NUMBER 13-20-00047-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

CVK ENTERPRISES, L.L.C., Appellant,

v.

ZONIA C. PULLEN, Appellee.

On appeal from the 138th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Perkes
Memorandum Opinion by Chief Justice Contreras

This is an accelerated appeal of an order denying a motion to dismiss brought under the Texas Citizens Participation Act (TCPA). Appellant CVK Enterprises, L.L.C. (CVK) argues the trial court erred because (1) the TCPA applies to appellee Zonia C. Pullen's suit for breach of restrictive covenants, (2) Pullen failed to produce clear and

specific evidence for each element of her claim, and (3) CVK established its affirmative defenses by a preponderance of the evidence. We affirm.

I. BACKGROUND

In 2000, Frances Lipe, the owner of the "Brownsville Land and Improvement Co. Subdivision" (the Subdivision), drafted and recorded an instrument (the Covenants) which stated, among other things, as follows:

> Be it resolved that the RESERVATIONS, RESTRICTIONS AND COVENANTS hereinafter set out shall be, and the same are hereby made applicable by Frances W. Lipe, Owner for the following property:
>
> [Legal description of property]
>
> PROPOSED LAND USE REGULATIONS
>
> The property shall be held, transferred, sold, conveyed, and occupied subject to the following restrictions, which shall constitute a covenant running with the land, binding upon all owners of the property and their respective heirs, legal representatives, successors and assigns.
>
> The ARCHITECTURAL CONTROL COMMITTEE membership, hereafter to be referred to as the ACC, shall be Frances W. Lipe, G. Russell Lipe, and Thomas W. Lipe. As each Lot sells, the new owner shall become a member of the ACC. When the last Lot sells, the owners shall comprise the ACC entirely and the Lipe members shall be removed from the committee.
>
> 1. RESIDENTIAL PURPOSES ONLY. All land included within the Property shall be used for "residential purposes" only and for the construction of a private single-family residence. The terms "residential purposes" as used herein shall be held and construed to exclude any business, commercial, industrial, hospital, clinic and/or professional uses, and such excluded uses are hereby expressly prohibited. This restriction shall not, however, prevent the inclusion of permanent living quarters for domestic servants or to allow domestic servants to be domiciled with an owner or resident.
>
> . . . .
>
> 5. ROOFING MATERIALS. The ACC shall have the discretion to approve all roof materials and roof treatments in its sole discretion. Provided however the main roof surfaces of all structures shall be a minimum of six (6) to twelve (12) pitch. . . . Flat roofs may be allowed with certain architectural styles if approved by the ACC. . . .

> 6. FENCES. Wood privacy, brick, stone, stucco, wrought iron or a combination thereof shall be allowed, but shall not exceed six (6) feet in height. No chain link fencing, or light gauge field fencing (ie…[sic] chicken wire) shall be allowed. The ACC, in its sole discretion, is empowered to waive the aforesaid composition requirements for fences if such waiver is advisable in order to accommodate a unique, attractive or advanced building concept, design or material, and the resulting fence, decorative wall and/or retaining wall (whichever is applicable) will not detract from the general appearance of the neighborhood.
>
> . . . .
>
> 10. MINIMUM AREA. The living area of each residence constructed on said property shall contain the minimum, contiguous square feet of living space of twenty-five hundred (2500) square feet or as determined by the ACC, such square feet being exclusive of open or screened porches, terraces, patios, driveways, carports, garages and living quarters for domestic servants separated or detached from the primary living area.
>
> . . . .
>
> 12. OUTBUILDING REQUIREMENTS. All outbuildings are to conform to "Building Setbacks." Every outbuilding shall be approved in size, location, and structure prior to construction and shall include structures such as detached garage, storage building, gazebo, spa, greenhouse or children's playhouse, and they shell be compatible with the dwelling to which it is appurtenant in terms of its design and material composition. The ACC shall have the right to allow a barn or animal shelter so long as it complies with the general nature of the structures located on the property.

The Covenants empowered the ACC to waive the Covenants at its discretion and to "establish additional land use regulations" as it deemed necessary.

In December of 2000, Pullen and her late husband purchased three Subdivision lots from Lipe. According to CVK, in 2003, the Pullens constructed a home with a flat roof, a fence that exceeds six feet in height, and a guest house under 2,500 square feet, all allegedly in violation of the Covenants. At the time, Pullen and her relatives owned all but one of the Subdivision lots and therefore controlled the ACC.

CVK acquired its two Subdivision lots in 2014 via a warranty deed that contained the following provision:

> This conveyance is made and accepted subject to any and all restrictions, covenants, conditions, easements, mineral and royalty reservations, zoning laws, regulations and ordinances of municipal and other governmental authorities, if any, and only to the extent that same are still in effect, shown of record in Cameron County, Texas; together with any and all visible and apparent easements, to include but not limited to easements for roadways on or across the land.

Subsequently, Pullen met at her property with CVK's owner Carlos Varela and his business partner Javier Huerta. According to CVK, Varela informed Pullen at this meeting that CVK was planning to build a "garden home development" or a "multi-family development" on its site. Pullen then advised Varela and Huerta that the property was currently zoned only for single-family housing, but she did not advise them about the existence of the Covenants, nor did she advise them that they would need to obtain her approval before building any multi-family units. CVK contends that Pullen expressed interest in purchasing one of the units in the planned development. The parties began negotiating for the sale of Pullen's Subdivision units to CVK, but they could not reach an agreement on price. Varela then asked Pullen to join as a partner in CVK's development, but Pullen declined. According to Pullen, she provided a certified copy of the Covenants to Huerta later in 2015.

In 2017, CVK sought to have its property rezoned to allow for multi-family residential use. At a December 7, 2017 public hearing before the City of Brownsville's Planning and Zoning Commission (PZC), no one appeared to contest the rezoning. The rezoning ordinance was passed by the City Commission on January 16, 2018. CVK then began construction on its multi-family housing development, comprised of sixty apartment units, in May of 2018.

Pullen's attorney sent CVK a demand letter in March 2019, alleging that CVK violated the Covenants by building the apartment complex. When CVK refused to cease

construction, Pullen filed this lawsuit, requesting economic damages for the alleged loss in value to her property, as well as attorney's fees and costs. In an amended petition, she added a claim for damages under Texas Property Code § 202.004. *See* TEX. PROP. CODE ANN. § 202.004(c) ("A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation."); *see also id.* § 5.006(a) (allowing recovery of reasonable attorney's fees by a prevailing plaintiff in an action based on the breach of a restrictive covenant).

CVK answered the suit and asserted affirmative defenses and counterclaims. It then moved to dismiss Pullen's claims under the TCPA, claiming that Pullen sued in retaliation for CVK's exercise of its rights to free speech and to petition. CVK argued that, even if Pullen could show a prima facie case for her claims, its defenses of waiver, laches, and quasi-estoppel required dismissal. In an unsworn declaration attached to CVK's motion, Varela stated that CVK's multi-family development was "already 80 percent complete" at the time Pullen filed suit. He further stated: "The deed that transferred the property to CVK did not set forth that the CVK Property was subject to any specific restrictive covenants or deed restrictions. At the time of the purchase, I was not aware, nor was I ever informed, that any restrictive covenants affected the CVK Property." Huerta also provided an unsworn declaration in which he stated that he "never reviewed" the Covenants and did not have any knowledge of the Covenants prior to the May 2019 demand letter.

Pullen responded to the TCPA motion and attached evidence, including her affidavit as well as appraisals of her property purporting to show the loss in market value caused by CVK's development. In her affidavit, Pullen stated that "[o]ne of the primary

incentives" for her and her husband to purchase the property in 2000 "was because of the covenants running with the land which included restrictions for single-family homes only and minimum square footage restrictions of 2500 square feet per home." She conceded that she and her husband built a six-foot concrete and stucco fence, but she said that Lipe did not oppose construction of the fence. She further conceded that part of her residence has a flat roof, but she said that "a variance was obtained" in 2003, when she and her family members made up a majority of the ACC and approved the plans for the construction. Pullen stated in her affidavit that, when she met with Varela and Huerta in early 2015, Varela told her CVK was planning to build "a multi-family development" on its Subdivision property. Pullen said she "offered [Varela] a copy" of the Covenants at that meeting, and that she "made it clear that building apartments next door would cause an extreme devaluation" of her property.

After a hearing on December 6, 2019, the trial court took CVK's motion under advisement. CVK subsequently filed a reply to Pullen's response, contending that Pullen had failed to establish that she performed under the restrictions or that she suffered damages. The trial court did not rule on CVK's TCPA motion to dismiss; therefore, it was denied by operation of law thirty days after the hearing. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(a), 27.008(a). This interlocutory appeal followed. *See id.* § 51.014(a)(12).

II. DISCUSSION

A. Applicable Law and Standard of Review

The TCPA "protects citizens from retaliatory lawsuits that seek to intimidate or silence them on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015) (orig. proceeding). Under the version of the TCPA applicable here, a defendant seeking

dismissal has the initial burden to show "by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association." Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws 961, 962 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)).[1] If the defendant meets its initial burden, then the plaintiff must establish by "clear and specific evidence a prima facie case for each essential element of the claim in question" to avoid dismissal. *Id.* § 27.005(c). If the plaintiff makes this showing, the trial court must nevertheless dismiss if the defendant "establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." Act of May 24, 2013, 83rd Leg., R.S., ch. 1042, § 2, 2013 Tex. Gen. Laws 2499 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d)).

Our review of a ruling on a TCPA motion to dismiss is de novo. *Entravision Commc'ns Corp. v. Salinas*, 487 S.W.3d 276, 281 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied); *Hicks v. Grp. & Pension Adm'rs, Inc.*, 473 S.W.3d 518, 526 (Tex. App.—Corpus Christi–Edinburg 2015, no pet.).

B. TCPA

CVK contends by its first issue that the TCPA applies to Pullen's claims. As noted, the version of the TCPA applicable to this case broadly encompasses any lawsuit that is "based on, relates to, or is in response to" the defendant's exercise of one of the three specified constitutional rights. Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011

[1] The current version of the statute applies only to actions filed on or after September 1, 2019. Act of May 20, 2019, 86th Leg., R.S., ch. 378, §§ 11–12, 2019 Tex. Sess. Law Serv. 684, 687. Pullen's original petition was filed on May 31, 2019.

Tex. Gen. Laws 961, 962 (amended 2019).[2] Those rights are specifically defined in the statute: "Exercise of the right of free speech" means "a communication made in connection with a matter of public concern," TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(3); "exercise of the right to petition" includes any "communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding," *id.* § 27.001(4)(B); and "exercise of the right of association" means "a communication between individuals who join together to collectively express, promote, pursue, or defend common interests." Act of May 21, 2011, 82nd Leg., R.S., ch. 341, § 2, 2011 Tex. Gen. Laws at 961 (amended 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2)). Thus, an exercise of rights under this version of the TCPA necessarily entails a "communication." *See Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 425 (Tex. App.—Dallas 2019, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(1) (defining "communication" to include "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic").

In its motion to dismiss and on appeal, CVK contended that Pullen's claims are "based on, related to, or in response to" the following "communications": (1) CVK's rezoning application, which was presented to the PZC and approved by the City; and (2) the discussions between Pullen and Varela in early 2015. CVK further argued that, by these activities, it was exercising its rights of free speech, to petition, and of association. In response, Pullen argues that (1) her claims are unrelated to those activities, and (2) those activities do not constitute the exercise of rights as defined in the statute.

[2] The words "relates to" were struck from the statute in the 2019 amendments. *See id.*

To show that a claim is covered by the TCPA, the defendant must establish a "nexus" between the plaintiff's claims and the conduct protected by the statute. *Dyer*, 573 S.W.3d at 428 (citing *Grant v. Pivot Tech. Sols., Ltd.*, 556 S.W.3d 865, 879 (Tex. App.—Austin 2018, pet. denied)). This requires a showing that the suit "is factually predicated on the alleged conduct that falls within the scope" of the statute. *Cavin v. Abbott*, 545 S.W.3d 47, 58 (Tex. App.—Austin 2017, no pet.). A plaintiff's claims are "related" to a protected communication when there is "some sort of connection, reference, or relationship between them"; and the claims are "in response to" a protected communication when they "react[] to or [are] asserted subsequently" to the communication. *Id.* at 69; *see ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900 (Tex. 2017) (per curiam) (holding, where defendant asserted that plaintiff's claims were based on an exercise of its right to free speech, that "[t]he TCPA does not require . . . more than a 'tangential relationship' to" a matter of public concern).

Pullen's lawsuit alleged that CVK violated the Covenants by building a sixty-unit apartment complex on its Subdivision property. Pullen never contested CVK's rezoning application before the PZC or the City Commission—a fact CVK emphasizes in its separate argument that Pullen waived her ability to enforce the Covenants, *see infra*—and she does not mention CVK's rezoning application anywhere in her petition. Thus, we cannot conclude her claims are "based on" or "factually predicated" on the rezoning application. *See Cavin*, 545 S.W.3d at 58. Nevertheless, it is undeniable that her claims are at least "related to" or "in response to" that application. The specific provision of the Covenants which Pullen alleges CVK violated prohibited the development of multi-family housing in the Subdivision; the zoning regulations in force at the time of Pullen's meeting

with Varela in 2015 also prohibited the development of multi-family housing in the Subdivision. The parties agree that, during the 2015 meeting, Pullen advised CVK of the zoning restriction and Varela acknowledged that CVK would need to apply for rezoning in order to build multi-family residences on the property. Pullen filed suit only after the rezoning application was approved and CVK began construction. Moreover, in the March 2019 demand letter, Pullen's counsel noted that CVK "intentionally effected a zoning change that was in direct conflict with" the Covenants.

Considering the extraordinarily broad scope of the applicable version of the TCPA, we conclude that Pullen's lawsuit is indeed "related to" or "in response to" CVK's rezoning application, which is indisputably a "communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding." TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4)(B). Accordingly, CVK has shown by a preponderance of the evidence that Pullen's suit implicates its exercise of the right to petition, and the TCPA applies. We sustain CVK's first issue.

C. Prima Facie Case

Because CVK met its initial burden to establish the TCPA's applicability, Pullen was required to make a prima facie case by producing clear and specific evidence of each essential element of her claim. *Id.* § 27.005(c). CVK contends by its second issue that Pullen failed to satisfy this burden.

A "prima facie case," as used in the TCPA, means "evidence that is legally sufficient to establish a claim as factually true if it is not countered." *S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018). It represents the "minimum

quantity of evidence necessary to support a rational inference that the allegation of fact is true." *Schimmel v. McGregor*, 438 S.W.3d 847, 855 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). In the context of the TCPA, "clear" has been interpreted to mean "unambiguous," "sure," or "free from doubt" and "specific" has been interpreted to mean "explicit" or "relating to a particular named thing." *In re Lipsky*, 460 S.W.3d at 590. We review the evidence in the light most favorable to the plaintiff. *Schimmel*, 438 S.W.3d at 855–56.

The only claim raised by Pullen in her petition is for breach of the Covenants. This is essentially a breach of contract claim. *See Tarr v. Timberwood Park Owners Ass'n, Inc.*, 556 S.W.3d 274, 280 (Tex. 2018) (noting that courts "have always treated unambiguous covenants as valid contracts between individuals"); *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998) (stating that "restrictive covenants are subject to the general rules of contract construction"); *Ski Masters of Tex., LLC v. Heinemeyer*, 269 S.W.3d 662, 668 (Tex. App.—San Antonio 2008, no pet.) ("A restrictive covenant is a contractual agreement between the seller and the purchaser of real property."). Generally, the elements of a breach of contract claim are: "(1) the existence of a valid contract; (2) the plaintiff performed or tendered performance as the contract required; (3) the defendant breached the contract by failing to perform or tender performance as the contract required; and (4) the plaintiff sustained damages as a result of the breach." *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 502 n.21 (Tex. 2018); *First Nat'l Bank of Edinburg v. Cameron County*, 159 S.W.3d 109, 112 (Tex. App.—Corpus Christi–Edinburg 2004, pet. denied).

In its motion to dismiss, CVK alleged that Pullen could not establish the essential

elements of her claim by clear and specific evidence, but it did not specify which elements were lacking in support. On appeal, CVK does not dispute that Pullen established by clear and convincing evidence that the Covenants constitute a valid, enforceable contract or that CVK built a multi-family housing complex in contravention of the Covenants' terms. Instead, CVK contends that Pullen failed to establish (1) that she herself performed under the Covenants[3] or (2) that she suffered damages as a result of CVK's actions. *See USAA Tex. Lloyds Co.*, 545 S.W.3d at 502 n.21.

The parties dispute whether Pullen was actually required to show that she performed under the Covenants in order to meet her burden to establish a prima facie case under the TCPA. We conclude, given the facts and circumstances of this case, that such a showing is unnecessary at this stage. Pullen's own performance would be an "essential element" of her claim only if her performance is considered a condition precedent to CVK's performance. *See Abrams v. Salinas*, 467 S.W.3d 606, 614 (Tex. App.—San Antonio 2015, no pet.) ("In a contract with a condition precedent, performance of that condition precedent is an essential element of a plaintiff's breach of contract case."). "A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation"; a covenant, on the other hand, is merely "an agreement to act or refrain from acting in a certain way." *Solar Application Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010); *see Abrams*, 467 S.W.3d at 614; *see also Int'l Paper Co. v. Signature Indus. Servs., LLC*, No. 13-18-00186-CV, 2020 WL 2079145, at *20 (Tex. App.—Corpus Christi–Edinburg Apr. 30, 2020, pet. filed) (mem.

[3] CVK argues that Pullen failed to perform because her property contains the following items which are prohibited by the Covenants: (1) a chain-link fence; (2) a fence exceeding six feet in height; and (3) a guest house of under 2,500 square feet.

op.).[4] The absence of conditional language such as "if," "provided that," or "on condition that" indicates that a provision should be construed as a covenant. *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990). The agreement at issue in this case explicitly provides that the obligations set forth therein are "covenants running with the land, binding upon all owners of the property and their respective heirs, legal representatives, successors and assigns." There is no language indicating that enforcement of the obligations is contingent on the complaining party's full compliance with the terms. Accordingly, the Covenants are not conditions precedent, and Pullen did not need to establish her own performance as part of her prima facie case. *See Abrams*, 467 S.W.3d at 614.

CVK also argues that Pullen failed to produce clear and specific evidence to support a finding that she suffered damages as a result of CVK's breach. *See USAA Tex. Lloyds Co.*, 545 S.W.3d at 502 n.21 (setting forth breach of contract elements). In response to CVK's motion to dismiss, Pullen attached, among other things, an affidavit by Patricio Ahumada Jr., a certified real estate appraiser. Ahumada stated that he prepared two reports, the first based on "the hypothetical condition" that the CVK property "is vacant," and the second "based on the external obsolescence caused to [Pullen's] property by the multifamily 60-unit development, if any." Ahumada stated that the second report "takes into account the increased traffic density impact" to Pullen's property, as well as "the noise, the loss of privacy, and impact on market desirability and marketability"

[4] Breach of a covenant does not affect the enforceability of the remaining provisions of the contract unless the breach is material or is a total breach. *Solar Application Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010). But "[t]he contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense" which is not part of the plaintiff's prima facie case in a breach of contract action. *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 646 (Tex. App.—Dallas 2015, no pet.).

of Pullen's property resulting from the building of CVK's apartment complex. Pullen's property was valued at $1,025,000 in Ahumada's first report and at $705,000 in his second report. Ahumada thus concluded in his affidavit that Pullen's property "suffered damages by a reduction in market value of $320,000.00 which was proximately caused by the building of the multifamily 60-unit development directly beside the property."

CVK notes that both of Ahumada's reports contain "conditions" including the following paragraph:

> The subject is located on Wildrose Lane next to a new multi-family development for the Section 8 housing, which is defined as a Housing Choice Voucher Program that provides a rental subsidy to low-income households. The renter is responsible for paying 30 percent of their income toward rent. HUD pays a portion of the rent for tenants living in conventional housing with a Section 8 voucher.

CVK denies that its development "is or will be Section 8 Housing, which would certainly cause a dramatic decrease in the value of surrounding properties." It contends that Ahumada's affidavit is therefore not "clear and specific" evidence that Pullen suffered damages as a result of its actions. CVK further notes that Pullen requested $570,000 in damages in her first supplemental petition, and it argues that her evidence of damages is not "clear and specific" because it does not support this amount of damages.

We disagree. In a supplemental affidavit attached to CVK's reply in support of its motion to dismiss, Ahumada stated:

> The Zonia Pullen property suffered damages by a reduction in market value of $320,000.00 which was proximately caused by the building of the multifamily 60-unit development directly beside the property of Zonia Pullen and the $320,000.00 loss exists irrespective of whether the 60-unit apartment complex is designated as Section 8 Housing or non-Section 8 Housing.

CVK asserts on appeal that, because Ahumada "alter[ed] facts within his appraisal report and still reach[ed] the same opinion for alleged damages," the evidence is not "sure" or

"free from doubt." *See In re Lipsky*, 460 S.W.3d at 590. But the supplemental report would be enough, if not countered, to support a rational inference that Pullen's property decreased in value because of the construction of CVK's development. *See S & S Emergency Training Sols.*, 564 S.W.3d at 847. And the fact that Pullen's petition requested more damages than the appraiser testified to does not render the evidence unspecific or unclear. *See id.* ("Direct evidence of damages is not required, but the evidence must be sufficient to allow a rational inference that some damages naturally flowed from the defendant's conduct."). We conclude that Pullen produced clear and specific evidence to establish a prima facie case.

D. Defenses

Finally, because Pullen established a prima facie case with clear and specific evidence, CVK was required to establish one of its defenses by a preponderance of the evidence in order to obtain dismissal. Act of May 24, 2013, 83rd Leg., R.S., ch. 1042, § 2, 2013 Tex. Gen. Laws 2499 (amended 2019). In its answer and in its TCPA motion to dismiss, CVK raised the affirmative defenses of quasi-estoppel, waiver, and laches.

1. Quasi-Estoppel

First, the doctrine of quasi-estoppel "precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000); *Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349 S.W.3d 258, 268 (Tex. App.—Dallas 2011, pet. denied) (noting that quasi-estoppel "is a term applied to certain legal bars, such as ratification, election, acquiescence, or acceptance of benefits"). "The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent

with one to which he acquiesced, or from which he accepted a benefit." *Lopez*, 22 S.W.3d at 864.

CVK contends that Pullen's claims are barred by quasi-estoppel because: (1) she "engaged in conversations to sell her property to CVK" and "considered purchasing a unit" in CVK's multi-family development in her 2015 meeting with Varela; (2) she never objected to the rezoning application; and (3) she waited to file suit until 2019, which is nearly one year after construction started and over four years since she first learned of CVK's intentions in her meeting with Varela. CVK argues that Pullen's filing of suit is unconscionable because she "changed her position on a transaction she already acquiesced to, the construction of a multi-family development." We disagree. Though Pullen may have discussed potentially selling her property to CVK or purchasing a unit in its development, those transactions did not materialize, and she never explicitly consented to CVK's construction of multi-family housing in the Subdivision. Instead, it is undisputed that Pullen advised Varela in 2015 that CVK's property was zoned for single-family housing at the time. Moreover, Pullen stated in her affidavit that she provided a certified copy of the Covenants to Huerta later in 2015.[5] CVK disputes this, but we cannot say it has shown by a preponderance of the evidence that Pullen acquiesced to or accepted any benefit from CVK's construction of the apartment complex. *See id.* Thus, dismissal would not be appropriate at this stage on the basis of quasi-estoppel.

[5] Because the Covenants were recorded in the Cameron County public records, CVK was charged with constructive notice of them at the time it purchased its Subdivision units. *See Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) ("A person is charged with constructive notice of the actual knowledge that could have been acquired by examining public records. . . . Constructive notice in law creates an irrebuttable presumption of actual notice."); *Inwood N. Homeowners' Ass'n, Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987) ("[A] purchaser with constructive notice of restrictive covenants becomes bound by them.").

2. Waiver

Next, CVK contends that Pullen waived her right to enforce the Covenants because she herself was in violation of them by: (1) building a guest house on her property which was less than 2,500 square feet; (2) having a "concrete and chain link fence" on her property; and (3) having a nine-foot-tall fence on her property. Waiver is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008) (citing *In re Gen. Elec. Capital Corp.*, 203 S.W.3d 314, 316 (Tex. 2006) (per curiam); *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (per curiam); *Bocanegra v. Aetna Life Ins. Co.*, 605 S.W.2d 848, 851 (Tex. 1980)). The elements of waiver include: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right. *Id.* (citing *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996)).

Restrictive covenants may be waived, and waiver is ordinarily a question of fact. *See Tenneco*, 925 S.W.2d at 643; *see also BCH Dev., LLC v. Lakeview Heights Addition Prop. Owners' Ass'n*, No. 05-17-01096-CV, 2019 WL 2211479, at *7 (Tex. App.—Dallas May 21, 2019, pet. denied) (mem. op.). To establish waiver in such a case, the defendant must prove that violations then existing are "so great" as to lead the mind of an average person to reasonably conclude that the restriction in question has been abandoned and its enforcement waived. *EWB-I, LLC v. PlazAmericas Mall Tex., LLC*, 527 S.W.3d 447, 466 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *Ski Masters of Tex.*, 269 S.W.3d at 673; *Hicks v. Loveless*, 714 S.W.2d 30, 35 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

Factors to be considered include the number, nature, and severity of the existing violations; prior acts of enforcement of the restrictions; and whether it is still possible to realize to a substantial degree the benefits intended by the restrictions. *EWB-I*, 527 S.W.3d at 466; *Hicks*, 714 S.W.2d at 35.

In the affidavit attached to her response to the TCPA motion to dismiss, Pullen conceded the existence of both a chain-link fence and a concrete and stucco fence on her property. However, she stated that the chain link fence existed at the time she and her late husband purchased the property, and it had been approved by the ACC, which at the time was comprised of Lipe and Lipe's family members. Pullen further explained that the concrete and stucco fence was six feet in height when she and her husband built it in 2001, but that it had since been heightened to nine-and-one-half feet by her tenant; she stated she would be willing to "reduce" the concrete fence to six feet if CVK believed it "caused problems." With respect to the guest house, Pullen notes on appeal that the Covenants permit the construction of an "outbuilding" of under 2,500 square feet; she further notes that, pursuant to the Covenants, the ACC had the authority to waive all of the restrictions she is alleged to have violated.

In light of Pullen's affidavit testimony, it is not clear whether the fences and guest house constituted violations of the Covenants. Even if we assume they were, these violations are not "so great" or severe so as to indicate that Pullen intended to abandon the Covenants or waive their enforcement. *See EWB-I*, 527 S.W.3d at 466. We cannot conclude that CVK established by a preponderance of the evidence that Pullen waived her claim for breach of the Covenants.

3. Laches

Finally, laches is an equitable defense which is established by a showing of: (1) an unreasonable delay by one having legal or equitable rights in asserting those rights; and (2) a good faith change of position by another to his detriment because of the delay. *Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 80 (Tex. 1989). Laches has been held to apply only to cases "strictly in equity or actions at law that are essentially equitable in character." *City of Corpus Christi v. Taylor*, 126 S.W.3d 712, 726 (Tex. App.—Corpus Christi–Edinburg 2004, pet. withdrawn); *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 415 (Tex. App.—Corpus Christi–Edinburg 2001, pet. denied). Breach of contract is an action at law which does not rely on principles of equity, and Pullen seeks damages, not equitable relief. *Wayne*, 52 S.W.3d at 415; *see* TEX. PROP. CODE ANN. § 202.004(c).

In any event, it is undisputed that suit was filed within the applicable limitation period, and "laches should not bar an action on which the statute of limitations has not run unless allowing the action 'would work a grave injustice.'" *Taylor*, 126 S.W.3d at 726 (citing *Culver v. Pickens*, 176 S.W.2d 167, 170–71 (Tex. 1943)); *see Wayne*, 52 S.W.3d at 415; *Dillard v. Broyles*, 633 S.W.2d 636, 645 (Tex. App.—Corpus Christi–Edinburg 1982, writ ref'd n.r.e.) (op. on reh'g) (noting that, if a cause of action "comes within a specific provision of the statute of limitations, then [laches] generally do[es] not apply"); *see also Malmgren v. Inverness Forest Residents Civic Club, Inc.*, 981 S.W.2d 875, 877 (Tex. App.—Houston [1st Dist.] 1998, no pet.) ("Actions to enforce restrictive covenants are controlled by the four-year [residual] statute of limitations."). For the same reasons we have already concluded that quasi-estoppel does not bar Pullen's suit, we further decline to find that a "grave injustice" would result from its prosecution under these

circumstances. Accordingly, laches does not apply.

Because CVK failed to establish any of its affirmative defenses by a preponderance of the evidence, the trial court did not err in denying its motion to dismiss under the TCPA. We overrule CVK's third issue.

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Chief Justice

Delivered and filed the
12th day of November, 2020.