

FALL 2014 NEWSLETTER

HOMEOWNERS' ASSOCIATION UPDATE

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TEXAS COURT OF APPEALS

***Walton v. Midland Mira Vista Homeowners' Ass'n*, No. 11-12-00214-CV, 2014 Tex. App. LEXIS 10492 (Tex. App.—Eastland Sept. 18, 2014, no pet. h.)**

An owner of two adjacent lots in a subdivision governed by a homeowners' association could not avoid paying assessments on both lots by unilaterally replatting the two lots into a single lot. Additionally, even though the homeowners' association that sued him for payment of unpaid assessments was not created according to the provisions in the Declaration, it still had the authority to levy assessments and sue for non-payment because it fulfilled the intent of the original Developer as laid out in the Declaration.

Appellant, Trent Walton, owned two lots in the Mira Vista Subdivision, a subdivision consisting of thirteen lots and governed by the "Declaration of Restrictions and Covenants for Mira Vista Subdivision" ("the Declaration"). In 2008 and 2009, the Midland Mira Vista Homeowners' Association ("the HOA") levied Maintenance Assessments and Special Assessments against all thirteen lots in the subdivision. After Walton failed to pay the assessments, the HOA filed suit against Walton, seeking payment of the unpaid assessments and a declaratory judgment that Walton would be liable for payment of assessments levied against both of his two lots for as long as he owned the lots. Walton answered the HOA's suit and made a cross claim for a declaratory judgment that: (1) the HOA was not the corporation that was authorized under the Declaration to levy assessments against the lot owners; (2) that Walton owned only one lot in the subdivision because the two lots he purchased had been replatted into one lot; and (3) that that Declaration limited the amount of Maintenance Assessments that could be levied against a single lot to \$500 per year.

The appellate court looked at the Declaration, and construed its provisions according to the general rules of contract construction, looking at the entire writing in an attempt to give effect to the true intentions of the parties as expressed in the contract and give effect to all of the provisions of the contract without rendering any meaningless. The appellate court noted that the Declaration stated that the Developer would create a non-profit corporation to be known as the Mira Vista Homeowners' Association and that the Association would have the power and obligation to collect assessments in order to maintain the common areas of the subdivision. The appellate court acknowledged that the HOA was not created by the Developer and was not named the Mira Vista Homeowners' Association, as pointed out by Walton. Instead, the HOA was created by lot owners and was named the Midland Mira Vista Homeowners' Association, since the Developer failed to create the HOA and the name "Mira Vista Homeowners Association" was unavailable with the Secretary of State. However, the appellate court found that these variances did not nullify the validity of the HOA that did come into existence, since to find otherwise would frustrate the Developer's intentions as expressed in the Declaration and

would render countless other provisions in the Declaration meaningless. As a result, the HOA was a proper homeowners' association under the Declaration and it had the authority to levy assessments against Walton.

With regards to Walton's argument that he could only be levied assessments on one lot since he had the two lots replatted into one, the appellate court found Walton's argument unconvincing. Again looking to the language in the Declaration, the appellate court found that it went against the intent of the Developer to allow a lot owner to unilaterally apply with the City to replat multiple lots into a single lot as a means of avoiding paying assessments on each individual lot. The appellate court found that Walton owed pass due assessments for both lots, regardless of his replatting the lots into one.

***Smith v. Aramark Corp.*, No. 13-11-00500-CV, 2014 Tex. App. LEXIS 8258 (Tex. App.—Corpus Christi – Edinburg July 31, 2014, no pet. h.)**

In Texas, a homeowners' association does not have a duty to disclose latent defects to a prospective purchaser when the purchaser is buying directly from the previous property owner, but only imposes a duty on the association to disclose information listed in Texas Property Code section 207.003(b), which does not include latent defects.

In 2003, Appellants, Charles E. Smith and Betty M. Smith (collectively "the Smiths"), purchased property located in Long Island Village directly from the property's owner. Property owners of Long Island Village are members of the Long Island Village Owners' Association ("LIVOA"). Prior to the sale of the property, and in accordance with Texas Property Code section 207.003, LIVOA provided the Smiths with a resale certificate. The resale certificate was prepared by LIVOA's agent, Aramark. On the resale certificate LIVOA stated that it had "no actual knowledge of conditions on the Property in violation of the restrictions applying to the subdivision or the bylaws or rules of the Owners' Association."

In 2008, the Smiths filed suit against multiple defendants, including LIVOA and Aramark, asserting causes of action for negligence, negligent misrepresentation, common law fraud, civil conspiracy, fraud by nondisclosure, unlawful taking and diminished value of the subject property, violations of the Texas Deceptive Trade Practices Act, and breach of fiduciary duty. The bases of the Smiths claims against LIVOA and Aramark was that the defendants "intentionally, willfully, and fraudulently stated" on the resale certificate that they were not aware of any conditions of the property that were in violation of LIVOA's rules and bylaws.

The Smiths, lost at the trial court level and appealed, arguing that LIVOA and Aramark breached a fiduciary duty to disclose latent defects in the property to a prospective purchaser. The Smiths argued that the fiduciary duty arose out of the appellees status as third party beneficiaries of the sale of the property and because the appellees "actively participated" in the sale of the property to the Smiths. In making their argument, the Smiths relied extensively on a California case which, the Smiths alleged, stood for the proposition that when a homeowners association is a third-party beneficiary to, and actively participates in, a sale of property in the subdivision, it could have a duty to disclose latent defects to prospective purchasers. The appellate court rejected this argument and made note that the Smiths conceded that there was no

Texas state or case law to support their contention that the homeowners' association had a duty to disclose a latent defect on a piece of property being sold by a member of the association to a prospective purchaser.

Rejecting the Smiths' argument, the appellate court found that when a member of a property owners' association sells his property to a prospective purchaser, the homeowners' association is only required to disclose information listed in Texas Property Code section 207.003(b), which does not include latent defects.

***Herrera v. Stahl*, No. 04-14-00018-CV, 2014 Tex. App. LEXIS 7683 (Tex. App.—San Antonio July 16, 2014, no pet.).**

A president and secretary of a homeowners' association were not entitled to dismissal of two residents' defamation claims against them under the Texas Citizens' Participation Act ("TCPA"), because they did not meet their initial burden of showing that the defamation action against them was based on, related to, or was in response to their exercise of a protected right. Conclusory statements did not amount to probative evidence and the defendants did not meet their initial burden for a motion to dismiss under the TCPA.

Judy Stahl and Sue Hensley (collectively "Plaintiffs") sued Damien Herrera, the Association's president, and Blaine Castle, the Association's secretary, (collectively, "Defendants") asserting fraud and defamation claims. The Plaintiffs' defamation claims were based on statements by the defendants that included: (1) calling Plaintiffs "bitch[es];" (2) that they were "crazy" and "had no lives" other than bothering the Association; (3) calling the San Antonio Police Department ("SAPD") on various occasions for invalid reasons in an attempt to make Plaintiffs appear unstable and untrustworthy; (4) sending emails to other residents ridiculing the Plaintiffs' efforts to retrieve relevant records for the lawsuit; and (5) telling one plaintiff to "not get her panties in a wad" in front of other residents thus embarrassing her in public. The defendants each moved to dismiss the defamation claim pursuant to the TCPA. The trial court denied the motions to dismiss and the Defendants brought an interlocutory appeal.

Asserting they were entitled to dismissal of plaintiffs' defamation under the TCPA, the defendants alleged that because the statements that plaintiffs' defamation claims were based on were an exercise of defendants' right of free speech, the right to petition, or the right to associate they were entitled to a motion to dismiss. In assessing the validity of defendants' claim, the appellate court laid out the purpose of the TCPA and the burden shifting standard applicable to the TCPA.

The TCPA recognizes the need to protect those filing meritorious defamation claims and the need to punish or deter those who abuse the defamation tort cause of action in an attempt to silence others who otherwise have a constitutional right to exercise certain rights. To address these concerns the TCPA provides a remedy for when a claim is brought in response to a person's exercise of the right to free speech, the right to petition, or the right of association—that person may move to dismiss the action. The movant bears the initial burden of showing *by a preponderance of the evidence* that the action "is based on, relates to, or is in response to the [movant's] exercise of certain rights." Covered rights under the TCPA include the right of

association, free speech, and petition. If the movant satisfies the initial burden, the burden then shifts to the nonmovant, and the trial court is required to dismiss the legal action unless the nonmovant “establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.”

In Defendants’ motions to dismiss, the Defendants claimed that the Plaintiffs’ defamation causes of action were in response to the exercise of Defendants’ right to association, free speech, and/or to petition because the statements were made during duly called Association meetings, to the SAPD, and to zoning administrators employed by the City of San Antonio. As a result, Defendants claimed that these statements were all “communications” made in connection with a “matter of public concern” for the purpose of collectively expressing, promoting, or defending the common interest of the Association’s membership, thereby falling under the protected right of association.

After reviewing the evidence presented in the Defendants’ motion to dismiss and affidavits, the appellate court found that the Defendants failed to meet their burden of showing that the Plaintiffs’ action was based on the Defendants’ exercise of any covered right under the TCPA. The appellate court noted that the Defendants failed to explain the specific “common interests” of the Association they were expressing, promoting, or defending when they made the alleged statements or how the alleged statements related to a specific “common interest.” The appellate court also noted that the only evidence that Defendants introduced was conclusory evidence that the Plaintiffs’ defamation action was based on, relates to, or is in response to Defendants’ exercise of their right of association or their right to petition. The appellate court noted that conclusory statements are not *probative evidence*, and as a result, Defendants failed to satisfy their initial burden for their motion to dismiss under the TCPA.

***Tanglewood Homes Ass’n v. Feldman*, 436 S.W.3d 48 (Tex. App.—Houston [14th Dist.] 2014, no pet).**

Chapter 38 of the Civil Practice and Remedies Code that provides for the recovery of a reasonable and necessary attorney’s fee for prevailing on a breach of contract claim does not guarantee that a plaintiff who prevails on a cause of action against a homeowners’ association based on the interpretation of the homeowners’ association’s governing documents is entitled to an award of attorney’s fees. Although the court looks to general contract construction for interpretation of restrictive covenants, restrictive covenants do not necessarily meet the requirements for a valid contract or a breach as required under Chapter 38 for the recovery of attorney’s fees. Additionally, a plaintiff may not plead a declaratory judgment action for the sole purpose of recovering attorney’s fees.

Stewart and Marla Feldman (collectively the “Feldmans”) own a home in Section 8 of the Tanglewood subdivision. Section 8 of the Tanglewood subdivision is governed by a set of deed restrictions. A dispute arose regarding the application of the deed restrictions to the Feldmans’ desire to expand their home. In their petition the Feldmans asserted that if they were to prevail they would be entitled to recovery of attorney fees under Chapter 38 of the Civil Practice and Remedies Code and section 5.006 of the Texas Property Code. The trial court repeatedly questioned the Feldmans’ ability to recover attorney’s fees under either statute and thought that

the declaratory judgment act was the only appropriate vehicle for the recovery of attorney's fees. In light of the trial court's statements, at the end of the Feldmans' case-in-chief, the Feldmans' Counsel requested leave to amend their pleadings to add a declaratory judgment cause of actions. Counsel stated that while he believed that they were entitled to attorney's fees under both section 5.006 of the Property Code and Chapter 38 of the Civil Practice and Remedies Code, if the court thought the declaratory judgment act was the more proper vehicle, they should be entitled to amend their pleading to add such an action. The trial court granted the Feldmans' leave to amend.

After a jury trial, the trial court signed a final judgment awarding the Feldmans declaratory relief as well as monetary damages and attorney's fees under the Declaratory Judgment Act. All parties appealed from the judgment.

On appeal, the appellate court concluded that the Feldmans' expansion plans were permitted by the subdivisions Deed Restrictions as decided by the trial court, but found that the Feldmans could not recover attorney's fees under the statutes on which they relied, including Chapter 38 of the Texas Civil Practice and Remedies Code and the Declaratory Judgment Act. In so reasoning, the appellate court provided the following analysis.

The Declaratory Judgment Act provides that a trial court may award costs and reasonable attorney's fees when doing so is equitable and just. However, "a party cannot use the [Declaratory Judgment Act] as a vehicle to obtain otherwise impermissible attorney's fees." Additionally, a party may not use a declaratory judgment action to duplicate issues already before the trial court in an attempt to recover fees. The appellate court found that on the record, the Feldmans sought the trial amendment adding a declaratory judgment cause of action solely for the purpose of obtaining attorneys' fees. Additionally, the appellate court found that the added declaratory judgment action did nothing more than duplicate issues already before the trial court in the Feldmans' live pleadings, as evidenced by Counsel's statements on the record. As a result, the trial court abused its discretion when it awarded attorney's fees under the Declaratory Judgment Act.

The appellate court also rejected the Feldmans' claim that they were entitled to recovery of attorney's fees under Chapter 38 because restrictive covenants are construed like contracts and a successful claim for a violation of a restrictive covenant is a contract claim subject to Chapter 38. Rejecting this argument, the appellate court found that while deed restrictions are construed like contracts, that does not mean that the deed restrictions always meet the essential elements of a valid contract or that non-compliance with their terms is always a breach of contract that will support an award of attorney's fees under Chapter 38.

The appellate court reversed the portion of the trial court's judgment awarding attorney's fees to the Feldmans and rendered judgment that they take nothing on their request for attorney's fees.