

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00293-CV

Bob E. Woody, Appellant

v.

J. Black's, LP and J. Black's, GP, LLC, Appellees

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 354TH JUDICIAL DISTRICT
NO. D-1-GN-09-001436, HONORABLE STEVEN YELENOSKY, JUDGE PRESIDING**

MEMORANDUM OPINION

Bob E. Woody appeals the trial court's final summary judgment awarding specific performance and attorney's fees to appellees J. Black's, LP and J. Black's, GP, LLC (collectively, J. Black's) for Woody's breach of the parties' commercial real-property sublease. On appeal, Woody contends that the trial court improperly awarded specific performance under the circumstances here and that the court's award of attorney's fees based thereon was also improper. We will reverse the trial court's final judgment ordering Woody to specifically perform the entirety of his obligations under the extended and modified sublease and awarding attorney's fees, post-judgment interest, and costs to J. Black's and render judgment that J. Black's take nothing by its claims against Woody.

BACKGROUND

The parties entered into an agreement whereby Woody subleased to J. Black's the first floor of a commercial building in the popular Sixth Street area of downtown Austin for use as

a bar and restaurant. The original term of the sublease was 36 months, and J. Black's had a unilateral option to extend the term by three years, up to four times, so long as it was not in default and gave timely written notice of its intent to extend. When a dispute arose about whether J. Black's had properly given notice to extend the sublease for the first time, Woody filed suit against J. Black's, alleging various defaults and claiming that J. Black's had breached the sublease and unlawfully removed fixtures from the premises. J. Black's countersued, claiming that Woody breached the sublease by refusing to acknowledge its extension and by alleging nonexistent defaults and that he committed fraud by making certain representations about the use of gas lines and heaters at the premises.¹

J. Black's prevailed on two motions for partial summary judgment and then on a motion for final summary judgment, in which the trial court adjudged that Woody breached the sublease by "refusing to acknowledge J. Black's extension of the Sublease," that J. Black's did not breach the sublease, that specific performance of the contract "is equitable and necessary to afford [J. Black's] sufficient relief," and that J. Black's is entitled to attorney's fees as the prevailing party. *See* Tex. Civ. Prac. & Rem. Code § 38.001. Woody appealed the final judgment, and the Seventh Court of Appeals, to which the case was reassigned from this Court, affirmed the finding of Woody's breach but reversed the award of specific performance and attorney's fees and remanded the cause to the trial court, sustaining Woody's sub-issues contending that (1) specific performance was improper

¹ At all times during the lawsuit and through this appeal, J. Black's has maintained its business in the subleased premises, and Woody has not initiated any eviction proceedings against J. Black's. Additionally, the sublease has been modified by the parties and extended by J. Black's two additional times as permitted by the original sublease, entitling J. Black's to remain in possession through August 2018, with one remaining extension option available.

because J. Black’s failed to prove that it was ready, willing, and able to perform the first option term of the sublease, *see DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593 (Tex. 2008); and (2) the attorney’s fees award was improper because J. Black’s did not “present conclusive proof entitling it to a summary judgment decreeing specific performance.” *See Woody v. J. Black’s, L.P.*, No. 07-12-00192-CV, 2013 WL 5744359, at *6–7 (Tex. App.—Amarillo Oct. 19, 2013, pet. denied) (mem. op.) (citing *Roundville Partners, L.L.C. v. Jones*, 118 S.W.3d 73, 82 (Tex. App.—Austin 2003, pet. denied) (holding that when party is denied specific performance, it may not recover attorney’s fees because it is not prevailing party)). Notably, the Seventh Court of Appeals did not reach Woody’s other sub-issues contesting the appropriateness of specific performance under these circumstances—many of which he re-urges in this appeal—because it determined that review of those arguments was “unnecessary to the disposition” of the appeal.² *See id.* at *6 (citing Tex. R. App. P. 47.1).

On remand, the trial court denied Woody’s motion for summary judgment on the issues of specific performance and attorney’s fees and granted the motion for final summary judgment of J. Black’s, to which J. Black’s attached evidence purporting to show that it was ready, willing, and able to comply with the terms of the Sublease.³ Woody appeals, contending that the trial

² The Seventh Court of Appeals also determined that, while the first option period had expired before briefing was completed on appeal, the issue of the propriety of the trial court’s decree of specific performance was not moot because the issue of attorney’s fees was also contested in the appeal, which depended on the “viability of the trial court’s decree of specific performance.” *Woody v. J. Black’s, L.P.*, No. 07-12-00192-CV, 2013 WL 5744359, at *5 n.3 (Tex. App.—Amarillo Oct. 19, 2013, pet. denied) (mem. op.) (citing *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642–43 (Tex. 2005) (holding that appellee’s remaining issue in recovering attorney’s fees precluded application of mootness doctrine)).

³ In letter rulings to the parties, the trial court acknowledged that it was granting the summary-judgment motion of J. Black’s on the basis of its summary-judgment proof of the “ready, willing, and able” element and that, while the Seventh Court of Appeals “did not reach” Woody’s

court erred in (1) granting summary judgment for J. Black's on its request for specific performance and denying his motion for summary judgment, (2) excluding certain of Woody's summary-judgment evidence and failing to exclude certain summary-judgment evidence of J. Black's, and (3) awarding J. Black's attorney's fees, interest, and costs.

DISCUSSION

In his first issue, Woody contends that for various reasons the trial court erred in granting summary judgment for J. Black's on its claim for specific performance. He argues that (a) specific performance is not available absent an actual, present breach of a performance obligation, and at most he merely repudiated the sublease and engaged in a legal dispute about the effectiveness of the extension notice; (b) J. Black's did not submit any admissible evidence that it was ready, willing, and able to perform; (c) J. Black's did not submit any evidence that damages would be an inadequate remedy and did not move for summary judgment on this element of its claim; (d) specific performance is improper because present performance of the various obligations in the sublease is not possible; and (e) an order of specific performance must compel performance by both parties, but the trial court's order does not require J. Black's to do anything.

We review a trial court's award of specific performance for abuse of discretion. *See Edwards v. Mid-Continent Office Distribs., L.P.*, 252 S.W.3d 833, 836 (Tex. App.—Dallas 2008, pet. denied); *see also Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004) (noting that appellate

other challenges to a decree of specific performance, the trial court would “let stand the prior rulings it still believes are correct” and its judgment “does not preclude the appellate court from reviewing prior rulings of this court that it did not reach in the first appeal.”

court will reverse trial court's ruling on claim seeking equitable relief only if it is arbitrary, unreasonable, or unsupported by guiding rules and principles). For the following reasons, we conclude that the trial court failed to adhere to guiding rules and principles applying to equitable relief in the form of specific performance and abused its discretion in awarding the remedy to J. Black's under the circumstances here.

The trial court's final judgment ordering Woody to "specifically perform the entirety of his obligations under [the sublease] as it has been extended and modified" is an order that can only be performed incrementally over years into the future rather than in the present. "It is well established that a court of equity will only order specific performance when present performance is possible." *Canteen Corp. v. Republic of Tex. Props., Inc.*, 773 S.W.2d 398, 401 (Tex. App.—Dallas 1989, no writ) (reversing portion of trial court's order of specific performance requiring lessee to operate restaurant in leased premises because it was not capable of present performance and was not matter of public interest that might justify deviation from general rule against ordering ongoing contractual activities by specific performance); *see Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 487–88 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). "A court will generally not decree a party to perform a continuous series of acts which extend through a long period of time and require constant supervision by the court. . . . Instead, the parties are left to their remedies at law unless the interest of the public is involved." *Canteen Corp.*, 773 S.W.2d at 401; *see Cytogenix*, 213 S.W.3d at 487–88; *American Hous. Res., Inc. v. Slaughter*, 597 S.W.2d 13, 15 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). J. Black's has not contended that there is any public interest involved, nor can we imagine that any is, and therefore we are guided by the general rule that precludes the

availability of specific performance if present performance of a contract is not possible, as it is not possible here.

Furthermore, a court will not order specific performance where such remedy will not grant complete relief for a present injury but would serve only to avert possible future damages or assist in the enforcement of a possible future damage award. *See American Hous. Res.*, 597 S.W.2d at 16 (reversing trial court’s award of specific performance requiring defendants to place funds in escrow account to indemnify plaintiffs in event their tax deductions for designated year were below stated amount in contracts because plaintiffs failed to establish that remedies at law were inadequate and had not contended that they had been injured by defendant’s failure to comply with escrow provision). While an order of specific performance requiring Woody to perform his obligations under the sublease might serve to avert future breaches on his part, such a remedy does not grant any relief for the particular breach found by the trial court here: Woody’s “refusal to acknowledge” the extension of the sublease by J. Black’s. In fact, J. Black’s conceded at oral argument that it has suffered no monetary damages and has not identified any other type of present, concrete injury that it has suffered as a result of the only “breach” by Woody found by the trial court. Should J. Black’s suffer injury from an as-yet-unknown future breach by Woody, then at that point in time a court would consider whether J. Black’s has incurred damages and whether there would be an adequate remedy.⁴ *See South Plains Switching, Ltd. v. BNSF Ry. Co.*, 255 S.W.3d 690, 703 (Tex.

⁴ While the case law setting out the doctrine of specific performance as a remedy for breach of contract does not explicitly say as much, it necessarily follows from the doctrine and from the common law of contracts generally that the remedy—be it equitable or legal—must *relate to* and be directly *in remediation* of a particular, identifiable injury. Here the trial court identified a particular breach—refusal to acknowledge the extension of the sublease—and the Seventh Court of Appeals

App.—Amarillo 2008, pet. denied) (“It is a fundamental rule of equity that specific performance may not be granted unless it is shown there is no adequate remedy at law.”); *United Coin Meter Co., Inc. v. Johnson-Campbell Lumber Co.*, 493 S.W.2d 882, 886 (Tex. Civ. App.—Fort Worth 1973, no writ) (It is “a settled rule that in order to get specific performance of a contract the party seeking it must show that he has no adequate remedy at law by way of an action for damages for breach of contract, and if an adequate remedy at law is available, then specific performance will not be granted.”).

Finally, a court’s order of specific performance of a contract must compel performance by both parties, rather than ordering only one party to specifically perform; here, the trial court’s order binds only Woody and, therefore, lacks the requisite mutuality required for an order rendering the equitable remedy. *See United Coin Meter Co.*, 493 S.W.2d at 888 (“[I]n the enforcement of affirmative promises[,] a court of equity deems it neither wise nor just to enforce one or more of such promises in a contract unless it can enforce all of the contract outstanding at the time of the suit, including the promises of the plaintiff as well as those of the defendant.”) (internal quotation marks omitted); *Galbreath v. Farrell*, 249 S.W. 277, 280 (Tex. Civ. App.—Dallas 1923, no writ) (“[B]efore a court of equity will enforce affirmative promises made by defendant in behalf of the plaintiff, it must also be able to enforce the affirmative promises made by plaintiff in behalf of the defendant.”).

affirmed that finding. However, J. Black’s has not pleaded or submitted any evidence identifying any particular injury or any damages resulting therefrom. In fact, all of the evidence indicates that J. Black’s has continued to operate and profit from its business in the subleased premises, choosing to extend the sublease period two additional times, purportedly doing so without dispute. It does not follow from Woody’s “breach” that J. Black’s was actually injured as a result or, more importantly, that the court’s ordering Woody to specifically perform the sublease going forward would remedy any failure to “acknowledge” the extension.

Nonetheless, J. Black’s contends that because the sublease involves real property, its legal remedies are inadequate as a matter of law, citing the real-estate mantra “location, location, location” as supported by its manager’s affidavit that J. Black’s benefits greatly from its particular, unique location. *See South Plains Switching*, 255 S.W.3d at 703 (holding that specific performance may not be granted unless party shows it has no adequate remedy at law). However, while specific performance is often an appropriate remedy for breach of a contract for the sale of real property, even in those circumstances “it is not a remedy that exists as a matter of right.” *United Coin Meter Co.*, 493 S.W.2d at 887–88 (citing *Kress v. Soules*, 261 S.W.2d 703 (Tex. 1953)); *see also South Plains Switching*, 255 S.W.3d at 703 (noting that rationale for remedy of specific performance is that “recovery of monetary damages would be inadequate to compensate the complainant and thus the transgressor should be compelled to perform that which he had promised in his contract”). As we have already discussed, specific performance as ordered by the trial court was not a proper remedy under the facts of this case.

We sustain Woody’s first issue and hold that the trial court abused its discretion by failing to follow guiding rules and principles of equity when ordering specific performance of the parties’ sublease. We also sustain Woody’s third issue and hold that, because the award of attorney’s fees was conditioned on J. Black’s having a “valid claim” on a written contract, *see* Tex. Civ. Prac. & Rem. Code § 38.001(8), the trial court erred in awarding attorney’s fees, interest, and costs to J. Black’s.⁵ *See Roundville Partners, L.L.C.*, 118 S.W.3d at 82.

⁵ Because of our disposition on Woody’s first and third issues, we need not reach his second issue. *See* Tex. R. App. P. 47.1.

CONCLUSION

Because the trial court erred in ordering Woody to specifically perform the parties' sublease and awarding attorney's fees, interest, and costs to J. Black's, we reverse its final judgment and render judgment that J. Black's take nothing on its claims.

David Puryear, Justice

Before Justices Puryear, Goodwin, and Field

Reversed and Rendered

Filed: July 7, 2016