

No. 03-17-00846-CV

IN THE COURT OF APPEALS FOR THE THIRD FILED IN
DISTRICT OF TEXAS AT AUSTIN 3rd COURT OF APPEALS
AUSTIN, TEXAS

3/22/2018 4:44:52 PM

RICHARD W. JACKSON AND LISA C. JACKSON, JEFFREY D. KYLE
Clerk
Appellants,

v.

JANICE COX AND HELEN RAMSEY,
Appellees.

From the County Court at Law No. 1, Travis County, Texas
Trial Court Cause No. C-1-CV-17-001833

APPELLEES' BRIEF

Michael L. Navarre
State Bar No. 00792711
mnavarre@bbsfirm.com
BEATTY BANGLE STRAMA, PC
400 West 15th Street, Suite 1450
Austin, Texas 78701
(512) 879-5050 Telephone
(512) 879-5040 Facsimile

ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
INDEX OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	iii
STATEMENT OF JURISDICTION.....	iv
ISSUES PRESENTED.....	iv
STATEMENT OF FACTS	1
ARGUMENT AND AUTHORITIES.....	3
I. Because The Relief Requested By Appellants Is Moot, The Court Lacks Jurisdiction	3
II. The Trial Court Did Not Abuse Its Discretion In Dissolving The Injunction.....	5
A. The newly revealed facts showing that Appellants had misled the trial court at the temporary injunction hearing constitute a changed circumstance	6
B. Ms. Woodall’s non-suit of her claims and Appellants’ dropping of their breach or attempted breach of restrictive covenant claims constitute a changed circumstance.....	8
C. There was also a change in circumstance as to the law that supports the trial court’s dissolution of the temporary injunction ...	9
CONCLUSION AND PRAYER	10
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE.....	11

INDEX OF AUTHORITIES

	Page
<i>F.D.I.C. v. Nueces Co.</i> , 886 S.W.2d 766 (Tex. 1994)	3
<i>Heckman v. Williamson Co.</i> , 369 S.W.3d 137 (Tex. 2012)	3
<i>In Re Uresti</i> , 377 S.W.3d 696 (Tex. 2012)	4, 5
<i>Murphy v. McDaniel</i> , 20 S.W.3d 873 (Tex. App.—Dallas 2000, no pet.)	5, 9
<i>Tober v. Turner of Texas, Inc.</i> , 668 S.W.2d 831 (Tex. App.—Austin 1984, no writ)	5
<i>Walling v. Metcalfe</i> , 863 S.W.2d 56 (Tex. 1993)	5

STATEMENT OF THE CASE

Nature of the case:

This case concerns the nuisance created by transient rentals owned by Appellants and Appellants' breaches of the Restrictive Covenants that apply to their properties. Appellants obtained a temporary injunction to prevent the recording of an amendment to the Restrictive Covenants. Subsequent discovery revealed that every lot owner was provided with notice of the proposed amendment and the transient rentals opposition to the amendment.

Respondent:

The Honorable Todd Wong, County Court at Law No. 1, Travis County, Texas.

The Court's Ruling:

The trial court dissolved the temporary injunction that had enjoined Defendants from recording an amendment to the Restrictive Covenants.

STATEMENT OF JURISDICTION

Pursuant to the mootness doctrine, the Court lacks jurisdiction because, as Appellants admit, the amendment at issue was recorded on December 11, 2017, prior to Appellants filing this appeal.¹ Additionally, Appellees have agreed not to record any amendments to the Restrictive Covenants between now and the end of the proceedings in the trial court.²

ISSUES PRESENTED

1. Whether the Court has jurisdiction given that the issue is moot because the amendment was recorded prior to the filing of the appeal.
2. Whether the trial court abused its discretion in dissolving the temporary injunction given the change in circumstances and the lack of any cause of action to support the temporary injunction.

¹ Tab A-Recorded Amendment.

² Tab B-Letter Agreement.

STATEMENT OF FACTS

Ms. Cox and Ms. Ramsey live in a residential neighborhood of Point Venture Section 3-1, Texas (“Point Venture”). The properties in Point Venture are governed by certain Restrictive Covenants. They moved to Point Venture for the quiet and family oriented lifestyle the community offered.³ However, as transient rentals have become more common in Point Venture, the quiet has been replaced with constant interference with and disrespect for their rights as property owners.⁴

The nuisances caused by the Jackson’s transient renters have been documented and include the following:⁵

- Transient renters urinating and vomiting in front of their family;
- Being chased by transient renters on foot, late at night;
- Observing weekend parties with over thirty (30) guests playing music, singing karaoke and dancing on the roof of the Jacksons’ house in the late night and early morning hours;
- Transient renters throwing trash and beer cans onto their property;
- Transient renters trespassing onto their property and damaging it; and
- Intoxicated transient renters harassing both Ms. Cox and Ms. Ramsey on their own property on multiple occasions.

Ms. Cox and Ms. Ramsey attempted to resolve the matter amicably by speaking with the Appellants and other Point Venture neighbors directly.⁶ After Ms. Cox and Ms.

³ Supp. CR 116-120.

⁴ *Id.*

⁵ *Id.*; CR 35-43.

⁶ *Id.*

Ramsey were met with hostility, retaliation, and threats, they attempted to change the Restrictive Covenants to prohibit rentals of less than (90) days.⁷

On February 24, 2017, Appellants and Kathleen Woodall sued Ms. Cox and Ms. Ramsey to stop them from recording the change to the Restrictive Covenants.⁸ On March 9, 2017, the trial court granted a temporary injunction prohibiting Ms. Cox and Ms. Ramsey from recording the amendment.⁹ To obtain the temporary injunction, Appellants told the trial court that there was a lack of due process and notice to the property owners.

Subsequent discovery showed that Appellants had misled the trial court as to due process and notice. As detailed below, Plaintiff Woodall testified that she sent a letter and flyer opposing the amendment to the property owners, including Appellants, more than three weeks before Appellants filed this lawsuit and more than a month before Appellants and Plaintiff Woodall claimed a lack of notice and due process.¹⁰

On December 8, 2017, the trial court heard several motions, including Ms. Cox and Ms. Ramsey's Motion to Dissolve the Temporary Injunction.¹¹ At the

⁷ *Id.*

⁸ Ms. Woodall nonsuited her claims on August 9, 2017. Supp. CR-61-62.

⁹ CR 23-26.

¹⁰ Supp. CR-183-186; Supp. CR 187-190.

¹¹ CR 44-48.

hearing, Appellants’ counsel complained that the trial stated “that the court has reversed its ruling on that [issue of notice]” in its summary judgment ruling against Appellants.¹² In response, the trial court explained that the newly revealed facts presented a change in circumstances:

“Probably because there were things that were said in that [temporary injunction] hearing that may not necessarily [] be true today.”¹³

After hearing argument, the trial court properly granted Ms. Cox and Ms. Ramsey’s Motion to Dissolve the Temporary Injunction.¹⁴

ARGUMENT AND AUTHORITIES

I. Because The Relief Requested By Appellants Is Moot, The Court Lacks Jurisdiction.

Pursuant to the mootness doctrine, courts are limited to deciding cases in which an actual controversy exists. *F.D.I.C. v. Nueces Co.*, 886 S.W.2d 766, 767 (Tex. 1994). “A case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer ‘live,’ or if the parties lack a legally cognizable interest in the outcome.” *Heckman v. Williamson Co.*, 369 S.W.3d 137, 162 (Tex. 2012). “Put simply, a case is moot when the court’s action on the merits cannot affect the parties’ rights or

¹² RR at 6:11-7:2.

¹³ RR at 7:3-5 (emphasis added).

¹⁴ CR 49.

interests.” *Id.* If an appeal becomes moot, it should be dismissed for lack of jurisdiction. *Id.*

The appeal is moot in this case. The injunction prohibited Ms. Cox and Ms. Ramsey from recording “any amendments to the 1972 Restrictions” that did not meet the notice and Architectural Control Authority requirements that are the prime focus of this case.¹⁵ After the injunction was dissolved, it is undisputed that Ms. Cox and Ms. Ramsey recorded the amendment on December 11, 2017.¹⁶ The amendment was recorded prior to Appellants filing their Notice of Appeal on December 13, 2017. There is no other amendment. Additionally, it is undisputed that Ms. Cox and Ms. Ramsey have agreed not to record any amendments to the Restrictive Covenants between now and the end of the proceedings in the trial court.¹⁷

Under similar circumstances, the Texas Supreme Court dismissed a petition for mandamus based on a lack of jurisdiction caused by mootness. *In re Uresti*, 377 S.W.3d 696 (Tex. 2012). In this election lawsuit, the trial court issued an injunction requiring that Caballero’s name be placed on the ballot. *Id.* at 696. Uresti, Caballero’s opponent, sought mandamus directing the trial court to dissolve its temporary injunction. *Id.* However, in the interim, Caballero won the election and,

¹⁵ CR 25.

¹⁶ Tab A-Recorded Amendment.

¹⁷ Tab B-Letter Agreement. Appellees also offered to enter into a written stipulation that they would not record any additional amendments during the pendency of this matter.

therefore, the Court “dismiss[ed] the petition for mandamus relief as moot.” *Id.* at 697. Similarly, the Court lacks jurisdiction and should dismiss this Appeal as moot because the amendment at issue has been recorded.

II. The Trial Court Did Not Abuse Its Discretion In Dissolving The Injunction.

The determination of whether to dissolve an injunction lies within the sound discretion of the trial court. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993). “The purpose of the motion to dissolve is to provide a means to show changed circumstances or changes in the law that require modification or dissolution of the injunction; the purpose is not to give an unsuccessful party an opportunity to relitigate the propriety of the original grant.” *Tober v. Turner of Texas, Inc.*, 668 S.W.2d 831, 836 (Tex. App.—Austin 1984, no writ). Here, Appellees do not seek to relitigate the grant of the original temporary injunction.

Instead, the changed circumstances required the dissolution of the temporary injunction. As Appellants agree, a trial court does not abuse its discretion by dissolving a temporary injunction where there is a change in circumstances. *Murphy v. McDaniel*, 20 S.W.3d 873, 878 (Tex. App.—Dallas 2000, no pet.). “Changed circumstances may include an agreement of the parties, newly revealed facts, or a change in the law that make the temporary injunction unnecessary or improper.” *Id.* at 878. In this case, the changed circumstances include the following: (1) newly revealed facts; (2) Ms. Woodall’s non-suit of her claims together with Appellants’

dropping of their breach and attempted breach of restrictive covenant claims; and
(3) a change in the law concerning the interpretation of the restrictive covenant.

A. The newly revealed facts showing that Appellants had misled the trial court at the temporary injunction hearing constitute a changed circumstance.

Discovery revealed new facts that showed that Appellants had misled the trial court at the injunction hearing by claiming that there was a lack of due process and notice to the property owners. Subsequent discovery, including the deposition of Plaintiff Woodall, revealed the truth.

The truth is that Ms. Woodall had sent a letter and flyer to all of the property owners, except possibly for Ms. Cox and Ms. Ramsey, opposing the amendment.¹⁸

- Your Section 3-1 neighbor and other newly elected PV Council members are on record in opposition to short term rentals in their current form and have already pledged to address and alleviate community wide concerns about short term rentals without you GIVING AWAY A PART OF YOUR PROPERTY.

Please consider the following regarding the impact of recently circulated legal documents **not prepared** and **not endorsed** by the PV POA proposing amendment of deed restrictions ONLY in our Section 3-1 of Point Venture. If the amendment is valid and legally upheld:

**THIS AMENDMENT LIMITS YOUR ABILITY TO RENT YOUR PROPERTY
AND YOUR RIGHTS AS A LANDLORD IF A TENANT IS A LONG TERM
LEASE HOLDOVER OR MONTH TO MONTH TENANT**

¹⁸ Supp. CR 181:1-7; Supp. 182:1-15; Supp. 187-190.

Plaintiff Woodall testified that she sent this letter and flyer on February 2, 2017.¹⁹ It was not until three weeks later, on February 24, 2017, that Ms. Woodall and the Appellants filed their lawsuit. And it was not until more than a month later, on March 9, 2017, that the trial court heard the request for the temporary injunction. Appellants, although they knew that everyone in Point Venture had received a copy of the proposed amendment and their reasons why they should not sign it, still argued a lack of due process and notice to property owners to the trial court more than a month later.

Ms. Cox and Ms. Ramsey informed the trial court of the truth and this changed circumstance in their briefing for the motions for partial summary judgment.²⁰ On November 17, 2017, the Court granted their motion for partial summary judgment. Subsequently, the trial court explained its reversal on this due process issue by referencing the prior statements that had been proved false:

“Probably because there were things that were said in that [temporary injunction] hearing that may not necessarily [] be true today.”²¹

This changed circumstance – newly revealed facts showing that Appellants had misled the trial court – is proper grounds for dissolving the temporary injunction.

¹⁹ *Id.*

²⁰ Supp. CR 153-154.

²¹ RR at 7:3-5 (emphasis added).

There is some irony in the fact that Appellants obtained the temporary injunction by misleading the trial court and now complain when the truth – a changed circumstance under *Murphy* – was discovered. Appellants complain throughout their brief that they have been harmed by the dissolution and that the case has changed of the injunction. But, Appellants brought this on themselves by – at best – misleading the trial court as to whether property owners had received notice of the proposed amendment. Appellants should not be heard to complain about the results of their own conduct. Therefore, the trial court did not abuse its discretion in dissolving the temporary injunction because the newly revealed facts constitute a changed circumstance.

B. Ms. Woodall’s non-suit of her claims and Appellants’ dropping of their breach or attempted breach of restrictive covenant claims constitute a changed circumstance.

Ms. Woodall’s non-suit of her claims and Appellants’ dropping of their breach or attempted breach of restrictive covenant claims constitutes a second changed circumstance. At the time of the temporary injunction, Appellants and Ms. Woodall asserted claims of breach or attempted breach of restrictive covenant.²² However, Ms. Woodall non-suited all of her claims.²³ Additionally, Appellants dropped their

²² Supp. CR 4-60.

²³ Supp. CR 61-62.

attempted breach or breach of restrictive covenant claims.²⁴ This meant that Appellants' request for a declaratory judgment was the only claim remaining in Plaintiffs' live petition when the trial court dissolved the injunction. And the trial court had ruled against Appellants concerning their declaratory judgment claim.

This meant that the claims that served as the basis for the request for the temporary injunction had either been (1) non-suited by Plaintiff Woodall or Appellants or (2) dismissed by the trial court in its summary judgment orders. Therefore, due these changed circumstances, there was no claim to support the temporary injunction and the trial court did not abuse its discretion in dissolving the temporary injunction.

C. There was also a change in circumstance as to the law that supports the trial court's dissolution of the temporary injunction.

There was also a change in circumstances as to the law. *Murphy v. McDaniel*, 20 S.W.3d 873, 878 (Tex. App.—Dallas 2000, no pet.). “Changed circumstances may include . . . a change in the law.” *Id.* In fact, Appellants admit that there was a change in the law. Appellants acknowledge that “the trial court reversed itself on the law.”²⁵ In granting Appellees' MPSJ, the trial court interpreted the Restrictive Covenants as a matter of law in favor of Appellees. This was a change from the

²⁴ Compare Plaintiffs' Third Amended Petition (Supp. CR 4-60) to Plaintiffs' Fifth Amended Petition (CR 27-34), Plaintiffs' live pleading when the trial court dissolved the injunction.

²⁵ Relators' Emergency Motion for Relief at 2.

temporary injunction hearing. Therefore, the trial court did not abuse its discretion in dissolving the temporary injunction.

III. Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully request that the Court dismiss the appeal as moot or affirm the decision of the trial court, and grant them such other relief as the Court deems proper.

Respectfully submitted,

/s/ Michael L. Navarre

Michael L. Navarre
State Bar No. 00792711
BEATTY BANGLE STRAMA, PC
400 West 15th Street, Suite 1450
Austin, Texas 78701
(512) 879-5050 Telephone
(512) 879-5040 Facsimile
mnavarre@bbsfirm.com

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was electronically served on counsel of record by electronic transmission on this 22nd day of March, 2018:

James Patrick Sutton – via jpatrickssutton@jpatrickssuttonlaw.com
The Law Office of J. Patrick Sutton
1706 W. 10th St.
Austin, Texas 78701

Mr. David M. Gottfried – via david.gottfried@thegottfriedfirm.com
The Gottfried Firm
West Sixth Place
1505 West Sixth Street
Austin, Texas 78703

/s/ Michael L. Navarre
Michael L. Navarre

CERTIFICATE OF COMPLIANCE

Appellees' Brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because it contains 1,967 words, excluding the parts of the response exempted by Tex. R. App. P. 9.4(i)(1). The undersigned relied on the word count of MS Word, the computer program used to prepare the brief.

/s/ Michael L. Navarre
Michael L. Navarre

APPENDIX TO APPELLEES' BRIEF

Description	Tab
Recorded Amendment.....	A
Letter Agreement	B

TAB A

Recorded Amendment

**AMENDMENT TO RESTRICTIONS**

STATE OF TEXAS

§

COUNTY OF TRAVIS

§

§

ARTICLE I. RECITALS

The undersigned owners hereby amend those certain restrictions recorded in Volume 4291, Page 1452, Deed Records of Travis County, Texas, concerning Point Venture, Section Three-1, according to the plat of said subdivision recorded in Volume 58, Page 48, Plat Records, Travis County, Texas ("Subject Property").

ARTICLE II. AMENDMENT

No property shall be rented except under a written lease for a term of not less than ninety (90) days. The purpose of this amendment is to prohibit short term rentals. Any lease that attempts to circumvent this prohibition by offering early cancellation, early termination without penalty, or any other scheme to violate the intent of this prohibition will be deemed to be a violation of this restriction.

ARTICLE III. GENERAL

3.1 **Enforcement; Obligations Run with the Land.** The restriction adopted and established for the Subject Property by this Restriction is imposed upon and made applicable to the Subject Property and shall run with the Subject Property and shall (i) be binding upon and inure to the benefit of and be enforceable by any owner, and each purchaser and grantee of the Subject Property or any portion thereof, and the respective heirs, legal representatives, successors and assigns of any owner and (ii) inure to the benefit of and be enforceable by any owner of property in this subdivision, and the respective heirs, legal representatives, successors and assigns of any such owner.

3.2. **Strict Compliance.** Each owner of the Subject Property, or any portion thereof, shall strictly comply with the purpose of this Restriction. Failure to strictly comply with this Restriction shall be grounds for an action to recover sums due for damages, injunctive relief, or both, including reasonable attorney fees, maintainable by any owner and the respective heirs, legal representatives, successors and assigns of each owner.

3.3. **Amendment.** This restriction may not be amended, altered, repealed, terminated or modified in any way unless and until (i) the approval of owners of sixty-seven (67%) of the Subject Property is obtained, each as evidenced by a written instrument executed by such owners and filed in the Real Property Records of Travis County, Texas.

3.4 **Gender and Number.** The singular wherever used herein shall be construed to mean the plural where applicable, the pronouns of any gender shall include the other genders, and the necessary grammatical changes required to make the provisions hereof applicable to individuals, corporations, trusts, partnerships, or other entities shall in all cases be assumed as though in each case fully expressed.

I, Dana DeBeauvoir, County Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 12/11/17



Dana DeBeauvoir, County Clerk
By Deputee

SS Williams

3.5 **Interpretation.** If this Restriction or any word, clause, sentence, paragraph or other part thereof shall be susceptible to more than one or conflicting interpretations, then the interpretation which is most nearly in accord with the general purposes and objectives of this Restriction shall govern.

3.6 **Omissions.** If any punctuation, word, clause, sentence or provision necessary to give meaning, validity or effect to any other word, clause, sentence or provision appearing in this Restriction shall be omitted herefrom, then it is hereby declared that such omission was unintentional and that the omitted punctuation, word, clause, sentence or provision shall be supplied by inference.

3.7 **Incorporation of Recital and Introductory Paragraph.** The Recitals and introductory paragraph of these Restrictions are hereby fully incorporated into, and a part of, these Restrictions for all purposes.

[Remainder of this page intentionally blank. Execution on following page.]

I, Dana DeBeauvoir, County Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 2/11/17



Dana DeBeauvoir, County Clerk
By Deputy

SS Williams

TAB B

Letter Agreement

December 22, 2017

Mr. James Patrick Sutton – via jpatrickssutton@jpatrickssuttonlaw.com
The Law Office of J. Patrick Sutton
1706 W. 10th St.
Austin, Texas 78701

Re: Cause No. C-1-CV-17-001833; *Richard W. Jackson, et al. v. Janice Cox and Helen Ramsey, et al.*; County Court at Law No. 2 of Travis County, Texas

Dear Patrick:

Pursuant to our discussion, please allow this letter to confirm that my clients agree not to record in the Official Records of Travis County, Texas, any amendments to the 1972 Restrictions between now and the end of the proceedings in the trial court in the above-referenced cause.

If you have any questions, please feel free to call me at your convenience.

Sincerely,



Michael L. Navarre

MLN/ahw