In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00450-CV

RICHARD VAUGHN SEEGER AND BEVERLY SEEGER, Appellants

V.

DEL LAGO OWNERS ASSOCIATION, Appellee

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 15-03-03034-CV

MEMORANDUM OPINION

In six appellate issues, Richard and Beverly Seeger ask the Court to reverse a final judgment holding them liable to Del Lago Owners Association (the Association) for $12,999[1] in past due assessments on three lots that they own in Del

[1] We have rounded all of the amounts that are referenced in the opinion to the nearest dollar.

Lago, a residential community located in Montgomery, Texas. Additionally, the Seegers were also found liable under the judgment for the attorney's fees and expenses that the Association incurred through trial, together with additional attorney's fees awards if the Seegers chose to appeal.

In their brief, the Seegers argue that this Court should reverse the awards the Association recovered against them in the judgment. With respect to the award of past due assessments, we conclude the arguments the Seegers raise in their brief to reverse the judgment as to the past due assessments are without merit. With respect to the Seegers' arguments challenging the attorney's fees awards, we conclude the jury erred by basing its award on the evidence presented by the Association, which failed to properly segregate the fees the Association incurred between the claims on which a recovery of fees is available and the claims on which it was not entitled to recover its fees. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006).

Background

In 2011, the Seegers stopped paying the annual assessments on their three lots in Del Lago. Like other lots in Del Lago, the Seegers' lots are burdened by deed restrictions that include covenants obligating property owners that own lots in Del

Lago to pay various assessments[2] to the Association. In March 2015, the Association sued the Seegers to collect the past due assessments that it claimed the Seegers had not paid, and to foreclose on its assessment lien, a lien provided for in the Covenants. The Association also sought to recover the attorney's fees it incurred in collecting the assessments it claimed the Seegers owed and to foreclose its assessment lien on the Seegers' lots.

The Seegers filed a general denial when they appeared in response to the Association's suit. Approximately four months later, the Seegers filed a counterclaim against the Association. In their counterclaim, the Seegers alleged the Association breached the obligations that it owed them under its "contract with the Seegers by failing to provide the services owed to the Seegers as stated in the [Covenants,]" breached the fiduciary duty that it owed them in its status as their homeowners association, and engaged in a conspiracy with the entity that owns the golf course to deprive them of the services they were entitled to receive from the

[2] The assessments burdening the Seegers' deeds include an annual assessment as well as special assessments, which are to be determined by the Association. The assessment burdening the lots in Del Lago are found in the deed restrictions that were filed in Montgomery County's property records in a document that is titled "Amended and Restated Declaration of Covenants, Conditions, Assessments, Charges, Servitudes, Liens, Reservations and Easements." In the opinion, we will refer to the restrictions relevant to the dispute between the parties in this case as "the Covenants."

Association as homeowners. The Seegers subsequently amended their counterclaim, and added negligence and intentional infliction of emotional distress claims to the theories of recovery they filed against the Association. Additionally, the Seegers' amended counterclaim includes a claim for attorney's fees.

Subsequently, approximately one year after it filed its suit, the Association filed a hybrid traditional and no-evidence motion for summary judgment. *See* Tex. R. Civ. P. 166a(a), (i). The hybrid motion sought to defeat some of the theories the Seegers raised in their counterclaim. In the no-evidence section of the Association's motion, the Association alleged that the Seegers could produce no evidence to show they were damaged by the Association, no evidence to show the Association had breached a contract, no evidence to show that the Association had a fiduciary duty to the Seegers or that it breached such a duty, no evidence to substantiate their claim that the Association had engaged in a conspiracy with the entity that owns the golf course, no evidence to establish that the Seegers had a right to recover attorney's fees, and no evidence to show that the Association was liable to the Seegers for exemplary damages. In the traditional section of its motion, the Association raised a two-year statute of limitations defense to the Seegers' claim for conspiracy. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (West 2017).

Approximately two weeks after the Association filed its hybrid motion, the Association notified the Seegers that the trial court would consider the hybrid motion on May 11, 2016, by submission.[3] Just one week before the trial court was to hear the Association's hybrid motion, the Seegers filed their response. In the response, the Seegers asked the trial court to delay considering the Association's motion. As to the merits of the Association's motion, the Seegers argued that "myriad issues of material fact" existed regarding their claims. The Seegers' response suggested the trial court should review the summary judgment evidence accompanying the Association's motion, together with several other documents that the Seegers attached to their response. The Seegers attached six groups of documents to their response: (1) an affidavit executed by Richard Seeger, which contains his explanation regarding why he chose to discontinue paying the assessments the Association levied on his lots; (2) records from St. Luke's Hospital, which indicate that on April 9, 2016, Beverly Seeger was treated and released from that facility after she was diagnosed with essential hypertension and heart palpitations; (3) a handwritten, but unsigned timeline of events listing various complaints that the

[3] Since oral testimony cannot be introduced under the Texas Rules of Civil Procedure during the hearing on a motion for summary judgment, an oral hearing on such motions is not mandatory. *See* Tex. R. Civ. P. 166a(c); *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998).

Seegers had made about the Association, starting in 2008; (4) uncertified copies of records from the Montgomery County Sheriff's Office indicating that Beverly Seeger was charged with misdemeanor assault in June 2012 after an Association board member complained that Beverly had thrown water at him following an argument with a groundskeeper, who was employed by the golf course, over whether the groundskeeper had the right to clear away some brush that was located near the Seegers' lots; (5) an unsigned handwritten timeline of events, which lists a variety of complaints about the Association's failure to remedy several problems that the author of the document indicates occurred on the Seegers' property; and (6) an affidavit from the Seegers' attorney, explaining why the Seegers desired a continuance regarding the date the court indicated that it would consider deciding the Association's motion for summary judgment.

Without ever expressly ruling on the Seegers' motion for continuance, the trial court granted the Association's motion in June 2016 regarding the Seegers' breach of fiduciary duty and civil conspiracy claims.[4] Nevertheless, the trial court's order

[4] In late July 2016, the Association filed a second hybrid motion for summary judgment on the Seegers' claims for negligence and intentional infliction of emotional distress. In August 2016, the trial court granted partial summary judgment in the Association's favor regarding the Seegers' negligence and intentional infliction of emotional distress claims. The Seegers have not challenged the trial court's rulings on those claims in this appeal.

of June 2016 did not dispose of all of the Seegers' counterclaims and the court's summary judgment was interlocutory. *See Farm Bureau Cty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 164 (Tex. 2015) (holding that a summary judgment order that failed to dispose of all of the parties' claims was not a final, and appealable, order).

In late May 2016, the Association filed a traditional motion for summary judgment on the claim it filed against the Seegers to collect the amount the Seegers allegedly owed to the Association in past due assessments. In its traditional motion, the Association also sought a summary judgment ruling on its claim for attorney's fees. Six weeks later, the Association amended its traditional motion for summary judgment, and the Association attached the following evidence to its amended motion: (1) certified copies of the deeds the Seegers used to acquire their lots in Del Lago; (2) a certified copy of the Covenants; (3) an affidavit from the custodian of records for the Association stating that the Seegers owed the Association $12,999 in unpaid assessments after considering all offsets and credits; and (4) an affidavit from one of the attorneys who represented the Association, which addresses the Association's claim for attorney's fees.

In late July 2016, the Seegers responded to the Association's amended traditional motion for summary judgment. In their response, the Seegers argued that

the Association had materially breached the Covenants by failing to provide their lots with all of the services the Association was required to provide them based on the Association's obligations under the Covenants. The Seegers asserted that the Association's breach excused any duty they might have otherwise had to pay the assessments. The Seegers attached the following evidence to their response: (1) the affidavit of Richard Seeger, acknowledging that he stopped paying the assessments because the Association failed to provide "services that it provides to all the other homeowners in Del Lago"; (2) deposition excerpts from a deposition taken in the case from one of the Association's Board Members, who discussed an occasion when Beverly Seeger allegedly threw water at him while he was talking to Richard Seeger about a groundskeeper who worked for the golf course; (3) pages from a deposition given by the Association's manager of accounts, which indicates that on the day her deposition was taken, she saw that the street in front of the Seegers' home was in need of repair, and she denied that the Seegers ever informed her that any repairs were needed to their street; and (4) an affidavit from the attorney representing the Seegers, who suggested the amount the Association was seeking in attorney's fees was unreasonable. Ten days before the trial began, the trial court granted the Association's motion for summary judgment in part, ruling that the Association should recover on its claim for past due assessments totaling $12,999.

On August 15, 2016, the case was tried on the issues that had not been resolved by the trial court in its interlocutory summary judgment rulings. According to the Seegers, the parties tried the case on the issues of the reasonableness of the Association's claim for attorney's fees and the Seegers' claim that the Association had breached its contract with the Seegers.[5]

The Association called seven witnesses to testify in the trial: (1) the Association's manager of accounts; (2) an attorney who testified regarding the reasonableness of the attorney's fees the Association was charged by his firm; (3) a homeowner residing in Del Lago, who testified that he regularly saw security, landscapers, and road repairs provided to the lot owners who live in Del Lago; (4) Lieutenant Stewart Hightower, the director of security for the Association, who testified that the Association provides security services to Del Lago and has done so to his knowledge since 2004; (5) a second homeowner living in Del Lago on the Seegers' street, who testified that he saw landscapers working on the pocket plant in front of the Seegers' home approximately one month before the trial and that the pocket plants and the roads in Del Lago are regularly maintained; (6) an employee of the landscaping company the Association used to service the landscaping in Del

[5] We assume without deciding that the Covenants create contract obligations, as the appeal has been decided without resolving the arguments the Association advances on that question.

Lago, who testified that he had worked on the landscaping in Del Lago since 2011, that he had serviced the pocket plant in front of the Seegers' home every year, and that in 2015, Richard Seeger told his helper, "don't worry about it[]" when the helper told Seeger that the landscapers were planning to work on the pocket plant located in front of the Seegers' home; and (7) Beverly Seeger, who testified that she and Richard stopped paying the assessments in 2010, after their home flooded because the entity that owned the golf course failed to properly maintain the drainage on the course, that she never informed the Association she wanted the pocket plant in front of her home maintained, and that she never told the Association their street was in need of repairs.

The Seegers called four witnesses in the trial: (1) a current member of the Association's Board of Directors, who testified that he complained to the police in 2012 that Beverly Seeger threw water on him while he was speaking to Richard Seeger about removing crime scene tape that the Seegers had placed around their property, and that the Association provided the Seegers with all of the services that it provided to the other homeowners in Del Lago; (2) Richard Seeger, who described how the Association had failed to provide the Seegers with the services that he felt

the Association was obligated to provide to all homeowners living in Del Lago;[6] (3) Beverly Seeger, who complained the Association failed to provide them with security, landscaping, and street repairs; and (4) the attorney for the Seegers, who testified that $20,000 to $25,000 was a reasonable sum for the attorney's fees that the Seegers had incurred to prosecute their claims, and that the Association's claim for attorney's fees was unreasonable because its claim for such fees should not have exceeded $7,000.

At the conclusion of the trial, the jury found that the Association had not "fail[ed] to comply with its contract with the Seegers." In another issue, the jury found that the Seegers "fail[ed] to comply with their contract with Del Lago[.]" In a separate issue that asked if the Seegers' failure to comply with their obligations was excused, the jury found that the Seegers' failure to comply with their obligations to the Association were not excused "by [the Association's] prior failure to comply with a material obligation of the same agreement[.]"[7]

---

[6] During his testimony, Richard agreed that he had received and continued to receive twice-a-week trash pickup at his home. Additionally, we note that the evidence in the trial did not establish that the Seegers incurred any out-of-pocket expenses for providing security, for maintaining their street, or for maintaining the pocket plant located in their front yard.

[7] The trial court did not submit an issue to the jury asking the jury to find the amount the Association should recover in unpaid assessments. Presumably, the issue was not submitted because the trial court had decided how much the Seegers owed

The jury was then asked to determine what the Association should recover in the reasonable and necessary fees for the services of its attorneys "in this case." The jury found that the Association should recover $51,497 in fees for "preparation and trial[,]" $10,000 "[f]or an appeal to the Court of Appeals[,]" and $15,000 "[f]or an appeal to the Supreme Court of Texas." The jury failed to award the Seegers anything on their claim seeking to recover their attorney's fees.

In late August 2016, the trial court rendered a final judgment. After the trial court denied the Seegers' motion for new trial, and denied the Seegers' request asking for a remittitur, the Seegers filed a timely notice of appeal.

Interlocutory Summary Judgment Rulings

In issues one and two, the Seegers argue that the trial court erred by granting the Association's two interlocutory motions for summary judgment. In issue one, the Seegers argue the trial court erred by granting the Association's motion seeking summary judgment against them on their claim alleging the Association breached a fiduciary duty that it owed them and on their claim for civil conspiracy. The Seegers also argue the trial court should have granted their request to continue the date the first hybrid motion was scheduled to be heard by submission. The Seegers conclude

---

the Association in unpaid assessments during the summary judgment proceedings that occurred prior to the trial.

that the summary judgment evidence before the trial court when it ruled on the first of the Association's hybrid motions demonstrates that issues of material fact, which need to be resolved by a jury, exist on both their breach of fiduciary duty and civil conspiracy claims.

First, we consider the Seegers' argument complaining that the trial court refused to continue the submission date regarding the Association's first hybrid motion. In this case, the Association filed its motion for partial summary judgment approximately one year after the Seegers filed their counterclaims. The trial court did not rule on the motion until June 1, 2016, which is approximately fifty-two days after the Association's motion was filed.

Generally, "[a] party seeking more time to oppose a summary judgment must file an affidavit describing the evidence sought, explaining its materiality, and showing the due diligence used to obtain the evidence." *Carter v. MacFadyen*, 93 S.W.3d 307, 310 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *see also* Tex. R. Civ. P. 252. "The affidavit must show why the continuance is necessary; conclusory allegations are not sufficient." *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520-22 (Tex. 1995) (holding further time for discovery unnecessary as construction of unambiguous contract required no discovery). When a movant fails to comply with the requirements

in Rule 251, which require that a motion for continuance be supported by affidavit, an appellate court will presume that the trial court did not abuse its discretion by denying a motion to continue. *See* Tex. R. Civ. P. 251; *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *Garcia v. Tex. Employers' Ins. Ass'n*, 622 S.W.2d 626, 630 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.).

In this case, the Seegers attached two affidavits to the request they filed asking the court to continue the submission date for considering the Association's motion. Richard Seeger's affidavit, one of the affidavits the Seegers rely on in their argument, represents that his wife, Beverly, could provide more information regarding the Seegers' claims and their damages. He explained that Beverly had not been deposed on the date her deposition was scheduled because she was ill. However, the illness that Richard describes in his affidavit suggests that Beverly was so upset over the Association's conduct that she was experiencing difficulty leaving home, and that she was having difficulty sleeping. Richard's affidavit states that "[Beverly] will hardly take walks on our street any [longer]." Richard also swore that he had spoken to a doctor about his wife's problems, but that he was "unable to get any specific information from [the doctor] regarding [her] status and prognosis." The other affidavit supporting the Seegers' request to continue the hearing consists of an affidavit signed by the Seegers' attorney. The attorney's affidavit indicated

that when he met with Beverly before presenting her for her deposition, she was "extremely upset, crying, and she was unable to prepare for the deposition with me." The affidavit reflects that the depositions of the Seegers, which were scheduled to be taken on April 15, 2016, were not taken on that date because Beverly could not provide her deposition at that time. While the affidavits supporting the motion contain an explanation about why Beverly failed to appear for her deposition on the date it was scheduled in April 2016, the trial court was not required to view her inability to provide a deposition as sufficient to explain why Beverly could not have provided a deposition at some other date prior to the date the trial court wanted to consider the Association's motion. And, the trial court could have viewed the explanations in the affidavits as wholly failing to explain why Beverly could not have provided the trial court with an affidavit to support the response the Seegers filed to the Association's motion.

The medical records the Seegers relied on in their motion to continue also did not require the trial court to delay hearing the Association's motion. The April 2016 report from St. Luke's Woodlands Hospital shows Beverly was treated once at the hospital for heart palpitations and essential hypertension, conditions the trial court could reasonably view insufficient to excuse the Seegers' failure to provide the trial court with summary judgment evidence raising a fact issue on the Seegers' claims.

Additionally, nothing in the affidavits before the trial court regarding the requested continuance hearing explain how the Seegers exercised due diligence in marshalling their evidence to respond to the Association's motion. On this record, the trial court was authorized to conclude that the Seegers had not established any of the grounds required to justify a continuance of the summary judgment hearing. We hold the trial court did not abuse its discretion by denying the Seegers' request to continue the hearing. *See* Tex. R. Civ. P. 252.

Next, we consider the Seegers' argument that the summary judgment evidence before the trial court when it ruled on the Association's motion raises issues of material fact on the elements they were required to prove to establish that the Association owed them a fiduciary duty, breached such a duty, or had engaged in a civil conspiracy with the entity that owns the golf course. We review rulings on motions for summary judgment when they are appealed using a de novo standard. *See Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 215 (Tex. 2003).

In resolving the Seegers' issue, we are first required to consider the ruling on the no-evidence part of the Association's hybrid motion before considering the ruling the trial court made on the traditional portion of the Association's hybrid motion. *See Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 600 (Tex. 2004). Rule 166a(i) of the Texas Rules of Civil Procedure provides that a court may rule on a

no-evidence motion for summary judgment after the party opposing the motion has had adequate time to engage in discovery on the claims that are challenged in the no-evidence motion. Tex. R. Civ. P. 166a(i). Under Rule 166a(i), the trial court "must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact" on the challenged elements of the respondent's claims. *Id.* The Texas Supreme Court has explained that the trial court must grant a no-evidence motion if "(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *King Ranch, Inc. v. Chapman,* 118 S.W.3d 742, 751 (Tex. 2003). Because a trial court's decision granting a no-evidence motion for summary judgment is essentially a pretrial directed verdict, the same legal sufficiency standard is used in reviewing rulings made by trial courts on motions for directed verdicts. *Id.* at 750-51.

Therefore, we address whether the summary judgment evidence before the trial court when it ruled on the Association's no-evidence motion raised an issue of material fact on the Seegers' breach of fiduciary duty claim. *See* Tex. R. Civ. P. 166a(i). The Association's no-evidence motion asserted there was no evidence that

it had a fiduciary relationship with the Seegers under the Covenants, no evidence that it breached any fiduciary duty that it owed to the Seegers, and no evidence that the Seegers were injured as a result of any such breach. Therefore, to demonstrate that a triable issue existed on their breach of fiduciary duty claim, the Seegers were required to establish that the Association owed them a fiduciary duty, that the fiduciary duty it owed to them was breached, and that the breach caused their damages. *See Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 520 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

According to the Seegers, the summary judgment evidence shows that the Covenants required the Association to spend the assessments that it collected from the Association's members for their benefit, that they were members of the Association, and that the Association quit providing them with the services they should have received based on obligations that the Association owed them under the Covenants.

We agree with the Association's argument that the summary judgment evidence before the trial court when it ruled on the Association's motion failed to establish that the Association owed the Seegers a fiduciary duty to use the assessments to directly benefit the lots the Seegers own. The deeds to the Seegers' lots, which reference the Covenants, do not include language requiring the

Association to spend the funds it collects as assessments to repair or improve a specific homeowner's lot. Moreover, the summary judgment evidence contains no evidence showing that the Association failed to spend the funds it collected in assessments to the benefit of the members of the Association as a whole.

The summary judgment evidence also failed to address whether a relationship of trust and confidence existed between the Association and the Seegers when they purchased their lots. Instead, the only evidence that is in the record shows that the Seegers never had a relationship of confidence or trust with the Association in any of the periods that they claimed the Association failed to provide them with the services they claimed they were entitled to receive. *See La Ventana Ranch Owners' Ass'n, Inc. v. Davis,* 363 S.W.3d 632, 644-45 (Tex. App.—Austin 2011, pet. denied) (holding that the evidence was legally insufficient to uphold a jury's finding that an informal fiduciary duty existed between a developer and the members of a homeowners association based on restrictive covenants that allowed the developer to collect fees).

Next, we consider the Seegers' argument that the summary judgment evidence revealed the existence of an issue of material fact regarding the Seegers' civil conspiracy claim. To establish the existence of a civil conspiracy, the Seegers were required to demonstrate that the Association and at least one other person or entity

worked together to accomplish an unlawful purpose, that the members of the conspiracy had a meeting of the minds on their course of action, that one of the members committed an unlawful, overt act to further the course of action, and that their injuries were proximately caused by the unlawful and combined course of action. *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 675 (Tex. 1998).

However, the summary judgment evidence that was before the trial court failed to address the elements of the Seegers' civil conspiracy claim. For example, there was no evidence that the Association and at least one other person, presumably the entity that owned the golf course, worked together to deprive the Seegers of the benefits they should have received as members of the Association. *See Triplex Commc'ns v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995); *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Additionally, the Seegers produced no evidence showing that the Association and the entity that owned the golf course had a meeting of the minds or engaged in an unlawful course of action. *Id*. Because the Seegers failed to file a response to the Association's no-evidence motion demonstrating that issues of material fact existed on the counterclaims they filed against the Association for breach of fiduciary duty and civil conspiracy, we overrule issue one.

In issue two, the Seegers challenge the trial court's partial traditional summary judgment ruling awarding the Association $12,999 in past due assessments.[8] In their brief, the Seegers argue that their duty to pay assessments levied by the Association was excused by the Association's failure to provide them with services.

We review a trial court's ruling on a traditional motion for summary judgment using a de novo standard. *See Provident Life & Accident Ins. Co.*, 128 S.W.3d at 215. On appeal, the summary-judgment record is reviewed "in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion." *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). If the party moving for summary judgment establishes through its motion and its summary judgment evidence that it should recover as a matter of law, the burden shifts to the party opposing the motion to produce evidence that raises a genuine issue of material fact that is sufficient to defeat the opposing party's motion. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000); *see also* Tex. R. Civ. P. 166a(c). A genuine issue of material fact exists if reasonable and fair-minded jurors could differ in the conclusions they could reach from the

[8] The Association's claim for past-due assessments covered the period between January 2011 and July 2016. The Association's traditional motion for summary judgment regarding its claim for unpaid assessments was filed in late May 2016.

evidence the trial court considered in deciding the motion. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

In this case, when the Association established that the Seegers failed to pay $12,999 in assessments, which the Association levied under the authority delegated to it under the Covenants, the burden of proof shifted to the Seegers to produce evidence to show that a material fact issue existed that a jury was required to resolve to determine if the Association's claim for payment was invalid. *See Willrich*, 28 S.W.3d at 23. In this case, the summary judgment evidence did not show that the Seegers were claiming they were never billed for the assessments; instead, the Seegers claimed that their duty to pay the assessments was excused because the Association breached its obligation to provide them with services, which is the issue the trial court allowed the jury to decide and the jury decided that issue against them. Moreover, the Covenants, which are included in the summary judgment evidence, provide that the Association "shall apply all funds and property collected and received by it (including the Annual and Special Assessments, fees, loan proceeds, surplus funds, and all funds and property received by it from any other source) for the common good and benefit of the Property[.]"[9] This provision does not require

[9] The Covenants define the "Property" as "(1) At the time of recordation of this [Covenant], the land described on Exhibit 'A' attached hereto and made a part hereof for all purposes; and (2) From and after the addition of each parcel of land

that the Association spend the monies that it collects in assessments directly on or near a particular property owner's lots, nor does it require the money to be spent in a manner that a particular property owner might desire. Moreover, there was no summary judgment evidence that showed the Association misappropriated the assessments, such as by using the funds in ways that were not authorized by the Covenants.

We conclude the Seegers failed to produce summary judgment evidence raising a genuine issue of material fact to show that they did not owe the Association $12,999 in past due assessments. Accordingly, we overrule issue two.

Breach of Contract

The trial court submitted the Association's breach of contract claim and the Seegers' claim of excuse to the jury. At the conclusion of a jury trial, the jury found the Association did not fail to comply with its contract with the Seegers. In their third issue, the Seegers argue that the jury's finding that the Association did not breach its contract with them is a finding that is contrary to the overwhelming weight

subjected to this [Covenant] pursuant to Article XV hereof, each such new parcel of land." The Seegers have never claimed that their lots are not among those that are subject to the requirements stated in the Covenants.

and preponderance of the evidence.[10] According to the Seegers, the jury heard uncontroverted testimony that the Association failed to provide security, to maintain pocket plants, and to repair the street in front of the Seegers' home, all of which were acts they contend amounted to a breach of the obligations the Association has to them based on the language that is in the Covenants.

When, as is in this case, the appellants challenge the factual sufficiency of the evidence supporting an adverse finding by a jury on an issue on which they had the burden of proof in the trial, the appellants must establish that "the adverse finding is against the great weight and preponderance of the evidence" to prevail in an appeal. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001). To prove a breach of contract claim, the plaintiff has the burden to prove (1) the existence of a valid contract, (2) the plaintiff's performance or tender of performance, (3) the defendant's breach, and (4) the plaintiff's damages that resulted from the breach. *See Bank of Tex. v. VR Elec., Inc.*, 276 S.W.3d 671, 677 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *Sullivan v. Smith*, 110 S.W.3d 545, 546 (Tex. App.—Beaumont 2003, no pet.). Since the Seegers did not prevail on the breach of contract issue in

[10] The Seegers argue we should overturn the jury's finding on the breach of contract issue because the jury based its finding "on factually insufficient evidence/legally insufficient evidence as a matter of law and/or against the great weight and preponderance of the evidence[.]"

the trial, they must demonstrate in their appeal that the jury's "No" answer to the breach of contract issue is "against the great weight and preponderance of the evidence[.]" *See City of Keller,* 168 S.W.3d at 826 (internal citations omitted); *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986).

Generally, the evidence supporting a jury's answer to an issue will be found to be sufficient if the evidence admitted during the trial would have allowed "reasonable and fair-minded people to reach the verdict under review." *City of Keller,* 168 S.W.3d at 827. When reviewing a jury's verdict, we are required to defer to the decisions the jury made regarding the weight the jury chose to give the evidence that was presented to it during a trial. *Id.* Jurors, as the factfinders that are given the opportunity to observe the witnesses testify, have the right to choose to believe one witness over others, and to reach their conclusions regarding how an issue should be resolved by deciding that certain witnesses were credible when others were not. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). Nonetheless, "[t]he jury's decisions regarding credibility must be reasonable." *See City of Keller,* 168 S.W.3d at 820. For example, jurors are "not free to believe testimony that is conclusively negated by undisputed facts." *Id*. But, even when evidence is undisputed, "it is the province of the jury to draw from it whatever inferences they wish, so long as more than one is possible and the jury must not

simply guess." *Id.* at 821. And, unless the record shows the jury's decision contradicts the overwhelming great weight and preponderance of the evidence, we are not allowed to merely substitute our judgment for the judgment made by the jury. *See Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1998).

In this case, the jury heard conflicting testimony about the extent the Association provided various types of services on or near the lots the Seegers owned. For example, while there was testimony suggesting that the pocket plant in the Seegers' front yard was not always maintained, and evidence that the street in front of the Seegers' home needed repair, there was also evidence showing that the Association maintained the pocket plant and street in front of the Seegers' home. Additionally, even the Seegers did not dispute that their trash was picked up regularly, one of the services the Association provided to homeowners in Del Lago. Moreover, the Covenants defining the Association's obligations require only that the assessments be spent for the "common good and benefit" of the Association's members as a whole, the language does not require the assessments to be spent on a specific project for the benefit of a specific homeowner or to remedy a specific homeowner's complaint.

Given the language in the Covenants and the testimony that was before the jury about the services the Association provided to the homeowners in Del Lago, the

jury's finding that the Association did not fail to comply with its contract with the Seegers is supported by the evidence admitted in the trial. Moreover, the record does not contain overwhelming evidence that contradicts this finding. We conclude that substantial and probative evidence before the jury supports the jury's resolution of the Seegers' breach of contract claim. Based on all the evidence the jury considered in the trial, the Seegers' testimony that the Association failed to provide them with services was not conclusive on the jury's resolution of the Seegers' claim. *See City of Keller*, 168 S.W.3d at 815-16 (explaining that "[u]ndisputed evidence and conclusive evidence are not the same—undisputed evidence may or may not be conclusive, and conclusive evidence may or may not be undisputed").

After reviewing the testimony and evidence as a whole, we conclude the overwhelming and greater weight of the evidence does not contradict the jury's decision to reject the Seegers' breach of contract claim. We overrule issue three.

Attorney's Fees

In their fourth issue, the Seegers challenge the jury's finding that $51,497 is a reasonable fee for the services the Association incurred in the case. According to the Seegers, the Association's attorneys should have only been permitted to recover those fees associated with the Association's prosecution of its claim to collect the assessments it claimed that they owed. The Seegers suggest the Association was not

entitled to recover the fees that its attorneys charged the Association for defending the Association against the Seegers' various counterclaims. According to the Seegers, the Association failed to properly segregate the fees that it was awarded between the various claims in a way that would have allowed the jury to consider the fees the Association could properly recover for prosecuting its claim for unpaid assessments.

Section 5.006 of the Texas Property Code permits the prevailing party who filed an action based on breach of restrictive covenant pertaining to real property to collect reasonable attorney's fees and costs. *See* Tex. Prop. Code Ann. § 5.006 (West 2014). Additionally, language in the Covenants allowed the Association to recover the costs and attorney's fees it incurred in connection with enforcing claims that it brought against a homeowner for the homeowner's unpaid assessments.

Nonetheless, we find nothing in the Property Code or the Covenants that allowed the Association to recover the attorney's fees it incurred in defending the Association against the Seegers' claims for negligence, intentional infliction of emotional distress, and civil conspiracy. *See id.* Moreover, the Seegers' counterclaims for fraud, negligence, civil conspiracy, and intentional infliction of emotional distress required that the Seegers establish the Association owed them duties independent of whatever duties the Association might have owed the Seegers

under the language found in the Covenants to the Seegers' deeds. *See generally Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991) (noting that tort obligations are usually viewed as obligations that are imposed by law apart from and independent of a party's promises under a contract); *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996) (holding that civil conspiracy is a derivative tort and the defendant's liability for conspiracy depends on his participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable). In this case, none of the parties disputed that the Seegers' deeds incorporated the Covenants. Thus, although the Association's obligations to the Seegers under the Covenants was relevant to the jury deciding if the Association had committed any torts, the Covenants do not serve as the legal basis for the Seegers' claims for negligence, intentional infliction of emotional distress, and civil conspiracy.

During the trial, one of the attorneys representing the Association testified about the fees the Association incurred in the proceedings. According to the attorney, the Association hired him to collect the assessments, and he explained that a collection claim seeking assessments is typically a fairly simple matter. However, the attorney explained that the Seegers complicated the suit by both filing counterclaims and by raising a claim of excuse as a defense to the Association's claim for unpaid assessments. According to the attorney, although he was not hired

to defend the Association against the Seegers' counterclaims, his invoices included work on them.

Even if the Association was required to defend against the Seegers' counterclaims, the Association provided the trial court with no provision by statute or in the Covenants that allowed the Association to recover attorney's fees for successfully defending the Association against the Seegers' tort claims. The jury's award clearly includes attorney's fees that cannot be recovered either under the Property Code or the Covenants, as the award includes fees the Association incurred in successfully defending the Association against the Seegers' tort claims. We conclude the appropriate remedy is to reverse the jury's award of fees and to grant the Seegers a new trial on that issue. *See Chapa*, 212 S.W.3d 313.

The Seegers also argue that the judgment should be reversed because the jury failed to allow them to recover attorney's fees against the Association based on their own breach of contract claim. In issue six,[11] the Seegers suggest that the jury's answer to their issue regarding the attorney's fees they incurred should be overturned

[11] In issue five, the Seegers argue the trial court should have reduced the jury's award of fees by $11,136. Given our resolution of issue four, we need not address issue five because resolving that issue would afford the Seegers no greater relief than the relief we have granted them by our ruling sustaining issue four. *See* Tex. R. App. P. 47.1.

because the finding contradicts the great weight and preponderance of the evidence.[12] According to the Seegers, the evidence they presented in the trial showed that they incurred attorney's fees of between $20,000-$25,000, and they argue that the jury was not free to find they should recover "0" in fees.

The Seegers based their claim for attorney's fees on section 38.001 of the Texas Civil Practice and Remedies Code, a section that allows a person to recover reasonable attorney's fees and costs on a *valid* claim based on an oral or written contract. *See* Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8) (West 2015) (emphasis added). To recover attorney's fees under this provision, a party must prevail on their underlying contract claim, and it must recover damages. *See Ventling v. Johnson,* 466 S.W.3d 143, 154 (Tex. 2015). In this case, the Seegers did not prevail on their claims.

Assuming without deciding that section 38.001 of the Texas Civil Practice and Remedies Code applies to the Seegers' claim that the Association breached the obligations that it owed them under the Covenants, the Seegers' failure to prevail on

[12] The Seegers characterized their argument about the jury's finding on their issue as challenging the factually sufficiency of the evidence. However, because the Seegers had the burden of proof on their attorney's fees issue, they must establish in their appeal that the jury's finding on this issue was inconsistent with the greater weight and preponderance of the evidence. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

that claim prevents them from recovering on their claim for attorney's fees. *Id.* Consequently, the jury's finding on the attorney's fee issue regarding the fees the Seegers incurred in the case is an immaterial finding, as it was rendered immaterial by the jury's other findings. *See Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994) (citing *C. & R. Transp. Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966)).

For the reasons discussed above, we sustain the Seegers' argument in issue four claiming the fees awarded to the Association included fees that were not properly recoverable, and we overrule the arguments the Seegers have advanced in their sixth issue, which addresses the jury's failure to award them a recovery on their claim for attorney's fees.

Conclusion

We sever and reverse the trial court's judgment regarding the amount of reasonable and necessary trial and appellate attorney's fees to be awarded the Association under the Property Code and the Covenants. *See* Tex. R. App. P. 43.2(d), 44.1(b). We remand that portion of the trial court's judgment for further proceedings in accordance with this opinion. We affirm the judgment in all other respects. *See* Tex. R. App. P. 43.2 (a).

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

_____

HOLLIS HORTON
Justice

Submitted on January 25, 2018
Opinion Delivered May 3, 2018

Before Kreger, Horton and Johnson, JJ.