SPRING 2015 NEWSLETTER

HOMEOWNERS' ASSOCIATION UPDATE

by Nichole Plagens

***Zuehl Land Development, LLC v. Zuehl Airport Flying Community Owners Association, Inc.*, No. 01-14-00562-CV (Tex. App.—Houston [1st Dist.] April 21, 2015, no pet. h.)**

For purposes of recovering attorneys' fees, a party is considered the prevailing party even if the matter is resolved through a settlement, if that settlement achieves the ends that the party was trying to achieve through trial. A finding of breach or liability is not necessary.

This dispute arose between landowners and a homeowners association for a subdivision adjacent to the landowners' property when the homeowners association attempted to interfere with the landowners' use of one of the subdivision's roads that was also used to access the landowners' land. The landowners brought suit to enjoin the association from interfering with their access and use of the road, including seeking the removal of a fence that was placed on the road blocking the landowners' access and use.

After over ten years of litigation, the parties reached a settlement and submitted to the trial court an agreed partial summary judgment. The agreed order was entered and contained various declarations including: (1) that the subdivision's road is a private road burdened by an easement for access to the landowners' land; and (2) while a boundary fence is permissible under the Declaration, it cannot interfere with the easement for use of the road. The agreed order went on to state: (1) that the association voluntarily removed a fence blocking the landowners' access to the road before entry of the order; (2) since the fence was no longer present there was no on-going dispute for the court to resolve; (3) all tort claims and claims for breach of restrictive covenant were denied; and (4) the parties took nothing on their breach of covenant claims, except the court reserved for further consideration the parties' competing claims for attorneys' fees under section 5.006 of the Property Code. Finally, the order stated that "notwithstanding the foregoing…construction of any fence or other barrier restricting the free and unimpeded use of the easement…is prohibited."

The association moved for entry of final judgment, specifically arguing that because the case was settled, no party prevailed and no attorney's fees were authorized under section 5.006 of the Property Code. The landowners filed a response requesting attorney's fees be awarded to them. Following a hearing, the trial court entered a final judgment denying attorney's fees to the landowners. The landowners appealed.

The Appellate Court found that the landowners prevailed in the litigation under the terms of the agreed partial summary judgment since the association is forbidden from erecting a fence and barring their access and use of the road, the subject of dispute throughout the multi-year litigation. Based on the agreed order, the landowners received something of value and the order materially altered the legal relationship between the parties by prohibiting the association from placing another fence in the objected-to area. The fact that the case was resolved through a

favorable settlement as opposed to a trial and a finding of breach or liability did not prevent the landowners from being the prevailing party.

Having concluded that the landowners were the prevailing party and stating that under section 5.006, an award of reasonable attorney's fees to a prevailing party is mandatory, the Appellate Court reversed the trial court's order denying attorney's fees and remanded the attorney's fee issue for an evidentiary hearing to determine an award of reasonable attorney's fees to the landowners.

***Ly v. Nguyen*, No. 01-14-00077-CV, 2015 WL 1263062 (Tex. App.—Houston [1st Dist.] March 19, 2015, no pet.)**

A condominium association did not have the requisite control over a terrace in the project property to show that the condominium association owed a duty to licensees to the project property when the terrace was defined as part of the condominium unit—not as a common element or limited common element.

Ng Ly dropped her two daughters Ashley and Tiffany off at Hoa Thi Tran's unit at the Saint Joseph Condominium complex to be babysat. At some point, Tran left to run an errand, leaving her 19-year-old son, David Nguyen, in charge of the children. While Tran was away from the unit, a fire started in the area between the terrace of Tran's unit and the terrace of an adjacent unit. Nguyen became aware of the fire and left the unit with his siblings, but did not take Ashley, Tiffany, or another child, Ethan Nguyen. Firefighters arrived on the scene; however they were unable to save the children.

Ly, individually and as administrator of the estate of her daughters, brought suit against Tran, Nguyen, the owner of the adjacent unit, and the condominium association. The association took the position that the terraces were considered privately-owned property because they are part of the condominium units. It maintained that without ownership, it had no right of control over the terraces and owed no duty to the girls. After trial, the trial court rendered judgment against Tran, but rendered a take-nothing judgment against the association and dismissed Ly's claim with prejudice. Ly appealed.

The Appellate Court looked to the governing documents of the condominium association and found that terraces were a part of the condominium units and were not common elements or limited common elements due to how the unit was defined. As a result, the terrace was the private property of the unit owner and not that of the condominium association. This finding was in spite of a rule that allowed the condominium association to dictate how the terrace area could be used and decorated. The Appellate Court found that in light of the definition in the governing documents stating that the terrace was a part of the condominium unit, Ly did not establish that the condominium association had the requisite control over the terraces to establish that condominium association breached a duty owed by the condominium association to Ly's daughters.

***Park v. Escalera Ranch Owners' Ass'n*, No. 03-12-00314-CV, 2015 WL 737424 (Tex. App.—Austin Feb. 13, 2015, no pet.)**

The notice provision of section 209.006 of the Texas Property Code requiring a property owners' association give an owner notice of the owner's right to a hearing before suing an owner is mandatory, but not jurisdictional.

Appellant, Dr. Saung Zin Park, purchased a lot in the Escalera Ranch subdivision and built a new home. The lot is subject to a Declaration that established the Escalera Ranch Owners' Association ("the Association") and gave the Association the authority to administer and enforce the provisions of the Declaration, including covenants and restrictions relating to all construction in the subdivision. The Declaration dictates that the construction and design of a home in the subdivision must be approved by the Master Design Committee ("the Committee"). The new home that Park built had windows installed that were not approved by the Committee.

On September 28, 2009, the Association Board and the Committee notified Park via email that the installed windows had not been approved and asked him to address the violation as soon as possible. Park responded by arguing that the installed windows were not in violation and stated that if the Committee did not immediately withdraw any prohibition from construction progression he would pursue judicial relief. Over the course of two weeks, the Association sent two letters to Park demanding that Park bring the windows into compliance within two working days from the dates of the letters. The letters went on to state that failure to do so could result in the Association taking adverse action against Park, including but not limited to filing a lawsuit to enforce the Declaration. The letters did not include the statutorily required notice that Park could request a hearing under Section 209.007 of the Texas Property Code on or before the 30th day after the date the owner receives the notice of violation of the property owners' association's restrictions. Park did not bring the windows into compliance and did not request any additional time.

On October 30, 2009, the Association brought suit asserting that Park had breached the restrictive covenants in the Declaration and sought an injunction that Park remove the noncomplying windows and install windows that complied with the approved design plan, damages under Section 202.004 of the Property Code, and attorney's fees under Section 5.006 of the Property Code. Park answered and asserted various affirmative defenses and a counterclaim for breach of duty of good faith and fair dealing.

On September 22, 2010—almost a year after filing suit—the Association sent Park a letter attempting to cure its failure to provide Park the presuit notice of his right to request a hearing before the Board regarding the violation and again requested that Park remove the noncompliant windows. Park did not request a hearing and did not remove the windows.

After a two-day bench trial, the trial court ruled in favor of the Association and against Park. The trial court granted the Association's request for injunctive relief, denied the Association's request for statutory damages under Section 202.004 of the Property Code, and granted the Association's request for attorney's fees. However, the trial court only awarded attorneys' fees from October 25, 2010, the deadline for Park to have requested a hearing if the Association's September 22, 2010 letter had properly provided notice of the right to request a hearing as required under Section 209.007. The limitation on the Association's award of

attorneys' fees was based on Section 209.008(b) establishing that an owner is not liable for attorneys' fees incurred by an association if the fees are incurred before the conclusion of a hearing on the alleged violation or before the date that the owner must request a hearing.

Park appealed, focusing on the Association's failure to provide the statutorily required presuit notice, claiming that the Association's failure to provide the notice deprived the trial court of jurisdiction.

In a matter of first impression, the Appellate Court denied Park's contentions finding that the presuit notice was mandatory but not jurisdictional. In reaching its holding, the Appellate Court looked to: (1) the plain language of Section 209.006—finding that the language indicates that the notice requirement is mandatory, but nothing dictates dismissal for noncompliance, weighing in favor of a nonjurisdictional interpretation; (2) the statutes purpose—finding that the purpose of the statute was to protect the rights of property owners, but that purpose does not implicitly mean that the Legislature intended to deprive trial courts of subject-matter jurisdiction when an association fails to provide the required notice; and (3) the consequences of the alternative interpretation—finding that if it were to determine that the presuit notice requirement was jurisdictional, it would preclude a trial court from considering an association's claims, if that association failed to provide the required notice, and would void for lack of jurisdiction and subject to collateral attack any judgments that had been rendered in cases that lacked presuit notice.

In so finding, the Appellate Court stated that the cure for an association's failure to provide the required notice would be a timely plea in abatement to allow for the provision of the notice. Finding that Park waived notice by failing to request abatement, the Appellate Court affirmed the trial court's final judgment granting the Association injunctive relief, attorneys' fees, interest, and costs.