TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00002-CV

Appellant, Landmark Dividend LLC//
Cross-Appellant, Hickory Pass L.P.

v.

Appellee, Hickory Pass L.P.//
Cross-Appellee, Landmark Dividend LLC

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT
NO. D-1-GN-13-001177, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

MEMORANDUM OPINION

Landmark Dividend LLC appeals from the trial court's judgment in favor of Hickory Pass L.P. on its breach-of-contract claim against Landmark arising from an option contract regarding the sale of real property. Hickory Pass raises a conditional cross-appeal, challenging the trial court's dismissal on special exceptions of Hickory Pass's declaratory-judgment claim against Landmark. For the reasons explained below, we will reverse the judgment and render judgment that Hickory Pass take nothing on its breach-of-contract claim against Landmark.

BACKGROUND

Landmark is a company that specializes in billboard and telecommunications ground leases. In early December 2012, Landmark entered into an "Option Contract" with Hickory Pass giving Landmark the option to purchase a 0.23-acre parcel of real property ("the Property") in

Marble Falls, Texas that was part of a larger tract owned by Hickory Pass. The Option Contract included a requirement that the closing on the property occur by December 31, 2012, and a "walk-away" clause providing the following:

> Landmark may exercise this Option at any time, providing that closing shall occur on or before December 31, 2012. If closing does not occur on or before December 31, 2012, then this option shall expire without any cost, expense, damages, or obligations to or from H[ickory] P[ass].

During the option period, Landmark discovered that subdividing the Property from the larger tract required approval from Burnet County officials, and that Landmark would not be able to garner that approval by the December 31 deadline because of the county officials' schedules during the holiday season. The parties discussed different transactions and exchanged proposed contracts into the next year, but ultimately Hickory Pass notified Landmark that it would not agree to Landmark's proposed terms and that it instead, planned to sell the Property as part of a larger tract of land.

Landmark sued Hickory Pass, alleging that Hickory Pass had breached the terms of the Option Contract by not cooperating to close the sale and seeking $8,965 in damages for the evaluation and research performed on the Property in anticipation of the sale. Hickory Pass denied liability and counterclaimed for breach of contract, indemnity, and declaratory judgment, contending that Landmark had breached the walk-away provision by asserting a claim in connection with the Option Contract after its expiration.

The trial court dismissed Hickory Pass's declaratory-judgment claim on Landmark's special exceptions.[1] Hickory Pass then filed a motion for summary judgment on Landmark's breach-of-contract claims, which the trial court granted. Thereafter, the parties filed competing motions for summary judgment on Hickory's Pass's counterclaims for breach of contract and indemnity. The trial court granted summary judgment in favor of Landmark on the indemnity counterclaim and granted partial summary judgment in favor of Hickory Pass on the breach-of-contract counterclaim.[2] After denying Landmark's motion for reconsideration, the trial court conducted a bench trial as to the amount of Hickory Pass's damages. In a final judgment, the trial court awarded Hickory Pass $128,383.12 in compensatory damages, which consisted entirely of Hickory Pass's attorney's fees, legal-assistant fees, court costs, court-reporter fees and expenses, lost time of Hickory Pass

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[1] Although Hickory Pass's declaratory-judgment claim was dismissed upon Landmark's special exception, Hickory Pass amended its pleadings several times after the ruling and included its declaratory-judgment claim in each of those amended pleadings. Landmark again specially excepted to the declaratory-judgment counterclaim, and the record before us does not contain any ruling on the second special exception. However, during the summary-judgment hearing the trial court noted that it was "dealing with everything here except for the amount of attorney's fees and the lis pendens issue." Hickory Pass conceded that its declaratory-judgment claim had been dismissed by special exception and was no longer at issue. Later, during the damages portion of the trial, Hickory Pass again stated that its declaratory-judgment counterclaim had been dismissed on special exception. We construe these statements to be an acknowledgment that Hickory Pass was not pursuing the declaratory-judgment counterclaim raised in its live pleadings, so as to make the court's judgment final and allow us to exercise jurisdiction over this appeal. *See In re Shaw*, 966 S.W.2d 174, 177 (Tex. App.—El Paso 1998, no pet.) (citing *Sosa v. Central Power & Light Co.*, 901 S.W.2d 562, 567 (Tex. App.—San Antonio 1995), *rev'd on other grounds*, 909 S.W.2d 893 (Tex. 1995)) (stating stipulation made on record in open court can be sufficient to show abandonment of claim, and amendment of pleadings is not necessary); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195, 205 (Tex. 2001) ("[A]n order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties.").

[2] The trial court granted summary judgment as to liability only on the breach-of-contract counterclaim.

executives, and other litigation expenses. The trial court made findings of fact and conclusions of law upon Landmark's request, and this appeal followed.

DISCUSSION

Landmark challenges the trial court's judgment in favor of Hickory Pass on its breach-of-contract counterclaim in six issues. First, Landmark asserts that the trial court erred in granting summary judgment on Hickory Pass's breach-of-contract counterclaim because there was no breach of the Option Contract and, even if there had been a breach, Hickory Pass did not suffer any recoverable damages as a result of that breach. As its second, third, and fourth issues, Landmark asserts that the trial court erred by awarding attorney's fees and litigation expenses as compensatory damages under the Option Contract and that the court erred by awarding attorney's fees under Section 38.001 of the Texas Civil Practice & Remedies Code. In its fifth issue, Landmark asserts that, even if attorney's fees were recoverable, Hickory Pass failed to segregate its fees and included impermissible administrative tasks. Finally, Landmark contends in its sixth issue that the trial court abused its discretion by awarding excessive attorney's fees. In a conditional cross-appeal, Hickory Pass challenges the trial court's dismissal of its declaratory-judgment counterclaim in response to Landmark's special exceptions, and asks us to direct the trial court to consider its declaratory-judgment claim and the possibility of attorney's fees based on that claim.[3]

As part of its first issue, Landmark argues that it and not Hickory Pass was entitled to summary judgment on Hickory Pass's breach-of-contract claim because Hickory Pass's attorney's

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[3] The parties do not challenge the trial court's summary-judgment rulings on Landmark's breach-of-contract claim and Hickory Pass's indemnity counterclaim.

fees and litigation expenses incurred in the present litigation do not constitute damages that will support a claim for breach of contract. We agree.[4]

"Courts have long distinguished attorney's fees from damages." *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 172 (Tex. 2013) (orig. proceeding) (citations omitted); *see also Haubold v. Medical Carbon Research Inst., LLC*, No. 03-11-00115-CV, 2014 WL 1018008, at *6 (Tex. App.—Austin Mar. 14, 2014, no pet.) (mem. op.) ("'Texas law distinguishes between recovery of attorney's fees as actual damages and recovery of attorney's fees incident to recovery of other actual damages.'" (quoting *Haden v. David J. Sacks, P.C.*, 222 S.W.3d 580, 597 (Tex. App.—Houston [1st Dist.] 2007), *rev'd in part on other grounds*, 263 S.W.3d 919 (Tex. 2008) (per curiam))). Attorney's fees are generally not recoverable as damages in and of themselves. *Tana Oil & Gas Corp. v. McCall*, 104 S.W.3d 80, 81 (Tex. 2003). "Texas has long followed the 'American Rule' prohibiting [attorney's] fee awards unless specifically provided by contract or statute." *MBM Fin. Corp. v. The Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009) (citing

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[4] In reviewing cross-motions for summary judgment, we must consider both motions de novo and render the judgment that the trial court should have rendered. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a traditional motion for summary judgment, the movant must show that "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law[.]" Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). To prevail on a no-evidence motion for summary judgment, the movant must first allege that there is no evidence of one or more specified elements of a claim or defense on which the nonmovant would have the burden of proof at trial. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006); *see* Tex. R. Civ. P. 166a(i). A nonmovant will defeat a no-evidence summary-judgment motion if the nonmovant presents evidence that raises a genuine issue of material fact regarding the elements challenged by the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000) (citing *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 862 (Tex.1993)).

Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 310–11 (Tex. 2006)). Similarly, "litigation expenses, including the value of lost time due to litigation, generally are not recoverable unless expressly provided by statute or contract or recoverable under equitable principles." *Profitlive P'ship v. Surber*, No. 02-09-00104-CV, 2010 WL 1999461, at *4 (Tex. App.—Fort Worth May 20, 2010, pet. denied) (mem. op.); *see also Texas Mut. Ins. Co. v. Ray Ferguson Interests, Inc.*, No. 01-02-00807-CV, 2006 WL 648834, at *8 (Tex. App.—Houston [1st Dist.] Mar. 16, 2006, no pet.) (mem. op.) (holding that "financial loss due to time spent by [party's] employees on litigation maters" cannot serve as basis for jury award of damages unless contract or statute expressly provides for such recovery); *Eberts v. Businesspeople Pers. Servs.*, 620 S.W.2d 861, 863 (Tex. Civ. App.—Dallas 1981, no writ) ("Expenses of litigation are not recoverable as damages unless expressly provided by statute or contract."). "A party relying on assertions of non-recoverable damages alone, such as attorney's fees and expenses sustained in defending a lawsuit and prosecuting a counterclaim, has presented a legal barrier to any recovery." *Woodhaven Partners Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.).

Hickory Pass agrees that attorney's fees are not generally considered contract damages, but relying on *In re Nalle Plastics*, 406 S.W.3d at 172–76, and *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 111 (Tex. 2009), Hickory Pass contends that it is entitled to its attorney's fees and expenses as damages in this case because the expenses were "directly caused by conduct prohibited by the relevant contract." Specifically, Hickory Pass contends that Landmark breached the Option Contract by filing suit

against Hickory Pass and the resulting damages of that breach were the attorney's fees and expenses incurred in defending the lawsuit.

In *Akin, Gump*, the law firm of Akin, Gump, Strauss, Hauer & Feld represented National Development & Research (NDR) in a declaratory-judgment action against another company, Panda. *See* 299 S.W.3d at 111. As a result of its litigation against Panda, NDR paid over $200,000 in attorney's fees to Akin, Gump and to Panda's attorneys as part of the judgment. After that lawsuit, NDR successfully sued Akin, Gump for legal malpractice and claimed as part of its damages the attorney's fees it had paid as a result of its litigation with Panda. The Texas Supreme Court explained that the damages awarded were not attorney's fees for prosecuting its malpractice suit against the law firm; rather, the damages awarded were measured by the economic harm the plaintiff had suffered as a result of Akin, Gump's breach of its duty of care. *Id.* at 121. The supreme court concluded that "the general rule as to recovery of attorney's fees from an adverse party in litigation does not bar a malpractice plaintiff from claiming damages in a malpractice case for fees it paid its attorneys in the underlying suit." *Id.* at 119.

Similarly, in *Nalle*, the law firm of Porter, Rogers, Dahlman, & Gordon PC sued Nalle for breach of contract after Nalle failed to pay the legal fees owed to the firm for prior representation. The supreme court explained that, while attorney's fees generally "are not, and have never been, damages[,] . . . [i]f the *underlying* suit concerns a claim for attorney's fees as an element of damages, . . . then those fees may be properly included in a judge or jury's compensatory damages award." 406 S.W.3d at 173, 175 (emphasis in original). Unlike the situation in this case, however, the attorney's fees awarded as compensatory damages to the law firm in *Nalle* were fees earned for

the law firm's prior representation of Nalle in a different, underlying lawsuit, not the fees it incurred in its subsequent lawsuit for recovery of those fees.

We view the facts of this case as more similar to those in *Haubold*. There, Haubold had sued his employer MCRI for breach of contract, and MCRI counterclaimed for declaratory relief in connection with a dispute regarding payment of Haubold's deferred compensation after a company reorganization. *See* 2014 WL 1018008 at *1. To settle their dispute, Haubold signed a settlement agreement in which he agreed to release "all claims which have been raised or could have been raised by the Parties relating solely to Haubold's present entitlement to the deferred compensation." *Id.* at *2 (internal quotation marks omitted). But Haubold sued MCRI again shortly after the settlement agreement was signed, asserting claims of breach of contract and seeking $500,000 in deferred salary and other compensation. *Id.* MCRI filed a counterclaim alleging the suit itself was a breach of the settlement agreement and the attorney's fees incurred to defend Haubold's claim were "the natural, probable, and foreseeable consequences" of Haubold's breach of the agreement. *Id.* (internal quotation marks omitted). This Court held, however, that MCRI's attorney's fees were not actual damages because MCRI sought to recover attorney's fees from the same suit, explaining that "MCRI has cited no Texas cases, and we have found none, holding that attorney's fees incurred to defend or prosecute an action are recoverable in that same action as actual damages." *Id.* at *8.

As in *Haubold*, Hickory Pass alleges that the breach of the agreement was Landmark's filing suit and that its damages from such a breach are its attorney's fees incurred in defending the suit. And, like MCRI, Hickory Pass has not cited to any controlling case law to suggest that a party may recover, as damages, attorney's fees incurred in the same lawsuit. Under

the facts presented here, we see no reason to deviate from our holding in *Haubold*, which is consistent with long-standing precedent that distinguishes attorney's fees from damages. *See id.* at *8; *see also Tana Oil & Gas Corp.*, 104 S.W.3d at 81.

Because Hickory Pass's litigation expenses and attorney's fees incurred in this suit are not recoverable damages for its breach-of-contract claim, Hickory Pass's claim fails as a matter of law. As such, Landmark, not Hickory Pass, was entitled to summary judgment on this issue. *See Woodhaven Partners*, 422 S.W.3d at 837 ("A party relying on assertions of non-recoverable damages alone, such as attorney's fees and expenses sustained in defending a lawsuit and prosecuting a counterclaim, has presented a legal barrier to any recovery."). We sustain Landmark's first issue and, having done so, we need not address its remaining challenges to the trial court's judgment.

Special exception to Hickory Pass's declaratory-judgment counterclaim

Having determined that Landmark, and not Hickory Pass, was entitled to summary judgment on Hickory Pass's breach-of-contract claim, we must address Hickory Pass's conditional cross-appeal, asserting that the trial court erred in sustaining Landmark's special exception to Hickory Pass's declaratory-judgment counterclaim.[5] The trial court sustained Landmark's special

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[5] In its appellate brief, Hickory challenged only the trial court's decision to sustain Landmark's special exception; it did not challenge the court's related decision to dismiss its declaratory-judgment counterclaim. *See Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008) (noting that "for merits of a trial court's order sustaining special exceptions and dismissing suit to be reviewed on appeal, the plaintiff must challenge both the order granting special exceptions and the order of dismissal) (citing *Cole v. Hall*, 864 S.W.2d 563 (Tex. App.—Dallas 1993, writ dism'd w.o.j.)). Hickory Pass's reply brief does mention the trial court's failure to allow its an opportunity to replead and asks this Court to allow such an opportunity, but an appellant may not include in its reply brief an issue not raised in the original brief. *See* Tex. R. App. P. 38.1; *Phillips v. Boo 2 You, LLC*, No. 03-14-00406-CV, 2016 WL 2907971, at *5 (Tex. App.—Austin May 13, 2016, no pet.)

exceptions and dismissed Hickory Pass's declaratory-judgment action on the grounds that declaratory relief is not available when the issue is already pending before the trial court. On appeal, Hickory Pass maintains this was error because its declaratory-judgment counterclaim was not simply a denial of Landmark's claims, but "had broader ramifications than the existing claim" because it sought a declaration that Landmark had "no other rights, claims, or causes of action apart from the Option Contract." As relief, Hickory Pass asks us to remand the case to the trial court for consideration of its declaratory-judgment claim and the availability of attorney's fees related to such a claim.

We cannot reach this issue, however, because Hickory Pass is seeking to reverse the trial court's dismissal of its declaratory-judgment action without having filed a notice of appeal. "A "party who seeks to alter the trial court's judgment . . . must file a notice of appeal." Tex. R. Civ. P. 25.1(c); *see Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171 (Tex. 2004) (holding challenge to portion of trial court's judgment was not preserved for appellate review because appellee, as party who sought to alter trial court's judgment, did not file notice of cross-appeal from judgment). We note, however, that even if Hickory Pass had filed a notice of appeal on this issue, the trial court did not err in dismissing its declaratory-judgment claim. Under well-established jurisprudence, the Uniform Declaratory Judgment Act "is not available to settle disputes already pending before a court," *BHP Petrol. Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990), and it cannot be used to obtain attorney's fees merely for resisting the plaintiff's right to recover, *HECI Explor. Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638–39 (Tex. App.—Austin 1992, writ denied). A counterclaim for

(mem. op.).

declaratory relief is appropriate only where the counterclaim is more than a mere denial of the plaintiff's claim and it has greater ramifications than the original suit. *BHP Petrol.*, 800 S.W.2d at 842. In its own brief, Hickory Pass acknowledges that it sought the same relief in its declaratory-judgment claim as in its breach-of-contract claim, stating that it "recovered by way of its breach-of-contract claim all relief it could have obtained by its declaratory relief claim." Hickory Pass attempts to state that it sought a declaration that no other claims were possible against it, but such an assertion is simply a defense to Landmark's claims, not a request for any affirmative relief on its own. Accordingly, the trial court did not abuse its discretion in striking Hickory Pass's declaratory-judgment claim. *See Perry v. Cohen*, 285 S.W.3d 137, 142 (Tex. App.—Austin 2009, no pet.) ("When reviewing a trial court's dismissal of a cause of action following the sustaining of special exceptions, we review the propriety of both the trial court's decision to sustain the special exceptions and the trial court's order of dismissal." (citing *Cole v. Hall*, 864 S.W.2d 563, 567 (Tex. App.—Dallas 1993, writ dism'd w.o.j.))).

CONCLUSION

Having sustained Landmark's first issue, we reverse the trial court's judgment in favor of Hickory Pass and render judgment that Hickory Pass take nothing on its claims.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Reversed and Rendered

Filed: November 17, 2017