



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00201-CV

LA TOUR CONDOMINIUMS, INC., APPELLANT

V.

JOHN E. KEATING AND DOLLETTA KAYE KEATING, APPELLEES

On Appeal from the County Court at Law No. 2
Potter County, Texas
Trial Court No. V-105,173-00-2, Honorable Pamela Cook Sirmon, Presiding

April 27, 2018

MEMORANDUM OPINION

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

In this dispute over a condominium association's assessment of a transfer fee, both parties filed motions for summary judgment. The trial court granted summary judgment for John E. Keating and Dolletta Kaye Keating and denied the competing motion filed by La Tour Condominiums, Inc. We will affirm in part and reverse in part.

Background

The La Tour condominium regime was organized in Amarillo, Texas, in 1980. The condominium property includes sixty-three units and several common areas and facilities. Management of the common elements is vested in La Tour Condominiums, Inc. (“La Tour”), the managing condominium association and appellant herein. Owners of condominium units are members of the association. At all times relevant to this suit, appellees John E. and Dolletta Kaye Keating were La Tour condominium unit owners.

In March of 2014, the association’s board of directors sent notice to each unit owner that the board had adopted a “buyers [sic] transfer fee of 3% of a Unit’s selling price” to raise funds for improving and maintaining the property. Shortly thereafter, the board realized that imposition of such a fee required a vote of the association’s members; therefore, no transfer fee was imposed at that time.

On June 19, 2014, the board notified unit owners that a board meeting would be held on June 23, 2014, to discuss the proposed transfer fee and the associated amendment to the Declaration and Master Deed. Following the meeting, the board informed owners that the proposed transfer fee would be put to a vote, and ballots were delivered to the owners. On June 30, 2014, the president of the board wrote to unit owners, encouraging them to vote in favor of the fee. The board president’s letter stated that votes could be cast by signing the ballot before a notary and returning it to the property manager no later than July 15, 2014.

In a letter to owners dated July 16, 2014, the board announced that as of that date, “62% of the home owners representing 59.0307% of the square footage” had voted to

approve the transfer fee. Additionally, owners were informed that if they had not yet voted, they could send in their ballot until July 23, 2015.

Believing that it had obtained a sufficient number of votes to do so, La Tour filed an "Amendment to the Declaration and Master Deed of La Tour Condominiums" establishing the fee: "Each time an Owner sells a Unit, the Owner must pay the Association a sum of money equal to 3.0% of the sales price (the Transfer Assessments)." This amendment, known as the "July 16th Amendment," was duly recorded in Potter County. The document included the voting ballots of the owners who had voted in favor of the amendment as of that date.

On October 14, 2014, the amendment was recorded again. This "October 14th Amendment" was identical to the July 16th Amendment, except that it included additional ballots that had been received since July 16. According to the board, the additional ballots brought the total of all voting interests approving the amendment to 69.05 percent. La Tour began assessing the transfer fee in January of 2015.

The Keatings filed suit in January of 2016, alleging that the adoption of the amendment was invalid because it was procedurally improper according to the association's governing documents and because it failed to comply with Texas law. They sought a declaration that the board's implementation of the transfer fee was invalid and unenforceable. The Keatings subsequently filed a motion for partial summary judgment, seeking a declaratory judgment on those matters. Specifically, the Keatings requested that the trial court make either of the following declarations: (1) La Tour's "implementation of the transfer fee is invalid because it violates the Texas Property Code's requirement

that assessments used for common elements must be assessed pro rata to all Unit owners” or (2) La Tour’s “implementation of the transfer fee, even if legally allowable, is unenforceable because [La Tour] failed to pass the Amendment with 67% of the vote at a meeting of the Unit owners, as required by the Texas Property Code.” La Tour then filed its own motion for partial summary judgment in which it sought a declaratory judgment that the transfer fee amendment is valid.

The trial court granted the Keatings’ motion for partial summary judgment and denied La Tour’s motion. The court conducted a bench trial on the issue of attorney’s fees. After entering the final judgment, the trial court entered findings of fact and conclusions of law.

Standard of Review

When a trial court resolves a declaratory judgment action on competing motions for summary judgment, we review the propriety of the declaratory judgment under the same standards that we apply in reviewing a summary judgment. *Hicks v. Castille*, 313 S.W.3d 874, 879 (Tex. App.—Amarillo 2010, pet. denied) (quoting *City of Galveston v. Tex. Gen. Land Office*, 196 S.W.3d 218, 221 (Tex. App.—Houston [1st Dist.] 2006, pet. denied)). We review a trial court’s decision to grant or to deny a motion for summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm’n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). We consider the summary judgment evidence presented by both sides, determine all questions presented, and render the judgment that the trial court should have rendered. *Id.*

Analysis

Issue No. 1

In its first issue, La Tour asserts that the trial court erred by deciding disputed facts in the summary judgment context. Here, the trial court's order granting partial summary judgment for the Keatings included statements of fact and law supporting the court's declaratory judgment. In addition, the trial court made forty findings of fact after final judgment was entered. The court's findings encompass both the matters decided by summary judgment and the matters presented at the evidentiary hearing on attorney's fees.

The Texas Supreme Court has long held that findings of fact and conclusions of law are not appropriate in a summary judgment proceeding because "if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response." *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997); see also *Besing v. Moffitt*, 882 S.W.2d 79, 82 (Tex. App.—Amarillo 1994, no writ) (findings of fact are ordinarily inconsistent with summary judgment since they indicate an adjudication by the trial court of controverted issues). If findings are made, they are correctly disregarded by the appellate court. *Cotton v. Ratholes, Inc.*, 699 S.W.2d 203, 204 (Tex. 1985). When a trial court makes findings of fact in its ruling on a summary judgment, any factual recitations in the trial court's order granting summary judgment are mere surplusage that we cannot consider in our appellate review. See *IKB Indus. (Nigeria) Ltd.*, 938 S.W.2d at 441; *Ridgepoint Rentals, LLC v. McGrath*, Nos. 09-

16-00393-CV, 09-17-00006-CV, 2017 Tex. App. LEXIS 11384 (Tex. App.—Beaumont 2017, pet. filed) (mem. op.).

Although the trial court's findings of fact are inappropriate to the extent they address summary judgment matters, such findings have no bearing on whether the trial court correctly granted summary judgment. See *Valley Mun. Util. Dist. No. 2 v. Hild*, 578 S.W.2d 827, 829 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (recitations in a dismissal order that do not constitute a judgment are mere surplusage). The court's findings do not, in and of themselves, render the summary judgment void. Accordingly, we overrule La Tour's first issue.

Issue No. 2

In its second issue, La Tour claims that in granting the Keatings' partial summary judgment, the trial court made rulings on points that were not raised in the summary judgment motion. When a trial judge grants more relief than requested in a motion for summary judgment, we must reverse and remand those issues after addressing the merits of the properly addressed claims. See *Gen. Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 836 (Tex. App.—Dallas 2000, no pet.). Therefore, we will examine the Keatings' claims that were before the court.

The Keatings' motion for summary judgment addressed only two matters: They sought a declaration that the transfer fee was invalid either because it violated the Property Code's requirement that assessments for common elements be assessed on a pro rata basis, or because La Tour failed to pass the amendment to the declaration by vote of sixty-seven percent of the ownership interests at a meeting, as required by the

Property Code. Both provisions relied on by the Keatings are found in Chapter 81 of the Texas Property Code, known as the Condominium Act. Section 81.204 sets forth the “pro rata” requirement as follows: “An apartment owner in a condominium regime is responsible for the apartment owner’s pro rata share of the expenses to administer the condominium regime and to maintain and repair the general common elements.” TEX. PROP. CODE ANN. § 81.204(a)(1) (West 2014). The voting requirement is in section 81.111: “After a condominium declaration is recorded with a county clerk, the declaration may not be amended except at a meeting of the apartment owners at which the amendment is approved by the holders of at least 67 percent of the ownership interests in the condominium.” *Id.* § 81.111 (West 2014).

In response to the Keatings’ argument that it failed to comply with these provisions, La Tour first argues that its compliance was not required. La Tour maintains that its governing documents, i.e., the declaration and bylaws, should control over the Condominium Act, and that application of the Act would be unconstitutional because the Act did not become effective until January 1, 1984, almost four years after the La Tour condominium regime was established. However, the trial court had before it evidence that the provisions of the Act do apply to La Tour. La Tour’s bylaws, which were included as summary judgment evidence by both parties, provide that “should all or part of any Article of these Bylaws be in conflict with the provisions of the Texas Non-Profit Corporation Act or the Texas Condominium Act, as amended, such Acts shall control.”

Hence, we first address the merits of the claim that the transfer fee amendment failed to pass with the requisite sixty-seven percent vote. Neither party presented competent summary judgment evidence of the common interest assigned to the units of

the owners who voted on the transfer fee amendment. Without such evidence, neither the Keatings nor La Tour could establish as a matter of law what percentage of ownership interest approved of the amendment.

But the Keatings go on to urge that, regardless of the percentage of those voting for the amendment, La Tour nonetheless failed to comply with the requirement that any such amendment be approved “at a meeting of the apartment owners.” *Id.* In this case, La Tour’s approval process involved an initial informational meeting at which no votes were taken, followed by the provision of ballots to the owners, followed by a period of collecting and tallying the ballots. In reply to the Keatings’ argument, La Tour asserts that the meeting requirement does not mandate any particular form of meeting, and that La Tour’s approach was acceptable.

On the record before us, we conclude that the summary judgment evidence was insufficient as a matter of law to support the trial court’s judgment on this theory. Summary judgment for the Keatings cannot be affirmed on this basis.

We next address the merits of the Keatings’ claim that the transfer fee amendment failed to comply with the requirement that assessments be charged on a pro rata basis. The transfer fee at issue here imposed a charge of three percent of the sales price, payable to the condominium association, any time an owner sold a unit. The Keatings argued that this charge was not “pro rata,” because the assessment would only be collected from certain units. La Tour counters that the assessment applied equally to all owners, at the same three percent rate, and was therefore a “pro rata” charge.

Neither party established as a matter of law that, in this case, a “pro rata” assessment calls for equal units, equal square footage, equal value, or something else entirely. We conclude that a question of fact exists as to whether the fee was a “pro rata” assessment and, therefore, summary judgment was not appropriate. See TEX. R. CIV. P. 166a(c). We reverse the trial court’s summary judgment in favor of the Keatings.

Issue Nos. 3 and 4

La Tour’s third and fourth issues raise arguments related to the denial of its motion for summary judgment, which sought a declaration that the transfer fee amendment was valid. In these issues, La Tour argues that the transfer fee amendment was approved by the requisite voting interest and that the transfer fee will be applied pro rata to all unit owners. We address these issues in determining whether the trial court properly denied La Tour’s motion for summary judgment.

As set forth above, we have concluded that there were fact issues as to whether the amendment was validly passed and whether the proposed fee satisfies the “pro rata” requirement of the Texas Property Code. La Tour was not entitled to summary judgment because genuine issues of material fact precluded such relief. The trial court properly denied La Tour’s motion, and we overrule La Tour’s third and fourth issues.

Issue No. 5

In its final issue, La Tour contends that the trial court's summary judgment order and Findings of Fact and Conclusions of Law rule on prospective terms of the Declaration. Because we have reversed the trial court's summary judgment in favor of the Keatings, we need not address this issue. See TEX. R. APP. P. 47.1.

Conclusion

We hold that the trial court erred when it granted summary judgment in favor of the Keatings. We further hold that the trial court did not err by denying La Tour's motion for summary judgment. The judgment of the trial court is therefore affirmed in part and reversed in part. We remand the cause to the trial court for further proceedings in accordance with this opinion.

Judy C. Parker
Justice