

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-19-00758-CV**

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**Action Roofing & Construction, Inc., Appellant**

**v.**

**Noble Capital Servicing, LLC, Appellee**

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**FROM THE 126TH DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-GN-19-000222, THE HONORABLE DUSTIN M. HOWELL, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

Action Roofing & Construction, Inc. appeals the trial court's order granting Noble Capital Servicing, Inc. declaratory and injunctive relief in its suit to enjoin Action Roofing from removing a roof it had installed on a home Noble Capital had acquired through foreclosure. Action Roofing asserts that the trial court lacked jurisdiction over the suit and also challenges the trial court's award of attorneys' fees to Noble Capital. We will affirm.

**BACKGROUND**

In order to purchase property located at 4907 Timberline Drive (the Property) in Travis County, E & C Development LLC borrowed \$1,575,000 from Noble Capital. The loan was evidenced by a promissory note dated June 13, 2017, in the original principal amount of \$1,575,000 payable to Noble Capital. The note was secured by a deed of trust dated June 13, 2017 and recorded in the official public records of Travis County. The deed of trust secures

repayment of the debt evidenced in the note, and for that purpose E & C Development granted and conveyed the Property to the trustees to hold in trust with power of sale.

In October 2017, Action Roofing installed a metal roof on the Property and submitted an invoice for \$28,000 to Assurance Home Warranty Group LLC, which had hired Action Roofing to install the roof on E & C Development's behalf. Neither Assurance nor E & C Development paid the invoice. Action Roofing then filed suit against E & C Development and Assurance in the 98th Judicial District Court in Travis County asserting causes of action for breach of contract and quantum meruit. Action Roofing did not assert or allege that it had a constitutional lien, a statutory lien, or any other type of lien. Action Roofing never filed a statutory lien to secure E & C's indebtedness. *See* Tex. Prop. Code § 53.051, .052 (to perfect lien, person must comply with chapter 53 subchapter C, which requires person to file affidavit with county clerk not later than 15th day of third calendar month after day on which indebtedness accrues). When E & C Development failed to file an answer after being served, Action Roofing moved for default judgment. On October 2, 2018, the trial court signed a default judgment on Action Roofing's breach of contract claim stating that E & C Development owed Action Roofing \$28,000. The court further found that the roof was "removable" and authorized Action Roofing to satisfy the judgment by removing the roof it had installed at the Property. Action Roofing filed an abstract of judgment with the Travis County district clerk.<sup>1</sup> Thereafter, Action Roofing requested that the district clerk issue a writ of possession in accordance with the terms of the

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<sup>1</sup> Counsel for Action Roofing informed the trial court in the proceeding underlying this appeal that Action Roofing "ended up getting payment through the title company because [] another property was later sold and [Action Roofing] was able to use the abstract of judgment [] and get payment."

judgment. The writ of possession, issued by the district clerk on January 4, 2019, commanded the Sheriff or Constable to seize the roof installed on the Property and deliver it to Action Roofing.

While Action Roofing's suit against E & C Development was pending, Noble Capital had accelerated the June 13, 2017, promissory note due to E & C Development's defaults on payment. In November 2018, Noble Capital foreclosed on the Property and purchased it at the foreclosure sale. In January 2019, the Travis County constable posted a Notice to Vacate the Property indicating that Action Roofing was going to remove the roof. Seeking to prevent Action Roofing from removing the roof, Noble Capital filed the proceeding underlying this appeal, which was assigned to the 126th Judicial District Court in Travis County. Noble Capital sought a declaration that any interest Action Roofing had in the Property was extinguished by the foreclosure. Noble Capital also requested that the court maintain the status quo during the pendency of the proceeding by enjoining Action Roofing from removing the roof and, after trial, to permanently enjoin Action Roofing from removing the roof or attempting to execute the Writ of Possession. Although the court issued a temporary restraining order enjoining Action Roofing from removing the roof, it denied Noble Capital's request for a temporary injunction during the pendency of the case.<sup>2</sup> At Action Roofing's request, the trial court issued findings of fact and conclusions of law supporting its denial of the temporary injunction.

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<sup>2</sup> Noble Capital appealed the denial of the request for a temporary injunction to this Court. See *Noble Capital Servicing, LLC v. Action Roofing & Constr., Inc.*, No. 03-19-00092-CV, 2019 WL 2608767 (Tex. App.—Austin June 26, 2019, no pet.) (mem. op.). This Court granted Noble Capital's motion for emergency relief seeking to enjoin Action Roofing from removing the roof during the pendency of the interlocutory appeal. Noble Capital ultimately moved to dismiss the appeal as moot when the trial court granted its motion for summary judgment while the appeal was still pending.

Noble Capital filed a motion for summary judgment, which the trial court granted. The court also granted Noble Capital's motion for attorneys' fees pursuant to the Uniform Declaratory Judgments Act. *See* Tex. Civ. Prac. & Rem. Code § 37.009 (in proceedings filed under UDJA court may award costs and reasonable and necessary attorneys' fees as are equitable and just). This appeal followed.

### DISCUSSION

Action Roofing's five appellate issues reduce to three challenges to the trial court's judgment. Action Roofing asserts that (1) the trial court erred by awarding attorneys' fees, (2) the trial court's judgment was in contravention of findings of fact and conclusions of law issued by the trial court to support its denial of Noble Capital's request for a temporary injunction, and (3) the trial court lacked subject-matter jurisdiction over the case. We first address Action Roofing's jurisdictional challenge.

Action Roofing argues that, pursuant to Texas Civil Practice and Remedies Code section 65.023(b), the 126th Judicial District court lacked subject-matter jurisdiction over Noble Capital's suit seeking declaratory and injunctive relief. *See id.* § 65.023(b). Texas Civil Practice and Remedies Code section 65.013 permits a suit for an injunction to stay execution on a judgment. *Id.* § 65.013; *Butron v. Cantu*, 960 S.W.2d 91, 94 (Tex. App.—Corpus Christi 1997, no writ). Section 65.023(b) provides, however, that “[a] writ of injunction granted to stay . . . execution on a judgment must be tried in the court in which . . . the judgment was rendered.” Tex. Civ. Prac. & Rem. Code § 65.023(b). This section has been held not only to control venue in a suit for an injunction seeking to stay execution on a judgment, but also to control “jurisdiction as well, so long as the judgment in question is valid on its face.” *McVeigh v.*

*Lerner*, 849 S.W.2d 911, 914 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *see also Butron*, 960 S.W.2d at 94 (“This requirement that an action to enjoin execution on a judgment must be brought in the court in which the judgment was rendered is jurisdictional, and does not relate merely to venue.”).<sup>3</sup> The purpose of this section has been described as “to ensure that comity prevails among the various trial courts of Texas” because “[o]rderly procedure and proper respect for the courts will require that . . . attacks upon their judgment should be made in the court rendering such judgment, rather than in other courts indiscriminately.” *McVeigh*, 849 S.W.2d at 914. However, section 65.023(b) only applies to a suit “attacking the judgment, questioning its validity, or presenting defenses properly connected with the suit in which it was rendered, and which should have been adjudicated therein.” *Kruegel v. Rawlins*, 121 S.W. 216, 217 (Tex. App.—Dallas 1909), *writ ref’d*, 124 S.W. 419, 419-20 (Tex. 1910); *see also Zuniga v. Wooster Ladder Co.*, 119 S.W.3d 856, 861 (Tex. App.—San Antonio 2003, no pet.).

Noble Capital’s suit for declaratory and injunctive relief does not attack the default judgment against E & C Development that Action Roofing obtained in the 98th Judicial District Court. Noble Capital neither questions that judgment’s validity nor presents defenses to the judgment that should have been adjudicated in the original suit. Instead, Noble Capital sought resolution of Noble Capital’s and Action Roofing’s competing claims to have rights to

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<sup>3</sup> In subsequent opinions, the Texas Supreme Court has expressed its resistance to “classifying a provision as jurisdictional absent clear legislative intent to that effect.” *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 391-92 (Tex. 2014) (citing *City of DeSoto v. White*, 288 S.W.3d 389, 393 (Tex. 2009)); *see Dubai Petrol. Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000) (noting modern trend against exposing final judgments to attack on subject-matter jurisdiction by treating statutory prerequisites as jurisdictional). Statutory interpretation principles guide the evaluation of whether a statutory requirement is jurisdictional. *Crosstex Energy Servs.*, 430 S.W.3d at 392. Because we hold that the statute at issue, Texas Civil Practice and Remedies Code section 65.023(b), does not apply in the present case, we need not reach, and express no opinion about, the issue of whether it implicates a trial court’s subject-matter jurisdiction.

the roof. Noble Capital sought injunctive relief only to maintain the status quo until the rights of the parties with regard to the roof could be determined in the declaratory judgment action. *See Campbell v. Wilder*, 487 S.W.3d 146, 150 (Tex. 2016) (applicability of section 65.023(b) depends on whether injunctive relief can be granted independently of judgment, not on whether injunction will disturb process issuing as result of that judgment). Noble Capital's suit was not attempting to interfere with the prior judgment but, rather, to determine whether Noble Capital's rights to the roof were superior to those of Action Roofing because of the foreclosure. We hold that section 65.023(b) does not apply to Noble Capital's suit for declaratory and injunctive relief and overrule Action Roofing's jurisdictional challenge to the trial court's judgment.

We next consider Action Roofing's challenges to the trial court's attorneys' fee award. First, Action Roofing asserts that the award was improper because it was not supported by the pleadings. We disagree. Noble Capital's suit sought declaratory relief pursuant to the Uniform Declaratory Judgments Act. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (UDJA). The UDJA "allows fee awards to either party in all cases." *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009); *see also* Tex. Civ. Prac. & Rem. Code § 37.009. The trial court's order expressly grants Noble Capital's request for declaratory relief and states that Noble Capital is "entitled to costs and reasonable and necessary attorney's fees pursuant to Texas Civil Practice and Remedies Code § 37.009." Action Roofing counters that Noble Capital's claim is "in reality brought upon Tex. Civ. Prac. & Rem. Code § 65.013, Stay of Judgment or Proceeding." The pleadings do not, however, support this assertion. As discussed above, Noble Capital's suit sought declaratory relief regarding the parties' competing claims to the roof after Noble Capital purchased the Property in foreclosure. Specifically, Noble Capital sought a declaration that its right to the roof was superior to Action Roofing's. *See Bonham State Bank v.*

*Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (declaratory judgment is appropriate if justiciable controversy exists as to rights and status of parties and controversy will be resolved by declaration sought). Noble Capital sought injunctive relief to maintain the status quo pending resolution of the competing claims to the roof and permanent injunctive relief in the event the court concluded that Action Roofing did not have a right to remove the roof from the Property. The trial court did not err in awarding attorneys' fees pursuant to UDJA section 37.009.

We also reject Action Roofing's assertion that Noble Capital had no cause of action for declaratory relief after the trial court initially denied its request for a temporary injunction and issued findings of fact and conclusions of law that, according to Action Roofing, settled the question of whether the foreclosure extinguished any right Action Roofing had to the roof. Action Roofing essentially argues that the trial court decided the merits of Noble Capital's request for declaratory relief at the conclusion of the hearing on application for a temporary injunction. However, the only question before the court at a hearing on an application for a temporary injunction is the right of the applicant to the preservation of the status quo pending trial on the merits. The court is not authorized to render judgment on the merits at such a hearing. *Houston Belt & Terminal Ry. Co. v. Texas & N. O. R. Co.*, 289 S.W.2d 217, 219 (Tex. 1956). A trial court's decision whether to grant a temporary injunction is based on the record presented at the temporary injunction hearing, and that evidence is not presumed to be the same as the evidence developed at a trial on the merits or, in this case, presented to the court in support of a motion for summary judgment. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). Thus, the trial court's findings of fact and conclusions of law issued in support of a temporary

injunction order are not determinations of an ultimate issue in the case. *See id.* (“The effect of premature review of the merits . . . is to deny [parties] their right to trial by jury.”).<sup>4</sup>

Action Roofing next asserts that Noble Capital “did not offer any evidence to establish that the attorney’s fees sought were reasonable and necessary.” *See* Tex. Civ. Prac. & Rem. Code § 37.009 (court may award reasonable and necessary attorney’s fees as are equitable and just). This is a legal sufficiency challenge to the evidence supporting the attorneys’ fee award. “We review attorney’s fees awarded pursuant to the UDJA under an abuse of discretion standard, and the trial court’s award will not be reversed on appeal absent a clear showing that the court abused its discretion.” *Texas Racing Comm’n v. Marquez*, No. 03-09-00635-CV, 2011 WL 3659092, at \*7 (Tex. App.—Austin Aug. 19, 2011, no pet.) (mem. op.) (citing *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998)). A trial court abuses its discretion by awarding fees when there is insufficient evidence that the fees were reasonable and necessary, or when the award is inequitable or unjust. *Bocquet*, 972 S.W.2d at 21.

As a general rule, the party seeking to recover attorneys’ fees carries the burden of proof. *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991). Whether an award of attorneys’ fees is reasonable and necessary is a fact question. *Bocquet*, 972 S.W.2d at 21. Texas courts consider eight factors when determining the reasonableness of attorneys’ fees, including awards made under the UDJA:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

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<sup>4</sup> For the same reason, we overrule Action Roofing’s appellate issue asserting that the trial court rendered a judgment in contravention of findings of fact and conclusions of law previously issued in support of the denial of Noble Capital’s request for a temporary injunction.



- (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

*Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). A trial court is not required to receive evidence on each of these factors. *State & Cty. Mut. Fire Ins. Co. v. Walker*, 228 S.W.3d 404, 407 (Tex. App.—Fort Worth 2007, no pet.).

Action Roofing contends that Noble Capital submitted no evidence to the trial court regarding any of these factors. We disagree. Noble Capital filed a motion for attorneys' fees with accompanying exhibits that detailed each action Noble Capital's attorneys took to pursue its declaratory judgment action and to protect its rights until resolution of the dispute with Action Roofing. The motion states that Noble Capital's attorneys and paralegals spent nearly 170 hours on the matter and that their fees totaled \$42,239, including expenses. Action Roofing did not file a response to the motion for attorneys' fees. At the hearing on the motion for attorneys' fees, counsel for Noble Capital testified. Counsel outlined the actions taken for Noble Capital by the various attorneys involved in the case and why they were necessary, testified that the fees were reasonable and necessary, explained why his billing rate and the billing rate of the other principal attorney working on the case were reasonable and consistent with fees charged

for similar work by similarly experienced attorneys in the area, and on cross-examination provided further detail about tasks performed while representing Noble Capital. Counsel for Noble Capital testified that \$42,239 was a reasonable amount of attorneys' fees for representing Noble Capital in the matter.

Documentary evidence is not a prerequisite to an award of attorneys' fees. *See, e.g., In re A.B.P.*, 291 S.W.3d 91, 99-100 (Tex. App.—Dallas 2009, no pet.). Instead, testimony from a party's attorney is taken as true as a matter of law and is alone sufficient to support an award of attorneys' fees if the testimony is clear, positive, direct, and free from contradiction. *Id.* at 98. This is especially true when the opposing party had the means and opportunity to disprove the testimony but failed to do so. *Id.* Here, Noble Capital's counsel testified that \$42,239 was reasonable and necessary attorneys' fees for obtaining a summary judgment in Noble Capital's favor and for maintaining the status quo while the declaratory judgment action was pending. Action Roofing did not object to this testimony or offer any controverting evidence about those fees. Consequently, we conclude that the trial court had legally sufficient evidence on which to exercise its discretion.

Action Roofing also asserts that the trial court's attorneys' fee award was unjust. It is the trial court's responsibility to determine whether an attorneys' fee award is just. Whether a fee award is just is, therefore, a matter of law. *Bocquet*, 972 S.W.2d at 21. We review whether attorneys' fees awarded under the UDJA are equitable and just under an abuse of discretion standard. *See id.* An award can be inequitable or unjust even when the fees are reasonable and necessary. *See id.* However, when reviewing matters committed to the trial court's discretion, an appellate court may not substitute its judgment for that of the trial judge, and a trial court does not abuse its discretion merely because it decides a discretionary matter differently than would

the appellate court under similar circumstances. *Baylor Univ. Med. Ctr. v. Rosa*, 240 S.W.3d 565, 569 (Tex. App.—Dallas 2007, pet. denied). The test for an abuse of discretion is whether the court acted without reference to guiding rules and principles. *See Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004).

To show that the attorneys' fee award was not just, Action Roofing asserts that it was "ordered to pay the attorneys' fees of a party that sued it for simply claiming the right to do what another, senior judge declared it had the right to do." Action Roofing further maintains that, under the circumstances, the trial court's attorneys' fee award "ignore[s] principles of fairness and justice." We understand Action Roofing to argue that, because it had previously secured a judgment in the 98th Judicial District Court, it was entitled to remove the roof despite Noble Capital's claim to have superior rights by virtue of the subsequent foreclosure. Action Roofing's position is that it was unjust to award Noble Capital its fees incurred in resisting what Action Roofing believed to be a legally authorized action. As previously explained, Noble Capital brought a declaratory judgment action to adjudicate competing claims to the roof that arose as a result of a foreclosure sale of the Property that took place after Action Roofing secured its default judgment in the 98th Judicial District Court. After foreclosure, there was a justiciable controversy between the parties about which had a superior right to the roof despite the existence of the default judgment. The trial court did not abuse its discretion in awarding Noble Capital its reasonable and necessary attorneys' fees in litigating that dispute. Action Roofing's conviction that it, rather than Noble Capital, had a superior right to the roof does not render an award to Noble Capital of attorneys' fees under the UDJA "unfair" or unjust. We overrule Action Roofing's challenges to the trial court's attorneys' fee award.

**CONCLUSION**

For the reasons stated in this opinion, we affirm the trial court's judgment

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Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

Filed: June 3, 2020