial, appellee will owe \$21,657.84 in interest, more than \$7,366.82 for property taxes, \$4,369.68 for property owners’ dues, and \$120,321.56 on the note, for a total of \$153,715.90. WCC contends the injunction bond should have been set at that amount.

The purpose of a bond as a condition to the granting of a temporary injunction is to secure the payment for the party against whom the injunction is issued including the amount of the monetary damages which it sustains as a result of the injunction, and costs, in the event the injunction is subsequently held to be wrongfully issued

and is dissolved. *See* Tex. R. Civ. P. 684; *Houston v. Plantation Land Co.*, 440 S.W.2d 691, 696 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.); *see also IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 203 (Tex. App.—Fort Worth 2005, no pet.) (citing *Bayoud v. Bayoud*, 797 S.W.2d 304, 312 (Tex. App.—Dallas 1990, writ denied)). The determination of the adequacy of the bond set by the trial court is to be made on a case-by-case basis based upon the record before the reviewing court. *Maples v. Muscletech, Inc.*, 74 S.W.3d 429, 431 (Tex. App.—Amarillo 2002, no pet.); *Stone v. Griffin Commc'ns & Sec. Sys., Inc.*, 53 S.W.3d 687, 696 (Tex. App.—Tyler 2001, no pet.). The amount of a bond is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion. *Four Stars Food Mart, Inc. v. Tex. Alcoholic Beverage Comm'n*, 923 S.W.2d 266, 269 (Tex. App.—Fort Worth 1996, no writ); *Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273, 286 (Tex. App.—San Antonio 2003, no pet.); *Maples*, 74 S.W.3d at 431.

WCC contends the bond amount should include interest based on default of the note and claims that amount is \$1,804.82 per month. Appellee counters that the appropriate amount of interest to be included in the bond is \$367.50 per month. The amount sought by WCC as bond for past due property taxes is the entire tax delinquency. Appellee argues the bond should be for the amount of property taxes due that have accrued due to enjoinder of immediate foreclosure, estimated as \$33.67 per month. WCC also requests the bond include all past due property owners' association dues. Appellee contends the bond should only include the amount owed each month, \$339, while the temporary injunction is in place. WCC further seeks to have the bond include the amount of the underlying debt owed on the note, which became due June 10, 2015.

The sum total of the amounts set forth above is \$740.17 (\$367.50+\$33.67+\$339). The trial court clearly set the bond amount based upon appellee's numbers rather than those suggested by WCC. The bond amount set by the trial court encompasses those damages sustained as a result of wrongful injunction for interest, taxes, and association dues for a single month. However, even using appellee's numbers, the minimum amount of damages for wrongful injunction would have been at least \$6,661.53 for the nine months between the date the order was entered in July 2016 for a trial setting in April 2017.

The order provides it "shall not be effective until Plaintiff deposits with the Clerk, a bond in the amount of \$740.00 in conformity with the law." Thus the "sum fixed by the judge" in the order granting temporary injunction is \$740. *See* Tex. R. Civ. P. 684.³ Although the trial court has considerable discretion in setting the amount of the bond, the record reflects the amount of damages sustained as a result of wrongful injunction, if only for interest, taxes, and association dues, exceeds the amount set by the trial court. *See* Tex. R. Civ. P. 684 (injunction bond must be conditioned on payment of "all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part"). We therefore conclude the bond is clearly insufficient. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Cellular Max, Inc.*, 123 S.W.3d 801, 804 (Tex. App.—Beaumont 2003, pet. diss'd). Appellant's second issue is sustained.

³ Although the order further directs appellee to deposit with the clerk of the court \$740 per month until trial on the merits or dissolution of the injunction, this monthly payment is not characterized as "a bond" and we are aware of no authority holding a monthly payment to the clerk of the court is a "sum fixed" as contemplated by Rule 684. *See* Tex. R. Civ. P. 684. Thus we do not consider this monthly stipend in our consideration of whether the bond is sufficient.

CONCLUSION

For the reasons stated above, that portion of the trial court's order setting bond at \$740 is reversed and remanded to the trial court for the setting of a new bond amount. That portion of the trial court's order granting the temporary injunction is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison and Donovan.