Opinion issued June 1, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00500-CV

PAUL T. YOUNG, Appellant

V.

WILLIAM HEINS, LEAH VIDRINE, EMILY LUECK, AND WAYDE SHIPMAN, Appellees

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On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Case No. 13-CV-0293-A

MEMORANDUM OPINION

Appellant, Paul T. Young, challenges the trial court's summary judgment orders in favor of appellees, William Heins, Emily Lueck, Leah Vidrine, and Wayde Shipman, the individual members of the Board of Trustees (the "trustees" or the "Board") of The Landing Community Improvement Association, Inc. (the

"Association"), on Young's third-party claims against the trustees for breach of fiduciary duty, breach of the duty of good faith and fair dealing, breach of contract, intentional infliction of emotional distress, and declaratory judgment. In two issues, Young contends that the trial court erred in granting the trustees summary judgment and severing his claims against them from *The Landing Community Improvement Association, Inc. v. Paul T. Young* (the "main case").[1]

We affirm.

Background

In his third amended third-party petition, Young alleged that in 1992, he purchased a house in The Landing, a subdivision in League City, Texas, has attempted to abide by the covenants outlined in The Landing's "Declaration of Covenants, Conditions, and Restrictions" ("Deed Restrictions"), and has timely paid his annual maintenance assessments to the Association. "For years, he has been assessed fees, fines, and charges by the [trustees] . . . for allegedly violating Deed Restrictions, which [he] has never violated"; has been "victimized by . . . deliberate, knowing, and intentional unlawful enforcement [of the Deed Restrictions], when there was no proper basis for enforcement actions against him before and during this lawsuit"; and has "undergone continued threats and harassment by [the trustees] . . . to intentionally instill fear in [him] that he might

[1] Case No. 13-CV-0293 (56th Dist. Ct., Galveston Cty., Tex.); appellate cause number 01-15-00816-CV.

lose his homestead of over twenty years." And Young asserted that the trustees have refused his payments for his annual maintenance assessments "in order to further harass [him], inflict intentional emotional distress, and to cause him mental anguish to ultimately force [him] to move out of The Landing . . . through foreclosure."

In regard to the Deed Restrictions, Young alleged that in 2003, he replaced the roof of his house; re-painted his house, changing it from a chocolate-brown color to a cream color; replaced all of his siding, windows, and exterior doors; replaced and added new light fixtures to the exterior; and replaced his garage doors. Subsequently, after a storm blew off some of the shingles of his roof, he replaced them with spare shingles that he had purchased when he replaced his roof.

In January 2012, Young received from the Association's attorney, Michael Treece, a letter "allegedly" written "on the orders of [the trustees]," ordering him to "completely re-roof his home" with materials pre-approved by The Landing's Architectural Control Committee ("ACC"). The Association required that he, within ten days of receiving the letter, submit documentation regarding the proposed roofing material, including style, strength, and color, and, within twenty days of approval, replace his roof. Young, in a letter to Treece, explained that he "faced physical and financial limitations due to disability and being out of work."

In February and May 2012, Young received from Treece letters in which the Association again ordered him to replace his entire roof with materials preapproved by the ACC. Although Treece did acknowledge Young's concerns and offered a "few months" for him to comply, Treece offered "[n]o hearing or appeal" and labeled each letter as a "final notice."

Young, in September 2012, again received from Treece a letter in which the Association demanded that he replace his roof with ACC pre-approved materials. It also demanded that he re-paint the trim, fascia boards, and shutters on his house because, it claimed, the paint was faded and peeling. Young denied that the paint on his house was faded or peeling, stated that "only [a] relatively small number of shingles were missing" from his roof, and alleged that other houses in The Landing had weathered, discolored, or missing shingles, or had replacements made with shingles of mixed colors. He also noted that he had replaced individual shingles on his roof with spare shingles left over from the 2003 roof replacement, it would take time for them to weather and match the rest of the roof, and the Deed Restrictions did not require him to completely re-paint or re-roof his house. Moreover, he asserted that the Association's demand that he replace his entire roof was "arbitrary, capricious, and discriminatory" and "part of a plan to force [him] from the subdivision."

Young also, "sometime in 2012," received from the Association a letter "request[ing]" that he remove a tree stump from his front yard. Although Young complied, he asserted that other homeowners in The Landing had tree stumps in their yards and they did not receive violation letters from the Association.

Young further alleged that the trustees, "as they became trustees" on the Board, "deliberately and knowingly misapplied" his payments for maintenance assessments for "the years of 2007 through 2011, respectively to who was on the board of trustees at the time." In May 2011, Margaret Eckhardt of AVR Management Consultants, Inc. ("AVR"),[2] a property management company representing the Association, notified Young that he was delinquent in paying his 2011 maintenance assessments. He responded that he had timely "dropped [payment] in the mail slot at the club house the last weekend of January," as he "ha[d] done many times over 19 years." Eckhardt, in a letter dated May 10, 2011, wrote:

> We are in receipt of your letter informing us of the payment made for the year 2011 Maintenance Fees in January. In reviewing your account, I do see where you have always made payments on time and I apologize for this inconvenience.

And Eckhardt noted that Young's payment may have been "thrown away by mistake." He then provided AVR with a replacement check, which he marked

[2] Eckhardt and AVR settled Young's claims against them, and they are not parties to this appeal.

"paid in full," and, in an accompanying letter, stated that the check would pay his account "in full in its entirety." And the Association "cashed []his check." Young alleged that he had "always" written "paid in full" on the checks to the Association to pay his maintenance assessments.

After Young, in 2012, had submitted a check to pay his 2012 maintenance assessment, he received from Treece a letter returning his check and claiming that his account had a balance of $487.31 outstanding from 2011. In March 2013, Young re-issued a check for his 2012 maintenance assessment and submitted a check to pay his 2013 maintenance assessment. The trustees, however, returned both checks. Young asserted that the trustees were responsible for his being in arrears on his annual maintenance assessments and for the associated attorney's fees and collection costs. He alleged that the trustees held his checks for months, "so that they could file a lawsuit against [him] to take his home."

Young brought third-party claims against the trustees for breach of fiduciary duty, breach of the duty of good faith and fair dealing, breach of contract, intentional infliction of emotional distress, and for a declaratory judgment. In his claims for breach of fiduciary duty and the duty of good faith and fair dealing, he argued that because the trustees had a fiduciary relationship with him, they owed him a "duty to refrain from self-dealing, a duty of care and loyalty, a duty of full disclosure, a duty to act with the strictest integrity, and the duty of fair, honest

dealing." Young further argued that they breached their duties to him because they had claimed that he had violated the Deed Restrictions and Guidelines, knowing that he had not done so, and claimed that he had not timely paid his 2012 and 2013 maintenance assessments, knowing that he had in fact paid them. He asserted that the trustees knew, or should have known, that "harassing him with false Deed Restriction violations" and refusing his 2012 and 2013 maintenance-assessment payments would "cause him to be under extreme emotional distress and mental anguish when he trusted them to show him a duty of good faith and fair dealing, and loyalty." And they knew, or should have known, that he was "injured and susceptible to extreme emotional stress when they caused him to believe he could lose his home."

Young further claimed that the trustees' refusal to properly apply his maintenance-assessment payments violated the Texas Property Code.[3] And, alternatively, "all debt" that he allegedly owed to the Association up to December 31, 2011 had been "satisfied by the acceptance and processing" of his 2011 check, on which he had written "paid in full" and to which he had appended a letter "verifying" that his account was "paid in full in its entirety."

In his breach-of-contract claim, Young asserted that the Association, in promulgating the Guidelines, violated the Deed Restrictions by "knowingly

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[3] *See* TEX. PROP. CODE ANN. § 209.0063 (Vernon 2014) (governing priority of payments under "Texas Residential Property Owners Protection Act").

attempting to amend, alter, modify, extend, or alter the Deed Restrictions without the required vote of the homeowners." And the trustees "knew or should have known that they did not have the authority to alter the Deed Restrictions in any way without the vote of the [homeowners]."

In his claim for intentional infliction of emotional distress, Young asserted that the trustees, after having been informed of his financial hardship, refused his checks for maintenance assessments, charged him "unlawful fees," and required that he make over $13,000.00 in repairs to his house that were not required under the Deed Restrictions. The trustees' conduct was extreme and outrageous, and they intended to harm him financially and personally by forcing him to move from the subdivision. Further, the fear of losing his house caused him extreme emotional distress; he was in pain from multiple surgeries and particularly susceptible to emotional distress; he could not sleep, "especially on days when a letter came from Treece or Eckhardt"; the "continued harassment" by the trustees caused him to be depressed and in "constant fear and worry of losing his home," which would subside only until the next letter came; and he has "not had any peace" since the Association filed its lawsuit against him in the main case.

Young generally sought damages in the amount of at least $95,190.00. And he further sought declarations that

- the Deed Restrictions do not have exterior maintenance guidelines and that the homeowners have not approved any extension of,

addition to, or modification of the Deed Restrictions by a vote of the majority[;]

- the [trustees] have used the address at 1109 Landing Blvd., League City, Texas 77573 to conduct transactions between themselves and the homeowner's of the Landing Subdivision . . . [;]
- the [trustees] have instructed the Landing subdivision residents to deposit "money in the drop box (below the mail box)" at 1109 Landing Blvd., League City, Texas 77573[;]
- the [trustees] have received, and on all occasions cashed/processed prior to 2012, payments for assessments made by Young at the "drop box" . . . [;]
- when he deposited the payment for 2012 and 2013 assessments, respectively, in the "drop box" . . . and [the trustees] acknowledged receipt of the payment, that Young had fulfilled his legal obligation to pay assessments under the Deed Restrictions requiring annual payment of his homeowner's fees[;]
- the [trustees] are not entitled to extra fees, expenses, and attorney's fees over and above Young's Assessment payments if Young's payment was received but lost . . . [or] was received but returned unprocessed (not cashed) . . . [;]
- the [Association] failed to comply with all the requirements of the Tex. Prop. Code § 209 [notice requirements]; [and,]
- [he] had to hire an attorney to . . . prosecute [his claims].

The trustees moved for a summary judgment, arguing that they are entitled to judgment as a matter of law on all of Young's claims because they are statutorily "immune from liability"[4] and there is no basis for individual liability against them. Further, there is no evidence of the essential elements of Young's claims against them.

[4] *See* TEX. BUS. ORGS. CODE ANN. § 22.221 (Vernon 2012); TEX. CIV. PRAC. & REM. CODE ANN. ch. 84 (Vernon 2017); TEX. PROP. CODE ANN. § 202.004(a) (Vernon 2014); *see also* 42 U.S.C. §§ 14501, 14503 ("Volunteer Protection Act").

Young, in his response, moved for a continuance of the summary-judgment hearing on the ground that he had not yet been afforded an adequate time to conduct discovery. He asserted that although discovery was "ongoing," it was incomplete and he had not had a "reasonable opportunity" to depose one of the trustees, Heins. Young argued that the trustees are not immune from liability based on any of the statutory grounds on which they relied because the statutes are inapplicable. And he asserted that he presented more than a scintilla of evidence raising a genuine issue of material fact on each of the challenged elements of his claims.

As his summary-judgment evidence, Young attached to his response his deposition; the depositions of trustees Vidrine, Lueck, and Shipman, and former trustees, Johnnye Foss and Mark Domma. He also attached the Association's Second Amended Petition in the main case; his Third Amended Third Party Claims against the trustees; copies of the Association's Bylaws, Deed Restrictions, and Exterior Maintenance Guidelines; and his letters to Treece.

After a hearing, the trial court granted a summary judgment in favor of Shipman, ordering that Young take nothing on his claims against Shipman and severing those claims from the main suit. The trial court, by separate order, also granted a summary judgment in favor of the other trustees, dismissing Young's claims against each of them. The trial court then issued an order severing Young's

claims against each of the individual trustees, including Shipman, into the instant case.

Jurisdiction

As a threshold matter, Shipman argues that we lack jurisdiction over Young's appeal of the trial court's summary judgment and severance granted in favor of Shipman because Young's notice of appeal was not timely filed.

We consider as a matter of law whether we have jurisdiction over an appeal. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). Generally, appeals may be taken only from final judgments. *Lehmann v. Har–Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001). Interlocutory orders may be appealed only if permitted by statute. *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2016) (authorizing interlocutory appeals). "A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record." *Lehmann*, 39 S.W.3d at 195.

A trial court may sign an order severing a party, cause of action, or issue, thereby rendering an otherwise interlocutory summary judgment final. *See Martinez v. Humble Sand & Gravel, Inc*., 875 S.W.2d 311, 312 (Tex. 1994). Unless the severance order indicates that further proceedings are to be conducted in the severed action, an order granting a severance is effective when signed,

regardless of whether the trial court, in its order, assigns a new cause number or directs a physical separation of the case file. *Id.* at 313 (technical requirements "would have the effect of depriving or deceiving a party out of the right to appeal"); *see Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795, 795 (Tex. 2001); *Senger Creek Dev., LLC v. IH45 Investments, LLC*, No. 01-15-01097-CV, 2016 WL 1658918, at *1 (Tex. App.—Houston [1st Dist.] Apr. 26, 2016), pet. denied) (mem. op. and order). Further, a severance order is final notwithstanding whether a court clerk creates a separate physical file with a different cause number. *McRoberts v. Ryals*, 863 S.W.2d 450, 452–53 (Tex. 1993).

After signing a final judgment, a trial court retains jurisdiction over a case for a minimum of thirty days, during which it has plenary power to change its judgment. TEX. R. CIV. P. 329b(d); *Lane Bank Equip. Co. v. Smith Equip. Co.*, 10 S.W.3d 308, 310 (Tex. 2000). "[A]ny change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date of the modified, corrected or reformed judgment is signed." *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988) (addition of correct docket number and statement that all writs could issue restarted deadlines); *see also* TEX. R. CIV. P. 329b(h); *see, e.g., Lane Bank Equip. Co.*, 10 S.W.3d at 313 (order making clerical change to

judgment while trial court retained plenary jurisdiction restarted appellate deadlines); *Crown Constr. Co. v. Huddleston*, 961 S.W.2d 552, 559–60 (Tex. App.—San Antonio 1997, no pet.) (order clarifying street address of property restarted deadlines); *Owens-Corning Fiberglas Corp. v. Wasiak*, 883 S.W.2d 402, 405 (Tex. App.—Austin 1994, no writ) (order making change in signature date restarted deadlines).

Once a severance order "takes effect, the appellate timetable runs from the signing date of the order that made the judgment severed 'final' and appealable." *Humble Sand & Gravel, Inc*., 875 S.W.2d at 313. A notice of appeal must be filed within thirty days after the date the final judgment or order is signed. *See* TEX. R. APP. P. 26.1(a). The deadline to file a notice of appeal is extended to ninety days after the date the order is signed if any party timely files a motion for new trial, motion to modify or reinstate, or, under certain circumstances, a request for findings of fact and conclusions of law. *See* TEX. R. APP. P. 26.1(a); *see also* TEX. R. CIV. P. 297, 329b(a), (g). A motion for new trial, if any, must be filed within thirty days after the date the judgment is signed. TEX. R. CIV. P. 329b(a).

Here, the trial court, on February 10, 2015, signed an order granting Shipman a summary judgment and severing Young's claims against him from the

main case.[5] The trial court's order states that it is "final for all claims against [Shipman]." Although the trial court, in its order, did not assign a new cause number to the severed portion, it was not required to do so. *See Humble Sand & Gravel, Inc.*, 875 S.W.2d at 313.

Ten days after the trial court signed its order, Shipman filed in the main case a joint motion with Heins, Vidrine, and Lueck to sever Young's claims against each of them from his claims against the Association, AVR, and Eckhardt. On March 4, 2015, the trial court, while still retaining its plenary power, signed an order severing Young's claims against Heins, Vidrine, Lueck, and Shipman into the instant case, assigning it cause number 13-CV-0293-A and ordering that certain documents be included in the record. In its March 4, 2015 order, the trial court does not mention its prior order severing Young's claims against Shipman.

Again, "*any* change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date of the modified, corrected or reformed judgment is signed." *Check*, 758 S.W.2d at 756; *see also* TEX. R. CIV. P. 329b(h). "Appellate deadlines are restarted by an order that does nothing more

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[5] Young complains that Shipman, in his summary-judgment motion, did not move for a severance. However, a trial court is authorized to sever claims on its own motion, so long as the severance is proper under the rules of civil procedure. *Aviation Composite Techs., Inc. v. CLB Corp*., 131 S.W.3d 181, 187 (Tex. App.—Fort Worth 2004, no pet.).

than change the docket number or deny all relief not expressly granted." *Arkoma Basin Expl. Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 391 (Tex. 2008).

Thus, the trial court's new order, which it signed while it still retained plenary power, to finalize its summary judgments in favor of all of the trustees, including Shipman, and assign the severed case a new docket number, extended commencement of the appellate deadlines to March 4, 2015. *See id.*; *Check*, 758 S.W.2d at 756. Young's notice of appeal was then due on or before April 3, 2015. *See* TEX. R. APP. P. 26.1(b). On March 30, 2015, Young filed a motion for new trial. *See* TEX. R. CIV. P. 329b(a). Thus, the deadline to file his notice of appeal was extended to June 2, 2015. *See* TEX. R. APP. P. 26.1(a); *see also* TEX. R. CIV. P. 297, 329b(a), (g). And Young filed his notice of appeal on June 1, 2015. *See* TEX. R. APP. P. 26.1(a).

We conclude that Young timely filed his notice of appeal. Accordingly, we hold that this Court has jurisdiction over his appeal from the trial court's order granting Shipman summary judgment and severing Young's claims against him.

Summary Judgment

In his first issue, Young argues that the trial court erred in granting the trustees summary judgment on his claims because he was not first afforded an adequate time to conduct discovery; the trustees are not immune from liability; and

he presented more than a scintilla of evidence raising a genuine issue of material fact on each of the challenged elements of his claims. *See* TEX. R. CIV. P. 166a(i).

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Provident Life & Accident Ins.*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

To prevail on a no-evidence summary-judgment motion, the movant must establish that there is no evidence to support an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. A no-evidence summary-judgment

may not be granted if the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ridgway*, 135 S.W.3d at 600. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

Adequate Time for Discovery

Young first argues that the trial court erred in denying his motion for continuance of the summary-judgment hearing because he was not afforded an adequate time to conduct discovery.

We review a trial court's denial of a motion for continuance and its determination that there has been adequate time for discovery for an abuse of discretion. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002) (motion for continuance); *West v. SMG*, 318 S.W.3d 430, 443 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (motion for continuance and adequate time for discovery). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner "without reference to any guiding rules or principles." *See Garcia v. Martinez*, 988 S.W.2d 219, 222 (Tex. 1999).

"When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit

explaining the need for further discovery or a verified motion for continuance." *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *West*, 318 S.W.3d at 443; *see also* TEX. R. CIV. P. 166a(g), 251, 252. The affidavit or motion must describe the evidence sought, state with particularity the diligence used to obtain the evidence, and explain why the continuance is necessary. *West*, 318 S.W.3d at 443. In determining whether the trial court erred in ruling on Young's motion, we consider: (1) the length of time the case was on file; (2) the materiality and purpose of the discovery sought; and (3) whether Young exercised due diligence to obtain the discovery sought. *See id.*

This Court has held that a "party moving for continuance of a summary-judgment hearing must obtain a written ruling on its motion in order to preserve a complaint for appellate review." *Kadhum v. Homecomings Fin. Network, Inc.*, No. 01-05-00705-CV, 2006 WL 1125240, at *2 (Tex. App.—Houston [1st Dist.] Apr. 27, 2006, pet. denied) (mem. op.); *see* TEX. R. APP. P. 33.1; *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 625–26 (Tex. App.—Dallas 2004, pet. denied). Because Young, as he states in his reply brief, did not obtain a written ruling on his motion for continuance, he has not preserved his complaint for appellate review. *See* TEX. R. APP. P. 33.1; *Kadhum*, 2006 WL 1125240, at *2.

Even were we to conclude that the trial court implicitly overruled Young's motion for continuance by moving forward with the hearing and ruling on the

trustees' motions for summary judgment, we note that the decision to grant or deny the motion for continuance was within the trial court's discretion, and we review its determination for a "clear abuse of discretion." *Kadhum*, 2006 WL 1125240, at *2.

The record shows that at the time Young filed his motion for continuance, the case had been on file for two years. The Association filed its original petition against him in the main case on February 25, 2013, and he filed his third-party claims against the trustees on June 21, 2013. Thus, Young's claims against the trustees had been on file for twenty months at the time he filed, on February 3, 2015, his motion to continue the summary-judgment hearing set for February 10, 2015. *See West*, 318 S.W.3d at 443.

Further, Young did not demonstrate that Heins's testimony was material. *See id.* In his motion for continuance, Young asserted only that he "believe[d]" that securing the deposition of Heins would be "instrumental in substantiating several of his claims" and necessary to "comprehensively present all of the facts" to support his opposition to summary judgment. We note that Young, in his third-party petition, did not make any allegations specific to Heins. And he, in his motion for continuance, did not discuss any particular knowledge or unique observations that Heins would have supplied that could not have been obtained through the depositions that Young took of the other five trustees.

Thus, Young has not established the factors necessary to justify a continuance. *See id.* at 444.

Immunity

Young next argues that the trustees were not entitled to summary judgment on the ground that they are immune from individual liability as directors serving on the Board because the Deed Restrictions and Bylaws establish that "the members of the [B]oard are in fact Trustees." *See* TEX. BUS. ORGS. CODE ANN. § 22.221 (Vernon 2012). He asserts that even if the statute were applicable, he "came forward with competent summary judgment evidence demonstrating a genuine issue of material fact" as to whether the trustees acted in good faith, with ordinary care, and in a manner they reasonably believed to be in the best interest of the Association, a nonprofit corporation. *See id*.

In their summary-judgment motion, the trustees argued that they were entitled to summary judgment because they are immune from liability pursuant to the "safe harbor" provision for directors of nonprofit corporations contained in the Business Organizations Code. *See id*. The Business Organizations Code, which governs nonprofit corporations, provides, in pertinent part, as follows:

> (a) A director shall discharge the director's duties, including duties as a committee member, in good faith, with ordinary care, and in a manner the director reasonably believes to be in the best interest of the corporation.

> (b) A director is not liable to the corporation, a member, or another person for an action taken or not taken as a director if the director acted in compliance with this section. A person seeking to establish liability of the director must prove that a director did not act: (1) in good faith; (2) with ordinary care; and (3) in a manner the director reasonably believed to be in the best interest of the corporation.

Id. § 22.221; *see also id.* § 22.051 (Vernon 2012) (governing nonprofit corporations). The trustees asserted that the burden was on Young, as plaintiff, to show that they had "failed to act in accordance with this standard." And, on appeal, they assert that there is no evidence that they "acted contrary to the best interests of the corporation."

Immunity is ordinarily an affirmative defense. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). An affirmative defense constitutes an independent reason why a plaintiff should not recover. *Haver v. Coats*, 491 S.W.3d 877, 881 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Generally, a party asserting an affirmative defense has the burden of pleading and proving the defense. *Id.* Thus, a defendant "cannot use a no-evidence motion for summary judgment to establish an affirmative defense." *Id.*; *Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 679 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("[A] party may never properly move for no-evidence summary judgment to prevail on its own claim or affirmative defense for which it has the burden of proof.").

This Court and others have held that the statutory protection in section 22.221 does not constitute an affirmative defense. *See Burns v. Seascape Owners Ass'n, Inc*., No. 01-11-00752-CV, 2012 WL 3776513, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.) (mem. op.); *see also Priddy v. Rawson*, 282 S.W.3d 588, 594–95 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). Rather, it provides a "safe harbor" provision and "makes clear that the party seeking to impose liability on a director bears the burden of proof." *Priddy*, 282 S.W.3d. at 594; *see also Burns*, 2012 WL 3776513, at *9. Thus, in order to survive the trustees' no-evidence challenge, it was incumbent upon Young to produce competent summary-judgment evidence establishing a genuine issue of material fact as to whether the trustees acted (1) in good faith, (2) with ordinary care, and (3) in a manner they reasonably believed to be in the best interest of the corporation. *See Priddy*, 282 S.W.3d. at 594–95; *see also Burns*, 2012 WL 3776513, at *9.

In his summary-judgment response, Young argued that the trustees were not entitled to the protection of the safe-harbor provision because it protects "directors" and the "Deed Restrictions and Bylaws of the Landing establish that the members of the board are in fact Trustees," not "directors." Young's summary-judgment evidence, i.e., The Landing's Bylaws, states that the affairs of the Association "shall be managed by a Board of five . . . trustees, who need not be

members of the Association." The mere use of the word "trustee," however, does not create a trust or a trustee relationship. *Nolana Dev. Ass'n. v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1984); *Stauffacher v. Coadum Cap. Fund 1, LLC*, 344 S.W.3d 584, 588–89 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Moreover, Young himself further asserted in his summary-judgment response that the trustees "were in a fiduciary relationship with [him] on the basis that they were *not only directors, officers or volunteers, but also* . . . Trustee[s]." (Emphasis added.)

Unless the management of the affairs of a corporation is vested in its members, "the affairs of a corporation are managed by a board of directors." *See* TEX. BUS. ORGS. CODE ANN. § 22.201 (Vernon 2012). And the board of directors "may be designated by any name appropriate to the customs, usages, or tenets of the corporation." *Id.* The term "board of directors" means the "group of persons vested with the management of the affairs of the corporation, regardless of the name used to designate the group." *Id.* § 22.001(1) (Vernon Supp. 2016).

Young further argues that section 22.221 "provide[s] no defense" for a person "acting in the capacity of a trustee" because section 22.223 "clarifies that a director is not the same as a trustee, and that a director does not have the same duties as a Trustee with response to the corporation." Section 22.223 states that a director "is not considered to have *the duties of a trustee of a trust* with respect to

the corporation or with respect to property held or administered by the corporation." *Id.* § 22.223 (Vernon 2012) (emphasis added). That is, the duties that a trustee has to a trust do not apply to a director of a nonprofit corporation. *See, e.g.*, TEX. PROP. CODE ANN. §§ 113.051, 114.001 (Vernon 2014) (duties and liabilities of trustee to trust under Texas Trust Code). And Young, in his summary-judgment response, concedes that he "recognizes that [the] Board of Trustees [is] not managing a trust."

We conclude that the statutory protections of section 22.221 apply to the trustees against Young's claims. Young, in his appellate brief, concedes that if the statute applies, "it [was] incumbent upon [him] to come forward with competent summary judgment evidence showing that [the trustees]" did not act (1) in good faith, (2) with ordinary care, and (3) in a manner they reasonably believed to be in the best interest of the corporation. *See Priddy*, 282 S.W.3d. at 594–95; *see also Burns*, 2012 WL 3776513, at *9.

Young argued in the trial court that the trustees failed to act in good faith and with ordinary care because they wrongfully refused his payments for his 2012 and 2013 maintenance assessments and failed, as required under The Landing's Bylaws, to supervise AVR Management, which physically returned his checks to him, and Treece, who wrote letters to him about violations of the deed restrictions and delinquent assessments. As his evidence that the trustees failed to act in good

faith and with ordinary care, he pointed to excerpts from three depositions: Vidrine, Lueck, and former trustee, Domma.

In Young's cited excerpts of Vidrine's deposition, she testified that it was not the trustees' responsibility to "supervise" the Association's property management company, AVR, or the Association's attorney, Treece, because the trustees were relying on them to provide professional accounting and legal services to the Association. Vidrine testified that she had not read the Deed Restrictions herself, because the Board relied on Treece to handle any legal matters. In regard to Treece, Vidrine testified, "I wouldn't think that it would be our duty to supervise him because he's an attorney."

In Young's cited excepts of Lueck's deposition, she testified that she relies on AVR to conduct inspections for deed-restriction violations, "keep the accounting on the petty cash," and create "fee reports," which Eckhardt then brings to the Board meetings for discussion. Lueck explained that once the Board refers a homeowner's account to Treece, the Board is not involved in the handling of the case. She noted that she had read the Deed Restrictions, knew "what's a deed restriction and what's not," drove by Young's house, and "personally inspected [his] property" herself.

In Young's cited excerpts of Domma's deposition testimony, she testified that the Board relies on its property management company to "collect the

violations and issue the letters." And it relies on its attorney to "handle the legal process." Domma noted that once the Board refers a homeowner's account to Treece, "all [it] did was review the process."

Although the trustees testified that they each, in discharging their duties to the Association and the owners of the 873 houses in The Landing, relied on the Association's property management company and legal counsel in the day-to-day affairs, the Business Organizations Code expressly provides for such reliance:

> In discharging a duty or exercising a power, a governing person, including a governing person who is a member of a committee, may, in good faith and with ordinary care, rely on information, opinions, reports, or statements, including financial statements and other financial data, concerning a domestic entity or another person and prepared or presented by:
>
> (1) an officer or employee of the entity;
>
> (2) legal counsel;
>
> . . .
>
> (5) a person who the governing person reasonably believes possesses professional expertise in the matter;
>
> . . . .

See TEX. BUS. ORGS. CODE ANN. § 3.102 (Vernon 2012); *see also id*. § 1.002(37) (Vernon Supp. 2016) ("'Governing person' means a person serving as part of the governing authority of an entity."). Thus, the trustees' reliance on AVR and Treece does not constitute evidence of bad faith. Further, in the deposition excerpts Young cites, the testimony shows that the Board reviewed Eckhardt's documentation at Board meetings and controlled the decisions as to whether to

refer matters to Treece. Young, in his summary-judgment response, did not point to any evidence that such reliance was not made in good faith or with ordinary care. *See* TEX. BUS. ORGS. CODE ANN. § 3.102.

We conclude that Young did not bring forth more than a scintilla of evidence to raise a genuine issue of material fact that the trustees did not act (1) in good faith, (2) with ordinary care, and (3) in a manner they reasonably believed to be in the best interest of the Association. *See Priddy*, 282 S.W.3d. at 594–95; *see also Burns*, 2012 WL 3776513, at *9. Thus, the trustees were entitled to summary judgment based on their immunity from individual liability under the "safe harbor" protection for directors of nonprofit corporations. *See* TEX. BUS. ORGS. CODE ANN. § 22.221; *Burns*, 2012 WL 3776513, at *10.

Accordingly, we hold that the trial court did not err in granting the trustees summary judgment against Young on his claims.

We overrule the portion of Young's first issue in which he challenges the trial court's rendition of summary judgment in favor of the trustees on their assertion of immunity under the safe harbor provision. *See* TEX. BUS. ORGS. CODE ANN. § 22.221.

Having so held, we do not reach the remainder of Young's first issue, in which he argues that the trustees were not entitled to summary judgment based on

other cited statutory protections[6] or because he presented more than a scintilla of evidence raising a genuine issue of material fact on each of the challenged elements of his claims.

Severance

In his second issue, Young argues that the trial court erred in severing his claims against the trustees from his claims against the Association in the main case because his claims against the trustees are "inextricably interwoven" with his claims against the Association. He asserts that "severance of [a] portion of a lawsuit subject to a partial summary judgment," as here, is "not proper when it amounts to the splitting of a single cause of action" and the severed claims would not be the proper subject of an independent lawsuit. And he asserts that the parties should have been required to "wait for a final judgment before filing an appeal." Specifically, the trial court's severance "force[d] a premature appellate timetable" on him and "deprived him of the opportunity to raise a . . . motion to re-open the evidence."[7]

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6 *See* TEX. CIV. PRAC. & REM. CODE ANN. ch. 84 (Vernon 2017); TEX. PROP. CODE ANN. § 202.004(a) (Vernon 2014); *see also* 42 U.S.C. §§ 14501, 14503 ("Volunteer Protection Act").

7 *See* TEX. R. CIV. P. 270 ("When it clearly appears to be necessary to the due administration of justice, the court may permit additional evidence to be offered at any time; provided that in a jury case no evidence on a controversial matter shall be received after the verdict of the jury.").

A trial court has broad discretion in the severance of cases, and its decision will not be disturbed absent an abuse of discretion. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *In re Henry*, 388 S.W.3d 719, 726 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding). Generally, "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41; *WorldPeace v. Comm'n for Lawyer Discipline*, 183 S.W.3d 451, 461 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (trial court did not err in severing third-party claims). A claim is severable if (1) the controversy involves more than one cause of action, (2) the severed claim is one that could be asserted independently in a separate lawsuit, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. *In re State*, 355 S.W.3d 611, 614 (Tex. 2011); *In re Henry*, 388 S.W.3d at 726; *see also* TEX. R. CIV. P. 41.

When a trial court severs a lawsuit, two or more independent suits result and each leads to its own final, appealable judgment. *In re Henry*, 388 S.W.3d at 725. "Severance of a single cause of action into two parts is never proper and should not be granted for the purpose of enabling the litigants to obtain an early appellate ruling on the trial court's determination of one phase of the case." *Pierce v. Reynolds*, 329 S.W.2d 76, 78, 79 n.1 (Tex. 1959). When a trial court grants a summary judgment in favor of one defendant in a case involving multiple

defendants, the trial court may sever the claims. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 734 (Tex. 1984); *see also Arredondo v. City of Dall.*, 79 S.W.3d 657, 665 (Tex. App.—Dallas 2002, pet. denied) (trial court did not err in granting severance after granting summary judgment for one of multiple defendants); *Weilbacher v. Craft*, No. 05-13-01252-CV, 2014 WL 6466856, at *7 (Tex. App.—Dallas Nov. 19, 2014, pet. denied) (mem. op.).

As discussed above, we concluded, that because Young's claims against the individual trustees are barred by immunity, the trial court did not err in granting the individual trustees summary judgment and dismissing Young's claims against them. *See* TEX. BUS. ORGS. CODE ANN. § 22.221. Having resolved Young's claims against the individual trustees, we further hold that the trial court did not err in severing those claims from the trial in the main case. *See Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 526 (Tex. 1982) (no error in severing defendant's counterclaim after summary judgment granted on plaintiff's claim); *Sumner v. Bd. of Adjustment of City of Spring Valley Vill.*, No. 14-15-00149-CV, 2016 WL 2935881, at *5 (Tex. App.—Houston [14th Dist.] May 17, 2016, pet. denied) (mem. op.) (no error in severing plaintiff's claims after resolution of their summary judgment); *Dorsey v. Raval*, 480 S.W.3d 10, 15 (Tex. App.—Corpus Christi 2015, no pet.) (no error in severing claims resolved through partial summary judgment, even though all causes of action, severed and un-severed, based on same alleged

act of negligence); *Cooke v. Maxam Tool & Supply, Inc*., 854 S.W.2d 136, 142 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

We overrule Young's second issue.

Conclusion

We affirm the orders of the trial court. We dismiss as moot all pending motions.

Terry Jennings
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.