In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00059-CV

CHARLES GLEN HYDE, HYDE-WAY, INC., AND TEXAS AIR CLASSICS, APPELLANTS

V.

ROBERT "BOBBY" HAWK, APPELLEE

On Appeal from the 158th District Court
Denton County, Texas
Trial Court No. 2013-20761-158, Honorable Steve Burgess, Presiding

November 27, 2017

MEMORANDUM OPINION

Before QUINN, C.J., CAMPBELL and PIRTLE, JJ.

Appellants Charles Glen Hyde, Hyde-Way, Inc. and Texas Air Classics[1] appeal a final judgment in a suit brought by appellee Robert "Bobby" Hawk. We will affirm.

[1] Unless otherwise indicated, we use the term "Hyde" in this opinion to refer to appellants collectively.

Factual and Procedural Background

In 1995, Charles Glen Hyde conveyed to Wayne Williams an undeveloped lot, Lot 25E, at Northwest Regional Airport in Denton County. The lot was subject to deed restrictions described in an exhibit to the deed. In 1998, Williams sold Lot 25E to Hawk; that deed also conveyed the lot subject to deed restrictions described in an exhibit.

Appended to the deed restrictions that accompanied the 1998 deed from Williams to Hawk is a document entitled "Addendum to Deed Restrictions Runway and Taxiway License." The document is unsigned, but was prepared for execution by Hyde-Way, Inc. as licensor and Hawk as licensee, and provides a non-exclusive license along common taxiways for access to and from the licensee's hangar, together with the right to use the runway for aircraft landing and departing. It states its term shall be irrevocable for ninety-nine years provided the licensee makes annual payments and complies with deed restrictions. The document contains a blank for the amount of the initial annual payment. An asterisk appears in the blank, and the bottom margin of the page has language, also marked with an asterisk, stating the payment would be determined and would be due on completion of construction of the hangar, at the rate of ten cents per square foot if the hangar was smaller than 5000 square feet and eight cents if it was 5000 square feet or larger. The language states the license agreement "may be re-recorded after hangar completed and amount of payment inserted."

Some years after Hawk constructed a residential hangar, disputes arose between Hawk and Hyde over Hawk's access to the airport's runway and taxiways, the deed restrictions, and Hawk's entitlement to water supply to the lot. Hawk filed suit

against Hyde. His second amended petition, filed in April 2012, sought declaratory and injunctive relief, money damages and attorney's fees.

A year later, Hawk filed a traditional motion for partial summary judgment on his claim for a declaration that he held a license or easement for access to the runways and taxiways. After a hearing, the trial court granted the motion and signed an order declaring a license for runway and taxiway use accompanies Lot 25E. Hawk shortly thereafter filed a motion to sever the runway-and-taxiway-license claim from his remaining claims.[2] Hyde opposed the severance. In September, the court signed an order granting the motion to sever, and in October 2013, signed the final judgment here on appeal.[3]

The order granting Hawk's motion for summary judgment states the grounds on which the court found Hawk possessed a license or easement permitting his use of the runway and taxiway. The court found that the unsigned Addendum appended to Hawk's deed "sets out Lot 25E's runway and taxiway license under the law of contract, and the statute of frauds is no bar." It found the partial-performance exception applicable. Alternatively, the court found the Addendum enforceable under the doctrines of promissory estoppel, equitable estoppel or quasi-estoppel. And as an

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[2] Hawk's stated reason for the requested severance was to enable him to record the declaration in the real property records.

[3] We abated this appeal in 2014, on Hawk's motion, to allow the parties to resolve their dispute over a settlement. *Hyde v. Hawk,* No. 07-14-00059-CV, 2014 Tex. App. LEXIS 8726 (Tex. App.—Amarillo Aug. 7, 2014) (per curiam order of abatement). The issues over the settlement were litigated in 2016, after which we reinstated this appeal.

additional alternative, the court found Hawk obtained an easement by estoppel on the Addendum's terms. The court's order further states that if the Addendum did not set the terms of Hawk's license, "then Lot 25E nonetheless has an easement for use of the runway and taxiways under the lot's 1995 Warranty Deed . . . ."

Analysis

In this Court, Hyde raises five issues, asserting: (1) the trial court's judgment is not final because it does not dispose of all issues severed; (2) the severance was improper; (3) indispensable parties were not before the court; (4) the court erred in its grant of summary judgment because the evidence did not prove the existence of a license; and (5) the court erred in its grant of summary judgment because the evidence did not prove the existence of a license or an easement by estoppel, equitable estoppel or quasi-estoppel.

Issue Four – Existence of License

We begin with Hyde's fourth issue, which asserts error in the grant of summary judgment. We review de novo the grant of summary judgment. *Nall v. Plunkett,* 404 S.W.3d 552, 555 (Tex. 2013) (per curiam). We take as true all evidence favorable to the non-movant, and indulge every reasonable inference and resolve any doubt in the non-movant's favor. *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 548-49 (Tex. 1985).

Hyde's primary contention is that the summary judgment evidence shows only an agreement between Williams and Hawk for sale of Lot 25E to Hawk, and that the

attachment of the unsigned Addendum to the Williams-to-Hawk deed does not reflect a contract between Hyde and Hawk. As Hawk points out, the contention misperceives Hawk's position, and ignores the summary judgment evidence that Charles Glen Hyde agreed to the Addendum's terms.

With respect to Hawk's contention that the evidence appellants invoiced him each year from 2000 through 2007 for the annual payment in the amount called for by the Addendum[4] and his payment of the invoices in each of those years constituted partial performance of the license terms set out in the Addendum,[5] Hyde again asserts the only agreement reflected by the evidence is that between Hawk and Williams. Again, the assertion misperceives Hawk's contention that Charles Glen Hyde agreed to the terms of the Addendum. We agree with Hawk that it is of no moment that the Addendum was appended to Williams' deed conveying Lot 25E to Hawk. The agreement Hawk seeks to enforce is not his deed from Williams but Charles Glen Hyde's agreement to the terms of the Addendum.

Finally, Hyde notes that the unsigned Addendum contains a blank for the amount of the initial annual payment, and does not state when it takes effect. Hyde argues it

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[4] As built, Hawk's hangar on Lot 25E contained 5250 square feet, yielding an annual license fee of $420 at the eight cents per square foot stated in the unsigned Addendum. The amounts of appellants' invoices to Hawk in the summary judgment record are consistent with the Addendum's formula.

[5] *See* TEX. BUS. & COMM. CODE ANN. § 26.01 (West 2015). For his contention that a written agreement that fails to comply with the statute of frauds because it is unsigned may nonetheless be enforced if there is proof of partial performance that is unequivocally referable to the agreement and corroborates its existence, Hawk relies on *Cottman Transmission Sys., LLC v. FVLR Enters., LLC*, 295 S.W.3d 372 (Tex. App.—Dallas 2009, pet. denied).

thus omits essential terms and cannot constitute an enforceable contract. We agree with Hawk that the Addendum's formula for determining the annual payment, and its provision the initial payment is "due on date construction of hangar is completed" makes it sufficiently definite for a court to fix the time when it can be enforced. *See Inimitable Group, L.P. v. Westwood Group Dev. II, Ltd.*, 264 S.W.3d 892, 899-900 (Tex. App.—Fort Worth 2008, no pet.) (quoting *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940, 942 (1944)).

In a reply brief, Hyde contends there is no summary judgment evidence establishing Charles Glen Hyde was authorized to act on behalf of Hyde-Way, Inc. when, as Hawk asserts, he agreed to the terms of the Addendum. We may not consider on appeal grounds for reversal of summary judgment that were not expressly presented to the trial court by written motion, answer or other response. TEX. R. CIV. P. 166a(c). Hyde's reply-brief challenge to the evidence of Charles Glen Hyde's authority was not presented to the trial court, and thus may not serve as grounds for reversal. Accordingly, we do not address the merits of Hyde's contention regarding evidence of Charles Glen Hyde's authority.

For those reasons, we conclude that Hyde's fourth issue does not raise a basis for reversal of the court's declaration that the terms of Hawk's license for use of the taxiways and runway are those contained in the Addendum. We overrule the issue.

Fifth Issue – Express Easement

Hyde's fifth issue challenges the correctness of Hawk's summary-judgment contentions regarding estoppel as a ground for the trial court's judgment. Because we have overruled Hyde's fourth issue, which challenged the court's judgment declaring the terms of Hawk's license for use of the taxiways and runway are those contained in the Addendum, it is unnecessary to disposition of the appeal that we consider other summary judgment grounds. *See* TEX. R. APP. P. 47.1; *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 627 (Tex. 1996) (appellate court considers summary judgment grounds that are necessary for final disposition of appeal). For that reason, we do not consider whether the summary judgment also could have been supported by the estoppel grounds addressed in Hyde's fifth issue.

Second Issue – Severance of Attorney's Fees Claim

Hawk's partial summary judgment motion did not address his claim for attorney's fees. In its order granting his motion to sever his claim for a declaration of the existence of his runway and taxiway license, the court expressly excluded from the severance Hawk's "claims for attorney's fees and costs associated with his license claims."

By his second issue, Hyde contends the trial court's judgment must be reversed because the court improperly severed a single cause of action when it failed to include in the severance the attorney's fee claim associated with Hawk's request for a declaration of his license rights. He relies on the Austin Court of Appeals' opinion in

Dalisa, Inc. v. Bradford, 81 S.W.3d 876 (Tex. App.—Austin 2002, no pet.). After review of the record, we find the issue is not preserved for our review.

Hyde filed a written objection to Hawk's motion for severance, but the motion did not mention Hawk's claim for attorney's fees. The objection generally contended that severance of the license issue from Hawk's other claims would cause "injustice, prejudice, and inconvenience" to the parties and the court by turning a single lawsuit into two, leading to two judgments and eventually requiring two appeals. The objection did not cite the *Dalisa* case or contend Hawk was seeking to sever a single cause of action for declaratory relief. The rules of appellate procedure require, as a prerequisite to presentation of a complaint on appeal, that a party make a timely request, objection, or motion stating the specific grounds, and secure the court's ruling on its request, objection, or motion, or object to the trial court's refusal to rule. *See In re E.R.C.*, 496 S.W.3d 270, 277 (Tex. App.—Texarkana 2016, pet. denied); TEX. R. APP. P. 33.1. From review of the record before us we are satisfied the trial court made no ruling on the issue presented as Hyde's second appellate issue. The issue therefore presents nothing for our review, and is overruled for that reason.

Moreover, even if we are mistaken regarding the issue's preservation, we would not find it raises reversible error. *See* TEX. R. APP. P. 44.1(a) (standard for reversible error).

In *Dalisa,* the court agreed with the contention a claim for declaratory relief under section 37.003 of the Civil Practice & Remedies Code and a claim for attorney's fees under section 37.009 are "merely different phases of a single cause of action." *Id.* at

880; TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.003, 37.009 (West 2015). It found that the trial court's grant of a severance of the claim for declaratory relief from the claim for attorney's fees sought under the same statute ran afoul of the prohibition of severance of a single cause of action under Rule 41. *Dalisa,* 81 S.W.3d at 879-80 (citing *Pustejovski v. Rapid-American Corp.,* 35 S.W.3d 643, 647 (Tex. 2000); *Pierce v. Reynolds,* 160 Tex. 198, 329 S.W.2d 76, 79 n.1 (1959)); TEX. R. CIV. P. 41. Accordingly, the court held, the severance constituted an abuse of the trial court's discretion. *Id.* at 881; *see also Town of Flower Mound v. Upper Trinity Reg'l Water Dist.,* 178 S.W.3d 841 (Tex. App.—Fort Worth 2005, no pet.).[6]

Even assuming the trial court abused its discretion by the severance order, however, a holding we do not reach, reversal would require a finding of harm. *See* TEX. R. APP. P. 44.1(a); *In re Columbia Med. Ctr. of Las Colinas,* 290 S.W.3d 204, 211 (Tex. 2009) (orig. proceeding) (addressing general requirement of harm in standard for reversible error). Hyde asserts harm resulted from the severance of Hawk's claim for attorney's fees from the claim for declaration of a runway and taxiway license, but the assertion contains no explanation how the severance probably caused an improper judgment or probably precluded Hyde from properly presenting the case on appeal. *Columbia Med. Ctr.,* 290 S.W.3d at 211. No attorney's fees were awarded, or sought, in the summary judgment proceeding we review in this appeal. If attorney's fees were improperly sought in the later proceedings in the trial court, nothing in the record before

[6] The appeal was transferred from the Second Court of Appeals to our Court, under an order of the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013); TEX. R. APP. P. 41.3 (precedent of transferor court).

us in this proceeding prevented Hyde from defending against such an improper claim. Hyde makes no persuasive argument showing harm from the improper severance of the attorney's fees issue. We overrule Hyde's second issue.

Issue One – Finality of Judgment

Hyde's first appellate issue contends the trial court's judgment is not final because it did not dispose of all the claims for declaratory relief contained in Hawk's pleadings. Hyde points out Hawk's live petition sought a declaration that he was entitled to a variance from the deed restriction prohibiting residential use of hangars. In response, Hawk acknowledges his pleadings sought the residential-use variance but argues his motion for partial summary judgment did not address the variance claim, and that the trial court neither ruled on the claim nor included it within the severance of the claim for declaration of a runway and taxiway license. We agree with Hawk's characterization of the summary judgment record. We find no mention of Hawk's residential-use variance claim in his motion for partial summary judgment, in the court's severance order or in its final judgment. If Hyde's contention actually is an argument that Hawk's motion for summary judgment sought declaratory relief not requested in his pleadings, we further agree with Hawk that the argument is foreclosed by the absence of an objection to the asserted variance raised in response to the motion for summary judgment. *See Miller v. Lucas*, No. 02-13-00298-CV, 2015 Tex. App. LEXIS 5195, at *8 (Tex. App.—Fort Worth May 21, 2015, pet. denied) (unpled claims may be tried by consent in a summary judgment context) (citing *Via Net v. TIG Ins. Co.*, 211 S.W.3d

310, 313 (Tex. 2006); *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991)). For those reasons, we overrule Hyde's first issue.

Third Issue – Joinder of Other Airport Lot Owners

Early in the litigation, Hyde filed a motion asserting the necessity for joinder of some 168 other owners of lots that, the motion said, are subject to deed restrictions like those appended to Williams' deed to Hawk. The motion referred to Hawk's claims affecting the deed restrictions and those seeking damages "that will be paid out of the TAC Fund." It asked the court to order the suit abated until those owners were joined, and to dismiss the cited claims if they were not joined. Hawk responded in opposition to the motion, and the trial court denied it by written order.

Hyde's third issue on appeal assigns error to the trial court's entry of judgment without requiring the joinder of the 168 other lot owners.

We review the trial court's denial of Hyde's motion to abate or dismiss for an abuse of discretion. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 910-11 (Tex. 2017).

The Declaratory Judgment Act provides, "When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding." TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a) (West 2015). Rule of Civil Procedure 39 governs joinder of persons under the Declaratory Judgment Act.

Crawford, 509 S.W.3d at 911 n.3 (citing *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 162 (Tex. 2004)).

As in the trial court, on appeal Hyde asserts that the 168 lot owners "have or could claim an interest that would be affected"[7] by the declarations Hawk sought regarding the deed restrictions or the monetary relief he sought.

Hyde argues the joinder issue should be governed by an opinion the Fort Worth Court of Appeals issued in earlier litigation involving other owners of property at Northwest Regional Airport. *Hyde v. Ray*, No. 02-03-00339-CV, 2004 Tex. App. LEXIS 5129 (Tex. App.—Fort Worth June 10, 2004, no pet.) (mem. op.). That litigation also included a contention lot owners were indispensable parties. *Id.* at *8. The posture of the appeal did not make it necessary that the court resolve the issue, but the court expressed its concern "that, as least insofar as [the plaintiffs'] request for declaratory judgment in the underlying lawsuit is concerned, some, if not all, of such persons would be indispensable parties." *Id.*

The requested declaratory relief described in the *Ray* opinion dealt with the use of funds collected by Hyde-Way, Inc. as runway and taxiway license fees from hangar owners. *Id.* at *2-3, *12-14. In question was the contractual authority of the Hyde parties to expend or withdraw funds. The trial court had issued a temporary injunction

[7] We do not dwell on it, but note that with respect to Hyde's assertion the 168 lot owners "could claim" an interest that would be affected by Hawk's requested declaratory relief, the Texas Supreme Court held in *Crawford* that Rule 39 "does not require joinder of persons who potentially could claim an interest in the subject of the action; it requires joinder, in certain circumstances, of persons who actually claim such an interest." 509 S.W.3d at 913.

enjoining the Hyde parties from withdrawing additional amounts from the license fee funds. *Id.* at *4.

In his response to Hyde's motion in the trial court, Hawk argued that his suit was unlike that addressed in *Ray*. Hawk's response acknowledged that his pleadings sought compensatory damages against the defendants to reimburse his costs of storing aircraft elsewhere and his loss of rental income on his Lot 25E hangar, resulting from the defendants' interference with his runway and taxiway license. But, he asserted, unlike the litigation in *Ray*, his pleadings did not implicate the license fee fund, which is referred to in this case as the "TAC fund." He noted his pleadings nowhere asked that damages awarded him be paid from the TAC fund, and he suggested that payment from the fund of a judgment based on the defendants' tortious conduct would be a misuse of the fund. We find Hyde's motion did not give the trial court a reason to conclude that other lot owners' interest in the license fees held in the TAC fund would be affected by any declaration Hawk sought, or that such owners' absence from the litigation might impair or impede their ability to protect their interests in those funds. *See* TEX. R. CIV. P. 39(a); *Brooks*, 141 S.W.3d at 163 (deed restriction litigation).

In the reply brief, Hyde elaborates on the contention that other declaratory relief Hawk sought affected the interests of the other lot owners, and that their absence from the suit would impair or impede their ability to protect those interests. The interest Hyde identifies is the owners' entitlement under the deed restrictions "to an airport without

residential tenants."[8] If Hawk obtained the declaratory relief he sought, Hyde argues, the deed restrictions would be violated and lot owners would have residential tenants in the hangars near them.

In his response to Hyde's motion, Hawk asserted his requested relief establishing his entitlement to build a residential hangar would not make other lot owners necessary parties. He noted his pleadings did not allege the restriction forbidding residential hangars was absent from his deed, nor did they seek any interpretation of the restriction. His suit, he argued, merely contended Hyde agreed to waive the restriction when Hawk bought Lot 25E from Williams in 1998, and, alternatively, that Hyde was barred by estoppel from enforcing the restriction against him, or the restriction had been abandoned or waived.

The deed restrictions contain provisions allowing variances from their requirements with the written consent of Hyde-Way, Inc. Given those provisions, we cannot agree that the deed restrictions would be "violated" if Hawk were successful in his request for a declaration he was entitled to a waiver. The deed restrictions, at most, could be said to give lot owners an expectation that the airport would have residential tenants only with Hyde-Way, Inc.'s consent. Hyde has not established that disposition of Hawk's claim for a waiver based on his dealings with Hyde without the joinder of the

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[8] The deed restrictions appended to Hawk's 1998 deed from Williams for Lot 25E state, "Airplane hangars are non-residential, i.e., residential uses are expressly prohibited." The deed restrictions appended to Hawk's deed differ in some respects from those appended to Hyde's 1995 deed to Williams conveying the same lot. The differences are not pertinent to Hyde's joinder argument.

other lot owners would as a practical matter impair or impede their ability to protect any interest they possess in a residence-free atmosphere.

Hyde's brief also contains the assertion complete relief could not be afforded the existing parties without joinder of the other lot owners. Hyde does not explain why this is so, and we do not agree. *See Brooks*, 141 S.W.3d at 162 (rejecting similar contention). For all these reasons, we see no abuse of discretion in the trial court's denial of Hyde's motion for abatement or dismissal, and so overrule the third issue.

Conclusion

We have overruled Hyde's first, second, third and fourth issues, and found it unnecessary to address the fifth issue. Accordingly, the trial court's judgment is affirmed.

James T. Campbell
Justice