



**NUMBER 13-15-00128-CV**

**COURT OF APPEALS**

**THIRTEENTH DISTRICT OF TEXAS**

**CORPUS CHRISTI - EDINBURG**

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**KINGSLEY PROPERTIES, LP,**

**Appellant,**

**v.**

**SAN JACINTO TITLE SERVICES OF CORPUS  
CHRISTI, LLC, SAN JACINTO TITLE SERVICES  
OF TEXAS, LLC, AND MARK SCOTT,**

**Appellees.**

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**On appeal from the County Court at Law No. 4  
of Nueces County, Texas.**

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**DISSENTING OPINION**

**Before Justices Rodriguez, Benavides and Perkes  
Dissenting Opinion by Justice Perkes**

I respectfully dissent with the majority's holding on issue one. I believe that appellee San Jacinto was a party to the agreement and, as the prevailing party in the

underlying suit, was entitled to attorney's fees. Therefore, I would affirm the trial court's award of attorney's fees.

## **I. ATTORNEY'S FEES**

The majority correctly states the standard of review and applicable law. However, I disagree with the majority's construction of the agreement to which San Jacinto was a signatory. In considering the entire agreement and harmonizing its provisions, I would conclude that San Jacinto is a party to the agreement and covered by the attorney's fee provision.

### **A. San Jacinto Is a Party to the Contract**

#### **1. Non-Disclosure Provision**

A San Jacinto representative signed the agreement on the last page of the agreement as follows:

AGREED AND ACCEPTED:        this 14th day of October, 2004.

TITLE COMPANY:                San Jacinto Title Company

The Title Company acknowledges receipt of this Contract, executed by Buyer and Seller, on this date shown above. The Title Company agrees to treat the subject transaction in confidence and will not disclose the terms or conditions of this Agreement to any party without the consent of Seller prior to closing and without the consent of Buyer after closing.

[Signature of a senior vice president for San Jacinto].

Traditionally, the presence or absence of signatures on a contract is relevant in determining whether the contract is binding on the parties. *In re Big 8 Food Stores, Ltd.*, 166 S.W.3d 869, 876 (Tex. App.—El Paso 2005, orig. proceeding); *In re Bunzl USA, Inc.*, 155 S.W.3d 202, 209 (Tex. App.—El Paso 2004, orig. proceeding); *see also Rachal v.*

*Reitz*, 403 S.W.3d 840, 845 (Tex. 2013) (“Typically, a party manifests its assent by signing an agreement.”); *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (“Evidence of mutual assent in written contracts generally consists of signatures of the parties and delivery with the intent to bind.”).

The language “AGREED AND ACCEPTED” follows the body of the agreement and is placed before the non-disclosure language, which indicates that San Jacinto is assenting to the terms of the entire agreement. Further, the agreement imposes numerous obligations and responsibilities upon San Jacinto including expressly defining San Jacinto as the “Title Company.” Section 3.2 requires San Jacinto to serve as the escrow agent for the earnest money deposit and imposes several obligations upon San Jacinto in connection with handling the earnest money deposit. Section 4.1 obligates San Jacinto to issue a title commitment to the buyers. Section 4.5 requires San Jacinto to issue an Owner's Title Policy to the buyers. Finally, sections 9.1 and 9.2 place a duty upon San Jacinto to disburse the earnest money in the event of default.

The non-disclosure provision must not be viewed in isolation, to the exclusion of the provisions imposing obligations upon San Jacinto. See *Greater Hous. Radiation Oncology, PA v. Sadler Clinic Ass'n, PA*, 384 S.W.3d 875, 886 (Tex. App.—Beaumont 2012, pet. denied) (“We do not view the contract's provisions in isolation but construe it as a whole.”). Construing the agreement as a whole, I would conclude that San Jacinto was a party to the entire agreement, not just the isolated non-disclosure provision. See *id.*; see also *Garcia v. Bank of Am. Corp.*, 375 S.W.3d 322, 333 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (explaining that regardless of whether an escrow agent owes a

fiduciary duty, the duties of the agent are limited and defined by the escrow agreement itself).

## **2. Section 12.5**

I do not believe the language in section 12.5 of the agreement supports a contrary interpretation. That section provides that the agreement “is binding upon and inure[s] to the benefit of the Seller and Buyer . . . but shall not inure to the benefit of another party.”

“In discerning the parties’ intent, ‘we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.’” *El Paso Field Servs., LP v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805 (Tex. 2012) (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011)). In considering the entire agreement, I believe that section 12.5’s reference to “another party” should be construed as excluding non-signatory third parties from the benefits and obligations of the agreement, not San Jacinto—a signatory with multiple obligations under the agreement. A contrary interpretation—one that binds only buyer and seller—would render meaningless the multiple provisions of the agreement which impose responsibilities upon San Jacinto. *See id.*

## **B. San Jacinto Is Entitled to Attorney’s Fees**

As a party to the contract, San Jacinto was entitled to attorney’s fees as a prevailing party in the underlying action. Section 12.9 of the agreement provides as follows: “If either party hereto shall be required to employ an attorney to enforce or

defend the rights of such party hereunder, the prevailing party shall be entitled to recover its reasonable attorney's fees."

As noted by the majority, with respect to an award of attorney's fees, case law defines the term "prevailing party" as referring to a party who successfully prosecutes an action or successfully defends against an action on the main issue. *Pegasus Energy Grp., Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 128 (Tex. App.—Corpus Christi 1999, pet. denied); see also *Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 40 (Tex. 2012). While the attorney's fees provision purports to apply to "either party" to the agreement, the provision does not limit recovery of attorney's fees to suits between the buyer and seller. San Jacinto, a party to the contract, successfully defended the underlying action, and was therefore a prevailing party entitled to recover its reasonable attorney's fees.

The cases cited by the majority are distinguishable as they all pertain to real estate brokers who were not parties to the contract. In *Lesieur v. Fryar*, a real estate broker signed only a provision regarding the ratification of the broker's fee, thereby obligating her to pay three percent of the total sales price to Lesieur's broker at closing. 325 S.W.3d 242, 252 (Tex. App.—San Antonio 2010, pet. denied). In the present case, as discussed above, a representative of San Jacinto, a title company, signed expressing San Jacinto's assent to the entire agreement. Further, the contract in *Lesieur* contained a paragraph titled "BROKERS' FEES" stating, "All obligations of the parties for payment of brokers' fees are contained in a separate written agreement." *Id.* at 253. The agreement in this case contains no such provision referencing a separate agreement with San Jacinto.

In *Arlington Home, Inc. v. Peak Environmental Consultants, Inc.*, the court framed the issue as follows: “whether the term ‘party’ in the attorney’s fees provision is limited to the parties identified and defined by the contract or whether the term includes persons who were not parties to the contract but who were parties in a legal proceeding related to the agreement.” 361 S.W.3d 773, 783 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). The court then determined that the real estate broker was not a party to the contract and, therefore, was not entitled to attorney’s fees. Similarly, in *Williamson v. Guynes*, the court held that a real estate broker was not entitled to attorney’s fees under an earnest money contract where “[t]here [was] nothing in the contract suggesting the buyer and seller intended the word ‘party’ in the attorney’s fees provision to include non-parties to the contract.” No. 10-03-00047-CV, 2005 WL 675512, at \*1 (Tex. App.—Waco Mar. 23, 2005, no pet.) (mem. op.). Unlike the real estate brokers in the above cited cases, San Jacinto served as an escrow agent under the agreement with multiple obligations created by the contract.

## II. CONCLUSION

San Jacinto was a party to the agreement and was entitled to attorney’s fees as the prevailing party. For the foregoing reasons, I respectfully dissent.

GREGORY T. PERKES  
Justice

Delivered and filed the  
22nd day of September, 2016.