Affirmed and Opinion Filed June 30, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00991-CV

CARE TECTURE, LLC, Appellant
V.
MATHESON COMMERCIAL PROPERTIES, LLC, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-03112-2017

MEMORANDUM OPINION

Before Justices Schenck, Molberg, and Nowell
Opinion by Justice Nowell

This is an appeal from a summary judgment relating to a mediated settlement agreement (MSA) in a lawsuit regarding a commercial lease. The landlord, Matheson Commercial Properties, LLC, sued the tenant, Care Tecture, LLC, seeking a declaratory judgment and other relief. The parties eventually signed the MSA, agreeing to release certain cashiers' checks held by the trial court to Matheson, to dismiss all pending claims in the lawsuit, and to negotiate for a new lease and a compromise settlement agreement (CSA). After several months of negotiation without reaching an agreement, Matheson filed a motion to disburse

the cashiers' checks pursuant to the MSA, which the trial court granted. Matheson then amended its petition and filed a motion for summary judgment seeking to enforce portions of the MSA and a declaration that it had no further obligation to negotiate a new lease or CSA. Care Tecture did not file a response to the motion. The trial court granted summary judgment for Matheson.

On appeal, Care Tecture contends the trial court erred by granting summary judgment because the MSA and Care Tecture's counterclaim were not attached to the motion for summary judgment and could not be considered by the court, the MSA is a single unified agreement contrary to the finding of the court, and there is a genuine issue of fact as to Care Tecture's failure to negotiate in good faith. We reject these arguments and affirm the trial court's judgment.

Standard of Review

We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Discussion

In its first issue, Care Tecture contends the trial court could not consider the MSA because it was not physically attached to the motion or an affidavit. Matheson argues that the MSA was properly before the court because it was on file with the court at the time of the summary judgment hearing, referenced in the motion for summary judgment, and authenticated by the affidavits. We agree with Matheson. *See Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 581 (Tex. App.—Dallas 2007, no pet.) (noting that the rules "do not require that summary judgment evidence be physically attached to the motion").

Rule 166a requires a trial court to grant summary judgment if the evidence and pleadings "*on file at the time of the hearing*, or filed thereafter and before judgment with permission of the court," establish that the movant is "entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c) (emphasis added); *see also Lance v. Robinson*, 543 S.W.3d 723, 732–33 (Tex. 2018). Here, the MSA was "on file" with the court at the time of the summary judgment hearing, it was referenced in the motion, and therefore qualified as proper summary judgment evidence. *Lance*, 543 S.W.3d at 733 & n.8 (holding deeds offered and admitted at prior temporary injunction hearing and referenced in motion for summary judgment were on file at time of summary judgment hearing and proper summary judgment evidence). We overrule Care Tecture's first issue.

In its second issue, Care Tecture contends the trial court erred by dismissing its counterclaim because Matheson failed to attach the pleading to the motion. As a result, Care Tecture argues, the court could not determine whether the counterclaim was permitted by the MSA. We reject this argument. The MSA released all claims between the parties in the lawsuit, but reserved any claims regarding interpretation or performance of the MSA. Care Tecture filed its second amended counterclaim on May 2, 2018, over a month before the MSA was signed on June 19, 2018. The counterclaim asserted claims regarding the existing lease and acts occurring before the execution of the MSA. Obviously, it did not reference the MSA, which was not yet in existence.

The counterclaim was on file at the time the trial court considered the motion for summary judgment and properly before the court. TEX. R. CIV. P. 166a(c); *Lance*, 543 S.W.3d at 733 & n.8. By comparing the claims made in the counterclaim with the terms of the MSA and the summary judgment motion and evidence, the trial court correctly determined that Care Tecture's claims in its counterclaim were released by the MSA and were not claims relating to interpretation or performance of the MSA. We overrule Care Tecture's second issue.

In its third issue, Care Tecture argues the MSA is a single unified agreement and the trial court erred by finding it contained two separate, stand-alone, enforceable provisions.

No single test or rule determines whether a contract is divisible or indivisible. *Stanley Works v. Wichita Falls Indep. Sch. Dist.*, 366 S.W.3d 816, 827 (Tex. App.—El Paso 2012, pet. denied). Determination of the issue depends primarily on the intention of the parties, and also the subject matter of the agreement, and the conduct of the parties. *Id*.; *Johnson v. Walker*, 824 S.W.2d 184, 187 (Tex. App.—Fort Worth 1991, writ denied). Usually, the terms of the written contract are the best indicator of the parties' intent. *See Matagorda Cty. Hosp. Dist. v. Burwell*, 189 S.W.3d 738, 740 (Tex. 2006) (per curiam) ("In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls."); *Calpine Producer Servs., L.P. v. Wiser Oil Co*., 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.).

The MSA states the parties agreed to settle all claims between them in the lawsuit as set forth in the agreement. It requires counsel for the parties to file a joint motion and agreed order to dismiss with prejudice within four business days of the court granting the order to release the cashiers' checks. It further states that all claims, except Matheson's claim for attorneys' fees, in the lawsuit shall be resolved by filing the joint motion to dismiss with prejudice and agreed order. Matheson's claim for attorneys' fees will be dismissed without prejudice. These terms are not conditioned on other terms in the agreement.

In contrast, the parties agreed to release and discharge all rights and obligations under the existing lease and guaranty conditioned on entering into the

new lease and CSA described in the MSA. In addition, as both parties agree, the MSA does not obligate the parties to reach agreement on a new lease or CSA, only to negotiate in good faith. There is no language in the MSA conditioning the dismissal and release of the claims in the lawsuit on the good faith negotiation or execution of a new lease or CSA.[1] Furthermore, an agreement to negotiate a future agreement, in this case the new lease and CSA, is not enforceable. *Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 371 (Tex. 2019). This is true even if the parties agree to negotiate in good faith. *Id*. Reading the MSA as a whole, it is clear that the main purpose of the parties was to resolve the existing claims in the pending lawsuit. Therefore, the unenforceable agreement to negotiate future agreements is divisible from the agreement to disburse the cashiers' checks and dismiss the claims in the lawsuit with prejudice. *See In re Poly-Am., LP*, 262 S.W.3d 337, 360 (Tex. 2008) (original proceeding) ("An illegal or unconscionable provision of a contract may generally be severed so long as it does not constitute the essential purpose of the agreement."). We overrule Care Tecture's third issue.

In its fourth issue, Care Tecture argues the trial court erred by granting the summary judgment because there is a fact issue about whether it negotiated in

[1] The MSA provides that at closing of the CSA, the parties would release each other from any and all claims, whether or not asserted in the lawsuit, up to and including the effective date of the CSA except for the obligations in the MSA and the new lease. This release is broader and in addition to the agreed dismissal with prejudice of all claims in the lawsuit required by the MSA.

good faith to enter into a new lease and CSA. Matheson attached affidavits to its motion detailing its repeated attempts to obtain substantive comments and ultimate agreement on drafts of the new lease and CSA from Care Tecture. The affidavits and attached e-mails indicate that when Care Tecture responded, it often merely said it was reviewing the documents, or seeking to retain a real estate lawyer, or it proposed terms contrary to the terms set out in the MSA. After more than eight months of these back-and-forth exchanges, Matheson filed the motion for summary judgment. Care Tecture contends that this evidence merely raised a fact question on whether it negotiated in good faith to attempt to enter into a new lease and CSA.

We conclude the evidence shows there is no genuine issue of *material* fact regarding the "agreement" to negotiate in good faith. Care Tecture admits the MSA did not obligate the parties to enter into a new lease or CSA. It simply required that they negotiate in good faith. Such agreements, however, are not enforceable. *See* Dallas*/Fort Worth Int'l Airport Bd.*, 576 S.W.3d at 371; *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016). Thus, any fact issue about whether Care Tecture negotiated in good faith is not a material issue in this case. *See* TEX. R. CIV. P. 166a(c). We overrule Care Tecture's fourth issue.

Conclusion

We conclude the MSA and Care Tecture's live counterclaim were on file at the time of the hearing and properly before the trial court. We also conclude the Care Tecture's counterclaim was dismissed by the terms of the MSA, the MSA is a

divisible contract, and any issue of fact regarding Care Tecture's good faith negotiation is not a material fact in this case. Accordingly, we overrule Care Tecture's issues and affirm the trial court's judgment.

/Erin A. Nowell/
ERIN A. NOWELL
JUSTICE

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JUDGMENT

CARE TECTURE, LLC, Appellant	On Appeal from the 380th Judicial District Court, Collin County, Texas
No. 05-19-00991-CV V.	Trial Court Cause No. 380-03112-2017.
MATHESON COMMERCIAL PROPERTIES, LLC, Appellee	Opinion delivered by Justice Nowell. Justices Schenck and Molberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Matheson Commercial Properties, LLC recover its costs of this appeal from appellant Care Tecture, LLC.

Judgment entered this 30th day of June, 2020.