Affirmed and Opinion filed June 21, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-00921-CV

GHADA KHATIB, Appellant

V.

CITY OF HOUSTON , Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 98-08945

O P I N I O N

The City of Houston brought suit to enforce a deed restriction against Ghada Khatib, appellant in this case. The trial court granted the city's motion for summary judgment. In four points of error appellant contends the deed restriction was not properly recorded, that material fact issues precluded summary judgment, that the deed restriction in question was inconsistently enforced, and that the trial court should have granted appellant's oral motion for continuance. We affirm.

Appellant bought her home in the Afton Oaks subdivision in 1997 and erected a

wooden privacy fence. The city brought suit, contending this fence violated the First Amended and Restated Deed Restrictions for Afton Oaks. Shortly after appellant filed a general denial, the city moved for summary judgment. At the April 24, 1998 hearing, appellant told the court that her attorney was not adequately representing her and that she needed a continuance to hire a new attorney and conduct discovery. The trial court set a trial date for May 4; it entered summary judgment in favor of the city on May 8.

The City moved for summary judgment under Rule 166a(c) of the Texas Civil Procedure. Under this rule, the question is "whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law." *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999) (citing *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex.1991); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex.1985)). Under the governing standard, this court must take as true all evidence favorable to the nonmovant and must make all reasonable inferences in the nonmovant's favor as well. See *KPMG Peat Marwick*, 988 S.W.2d at 748; *Nixon*, 690 S.W.2d at 548-49. When a defendant moves for summary judgment on an affirmative defense, he must conclusively prove all the essential elements of his defense as a matter of law, leaving no issues of material fact. *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex.1984); *Fernandez v. Memorial Healthcare Sys. Inc.*, 896 S.W.2d 227, 230 (Tex.App.--Houston [1st Dist.] 1995, writ denied).

In appellant's first point of error she contends the deed restrictions in question were void on their face. In her third point of error she raises issues of selective enforcement. However, she did not present these issues to the trial court in opposition to the motion for summary judgment and therefore waived them as grounds of review in this court. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-679 (Tex. 1979); *Easley v. Members Ins. Group*, 828 S.W.2d 39, 40 (Tex. App.—Houston [14th Dist.] 1991, no writ). We therefore overrule appellants' first and third points of error.

In appellant's second point of error she contends an issue of fact involving application of the restriction to her lot precludes summary judgment. The issue involves whether Staunton Street is a side street or rear street in relation to her lot. The city contends that whether a street constitutes a side street or a back street is a question which can be answered as a matter of law. We agree with the city.

In construing a deed restriction, a reviewing court's primary task is to determine the intent of the framers of the restrictive covenant. *See Highlands Management Co. v. First Interstate Bank of Texas, N.A.*, 956 S.W.2d 749, 752 (Tex.App.—Houston [14th Dist.] 1997, pet. denied) (citing *Wilmoth v. Wilcox*, 734 S.W.2d 656, 658 (Tex.1987)). In that regard, we must determine whether the deed restriction is ambiguous. See, e.g., *Wilmoth*, 734 S.W.2d at 657-58. Whether an instrument is ambiguous is a question of law. *See Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474, 477 (Tex.App.—Houston [14th Dist.] 1988, writ denied) (citing *Chambers v. Huggins*, 709 S.W.2d 219, 221 (Tex.App.—Houston [14th Dist.] 1986, no writ). An ambiguity in a written document may be either patent or latent. See *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex.1996); *National Union Fire Ins. Co. v. CBI Indus.*, Inc., 907 S.W.2d 517, 520 (Tex.1995). A patent ambiguity is one which is evident on the document's face. *See Friendswood*, 926 S.W.2d at 282; *National Union*, 907 S.W.2d at 520. A latent ambiguity exists when a document is "unambiguous on its face, but fails by reason of some collateral matter when it is applied to the subject matter with which it deals." *Friendswood*, 926 S.W.2d at 282; see also *National Union*, 907 S.W.2d at 520. If a document is deemed to be unambiguous, then its construction is also a question of law, and not one of fact. See *Candlelight Hills*, 763 S.W.2d at 474 (citing *Chambers*, 709 S.W.2d at 222). Like any contract, deed restrictions are "unambiguous as a matter of law if [they] can be given a definite or certain legal meaning." *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex.1998) (quoting *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex.1997)). On the other hand, a restrictive covenant is ambiguous if it is "susceptible to more than one

reasonable interpretation." Id. (citing *Grain Dealers*, 943 S.W.2d at 458).

Here we find that, when acting with reference to the plat, the covenant can be given a definite or certain legal meaning. Appellant does not contend that intervening circumstances have created an ambiguity in the document. *See Oldfield v. City of Houston*, 15 S.W.3d 219, 224 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Section 5.10 of the deed restrictions provides:

> No Improvement, carport, fence or any type of building shall be located nearer to the front line and on a *corner* Lot not nearer to the side street line than the building set back lines *as shown on the Plat*, original plat or map for that Section of Afton Oaks in which the Lot sits (emphasis added).

The Plat clearly shows that appellant's corner lot (Lot 5, section 12) is subject to 25-foot set back lines on both sides of her lot that border on Staunton Street and Richmond Avenue. The survey plat of appellant's lot, prepared by Tri-Tech Surveying Company, clearly shows that appellant's fence is 22.8 feet into the 25-foot set-back zone on the Staunton Street side.

In her affidavit attached to her response to the city's motion for summary judgment, appellant stated:

> I have erected a fence which I believe to be at the rear of my property. My fence is at least ten (10) feet from my rear property line as is required by Section 5.10 of the deed restrictions.

Appellant's statements are her subjective beliefs that her fence was in compliance with the restrictions. Subjective beliefs are nothing more than conclusions and will not support summary judgment. *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex.1994). Conclusory affidavits do not raise fact issues because "[t]hey are not credible, nor susceptible to being readily controverted." *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). Appellant produced no summary judgment proof to

establish a material fact issue. We find that the city established appellant's violation of the 25-foot set back deed restriction as a matter of law. We overrule appellant's point of error two.

In point four, appellant asserts that the trial court erred by denying her oral request for a continuance at the summary judgment hearing to dismiss her then counsel and to hire new counsel and to conduct discovery. Appellant did not file a verified, written motion for continuance nor submit an affidavit in support of her discovery request.

When a party contends it has not had 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* TEX. R. CIV. P.166a(g), 251, 252; *Tenneco, Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 647 (Tex.1996); *Galbaldon v. General Motors Corp.*, 876 S.W.2d 367, 369 (Tex.App.–El Paso1993, no writ); *Watson v. Godwin*, 425 S.W.2d 424,430 (Tex.Civ.App.–Amarillo 1968, writ ref.'d). The summary judgment record does not reflect that appellant took either of these steps. Appellant's point of error four is overruled.

We affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 21, 2001.
Panel consists of Justices Sears, Draughn, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Joe J. Draughn, and Norman Lee sitting by assignment.