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Casie Walker, District Clerk
Burnet County, Texas
By: Amy Tippie, Deputy

CAUSE NO. 48292

RENE FFRENCH,	§	**IN THE DISTRICT COURT**
Intervenor Plaintiff	§	
	§	
JOHN RICHARD DIAL,	§	
Intervenor Plaintiff	§	
	§	
STUART BRUCE SORGEN,	§	
Intervenor Plaintiff	§	
	§	
And AS REPRESENTATIVES FOR	§	
WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION	§	
	§	**33RD JUDICIAL DISTRICT**
v.	§	
	§	
FRIENDSHIP HOMES & HANGARS,	§	
LLC, WINDERMERE OAKS WATER	§	
SUPPLY CORPORATION, AND ITS	§	
DIRECTORS WILLIAM EARNEST;	§	
THOMAS MICHAEL MADDEN;	§	
DANA MARTIN; ROBERT MEBANE;	§	
and PATRICK MULLIGAN,	§	
Defendants.	§	**BURNET COUNTY, TEXAS**

DEFENDANT FRIENDSHIP HOMES & HANGARS, LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS SEEKING TO VOID OR ANNUL THE SALE TO FRIENDSHIP HOME & HANGARS

To the Honorable Judge Mirabel:

Defendant FRIENDSHIP HOMES & HANGARS, LLC ("Friendship") files this Motion for Partial Summary Judgment, solely on the issue of whether any of the remaining legal claims plead by Plaintiffs would provide them with the remedy of voiding or annulling the sale at issue to Friendship if they prevailed. As set forth below, Friendship will show that the remedy sought by Plaintiffs of annulling or voiding the sale of the 4.3 acres at issue from WOWSC to Friendship is not an available remedy to Plaintiffs as a matter of law.

I.
PROCEDURAL SUMMARY AND OVERVIEW

On February 24, 2020, the Court granted in part and denied in part all of the Defendants' Pleas to the Jurisdiction, finding the Plaintiffs to have standing in this case only to the extent that their remaining claims for breach of fiduciary duty, fraud and other theories are brought pursuant to Business Organization Act Section 20.002 (c)(1) and (c)(2), generally referred to as the "ultra vires statute" and Chapter 22, subchapter J related to ratification. Friendship's and the other Defendants' pleas to the jurisdiction on all of Plaintiff's other claims[1] were granted and so those claims dismissed.

Since Plaintiffs' surviving claims against Friendship Homes related to the March 2016 sale are only those plead under the *ultra vires* statute, Section 20.002(c), the only remedies available to Plaintiffs against Friendship Homes are the remedies allowed under Section 20.002(c). As detailed below, the primary remedy sought against Friendship is the annulment or voiding of the March 2016 deed, as corrected by the December 2019 deed. This remedy is unavailable under the *ultra vires* statute as a matter of law. Remedies under Section 20.002(c) include injunctive relief to stop proposed future actions by the corporation and monetary damages claims against directors. The law is well settled in Texas that an *ultra vires* claim will not support the reversal or "annulment" of a fully performed contract or real property conveyance. Plaintiffs' request for the remedy of annulment or reversal of the sale to Friendship therefore fail as a matter of law.

II.
SUMMARY JUDGMENT EVIDENCE

Friendship will rely on the following evidence in support of its motion for summary:

Exhibit 1: Declaration of Dana Martin

Exhibit 1-A: Earnest Money Contract

Exhibit 1-B: March 2016 Deeds

Exhibit 1-C: Settlement Statement from sale

Exhibit 1-D: Resolution Approving March 2016 Sale

Exhibit 1-E: Correction Deed

Exhibit 2: Declaration of Dana Martin filed 11/1/2019

Exhibit 3: Affidavit of Mike Nelson, with exhibits A-H attached

All prior summary judgment evidence filed of record in this case, including without limitation the exhibits attached to WOWSC's brief in support of its plea to the jurisdiction and motion for summary judgment.

III.

FACTUAL BACKGROUND

The Windermere Oaks Water Supply Corporation is a non-profit water supply corporation with fewer than 1,000 members. (Ex. 3-A)

On August 24, 2013, the WOWSC board of directors ("the Board") discussed and approved building a new, much needed, wastewater treatment plant. (Ex. 3-B) The cost for construction of the new wastewater treatment plant was anticipated to be $750,000. In that same meeting, the Board discussed its desire to sell WOWSC-owned property in the Spicewood Airport in order to pay down some of the debt incurred for the construction of the new

[1] The Chapter 22 claims relate to the 2019 ratification vote by the WOWSC and are not the subject of this Motion,

wastewater treatment plant. (Ex. 3-B) As a non-profit corporation, the WOWSC has the absolute right to sell its real estate so such action cannot be *ultra vires* in and of itself. Tex. Bus. Orgs. Code § 22.255 and 2.101.

In Fall 2015 the Board had decided to list the subject property for sale for $225,000, based upon the advice received from local independent third-party real estate professionals and other due diligence. (See Exhibit 1.) In an open meeting on December 19, 2015, the Board voted to instead accept a proposal from soon to-be-formed Friendship to purchase approximately 4.3 acres of WOWSC owned land for $203,000 or roughly $50,000 an acre. Dana Martin had been doing business as Friendship Homes for some years prior to that time, using it as a DBA. Friendship was formed as a limited liability company owned by Dana Martin prior to the March 2016 closing on the property at issue. The Board was aware of Martin's affiliation with Friendship Homes both before and after its formation as a limited liability company when the Board reviewed and approved the proposed offer from Friendship to purchase the 4.3 acres of the WOWSC's property ("the Original Transaction"). Dana Martin recused herself from the vote and stepped outside while the other board members discussed the offer. (Exhibit "1" hereto). The Board made a counteroffer, which included certain use limitations and specified that its sale expenses would be capped at $3,000, so that it would net $200,000 in sale proceeds. Dana Martin d/b/a Friendship and on behalf of the to be formed entity accepted the counteroffer.

As WOWSC detailed in its prior motion for summary judgment, the Board determined the sale to Dana Martin/Friendship was at a fair price for the land based on several factors. (Ex. 4 to WOWSC's Motion.) First, the only prior offer, (the Frank Greenberg offer) was significantly lower in price. Second, the Board received several separate oral valuations of the

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since if the original sale is not subject to being set aside under 20.002 it does not become so by virtue of Section J.

land, 1) by a real estate agent that had done work for the Board in the past, Kenny Dryden[2], 2) by a central Texas airport developer, 3) by a member of the Texas Department of Transportation Aviation Division, and, 4) by a Lakeway real estate agent who had dealt with airport property in the past. Based upon this due diligence, the Board understood the fair value of the land to be around $50,000 an acre. (Ex. 4 to WOWSC's Motion.) Also, by negotiating a purchase with Dana Martin/Friendship before it went on the market, the 6% brokers fees and other marketing costs would be saved. A summary of known value opinions[3] for all or portions of the WOWSC property is below:

2007 bank appraisal	$350,000 for 7.027 acres
2013-2015 Frank Greenburg offer	$175,000 for 7 acres
2015 Hinton appraisal of entire 10 acres	$185,000 for 10 acres
2015 Burnet Co. appraisal district value	$246,500 of 7.12 acres
Fall 2015 independent realtor opinion	$225,000 for 10 acres
2018 Bolton appraisal (as of 2015) (post litigation)	$1.3 million for 10 acres $700k for 3.86 acre
2019 Hornsby appraisal (as of 2015) (post litigation)	$221,000 for 3.86 acre

The sale closed in March 2016, at which time WOWSC received the stipulated $200,000, plus closing costs, and WOWSC conveyed the Property[4] to Friendship. Some months later after this dispute arose it was discovered that the title company which had prepared the legal

[2] Dana Martin did not know Kenny Dryden, but one or more of the other board members did. (Exhibit 1).
[3] Property values are not at issue in this Motion, but the above value estimates have been referenced in other pleadings, depositions and exhibits in this case and are summarized here just for context.
[4] The Contract required the conveyance of 4.3 acres as identified on a survey. As a result of re-platting of the 4.3 acres and the creation of new property descriptions, the title company that closed the transactions that did the closing document omitted a portion of the 4.3 acres so that Friendship's deed only included a legal description covering 3.86 of the acres of the 4.3 acres for which Friendship had contracted and paid. This was the reason for the correction deed done in 2019 which Plaintiffs paint as some sort of conspiracy, but which was really a simple correction to make the deed match what had been contracted and paid for.

attachments and descriptions for the closing documents, including the deed, had left out a strip of land covered by the contract on which a portion of Piper Lane is located, such that instead of receiving the 4.3 acres identified in the Earnest Money Contract, Friendship received only approximately 3.86 acres. (See Exhibit 1 hereto) The legal description was corrected through a correction deed recorded on November 1, 2019, which relates back to the March 14, 2016 recording date of the original deed. Tex. Prop. Code Section 5.029 and 5.030. (See Exhibit 1-E hereto).

As the Court is aware, the notice for the December 2015 meeting at which the Original Transaction was authorized has been found to have violated the Texas Open Meetings Act because the subject of the prospective sale was not included in the published notice of the meeting. Though finding the meeting notice defective, the Sixth Court of Appeals held that the Plaintiff[5]'s claim for injunctive or mandamus relief based on the mistake was not available and was moot. *TOMA Integrity, Inc. v. Windermere Oaks Water Supply Corp.*, 06–19–00005–CV, 2019 WL 2553300, at *1 (Tex. App.—Texarkana June 21, 2019, pet. filed), reh'g denied (July 23, 2019); (Ex. 6 to WOWSC's Motion.)

Plaintiffs amended this suit to try to accomplish what they could not in their *TOMA Integrity v. Windermere Oaks Water Supply Corp* suit, which is the reversal of the 2016 sale to Friendship. As detailed below, this relief is likewise moot and otherwise unavailable under Texas *ultra vires* statutory and case law, as a matter of law.

IV.
ARGUMENT AND AUTHORITIES

The sale to Friendship closed and funded prior to filing of this lawsuit, and the Correction Deed (through which the property description was corrected) was executed by WOWSC and was

[5] *TOMA Integrity*, the nominal plaintiff in that suit was owned and directed by the plaintiffs.

recorded on November 1, 2019. Thus, under the language of both Section 20.002 and decades of case law interpreting the scope of the *ultra vires* doctrine in Texas, Plaintiffs cannot annul or set aside the sale transaction, and their claims for injunctive relief related to both transactions are moot, and the relief unavailable. "It has been often held, and may be considered settled, that when an *ultra vires* contract with a corporation has been fully executed the courts will not interfere with the rights acquired under that contract." *San Antonio Hardware Co. v. Sanger,* 151 S.W. 1104 (Tex. Civ. App.- San Antonio 1912), citing *First Nat. Bank v. Stewart,* 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592*; Parish v. Wheeler,* 22 N. Y. 49*4; Holmes v. Holmes,* 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448; *Wilson v. Carter Oil Co.,* 46 W. Va. 469, 33 S. E. 249.

If a contract claimed to be invalid on the grounds that it is *ultra vires* has been fully performed and executed on both sides, it may not be set aside. *Menard v. Sydnor,* 29 Tex. 257 (1867); *Reed v. Continental State Bank of Beckville,* 2 S.W.2d 426 (Tex.Com.App., 1928); *McCombs v. Abrams*, 28 S.W.2d 584 (Tex.Civ.App., Galveston, 1930), affirmed 48 S.W.2d 612 (Tex.Com.App., 1932); *Nat'l id Life of Oklahoma City, Okla. v. Adams*, 157 S.W.2d 957 (Tex.Civ.App., Eastland, 1941), err. ref.; Maz*zola v. Lucia*, 109 S.W.2d 273 (Tex.Civ.App., Beaumont, 1937) err. ref.; *Ogburn–Dalchau Lumber Co. v. Taylor,* 59 Tex.Civ.App. 442, 126 S.W. 48 (1910), no writ hist.; *Southwestern Cooperage Co. v. Kivlen*, 266 S.W. 826 (Tex.Civ.App., Dallas, 1924). Where the only relief a plaintiff could "possibly ask for at this time is a declaration that an already-performed contract is void, a remedy that is not only moot, but is retrospective in nature and therefore not permitted in an ultra vires action." *City of El Paso v. Waterblasting Technologies, Inc. ,* 491 S.W.3d 890, 909 (Tex. App.- El Paso 2016).

The 1st Court of Appeals in Houston revisited this issue recently in *City of Houston v. Hope for Families, Inc*., 2020 WL 97176 (Tex. App.- Houston, [1st Dist] 2020) noting that under

Section 20.002 shareholders could pursue claims against board members, but that only the attorney general had standing to seek to reverse a sale. See also *Texas Practice Series,* December Update, Section 27.9 Ultra Vires Doctrine: "A shareholder may only seek to enjoin action that is executory, action that is being or is to be performed. A shareholder is not permitted to attack fully executed contracts or transfers."

The law in abundantly clear in Texas that the *ultra vires* doctrine, as now expressed in Section 20.002, does give members or shareholders certain claims but does not afford members or shareholders with the remedy of reversing and setting aside a contract or conveyance that has been fully performed, as in this case. Friendship requests that the Court grant summary judgment denying all of the Plaintiffs' claims, under whatever theory plead, to the extent they seek as their remedy the reversal or invalidation of the March 2016 deed and/or the November 1, 2019 correction deed to Friendship.

Friendship therefore prays that the Court: a) grant this Motion, b) order that all of Plaintiffs' claim are dismissed with prejudice, to the extent they seek as their remedy the annulment or reversal of the sale by the WOWSC to Friendship of the 4.3 acres purchased from WOWSC, c) confirm that therefore neither Plaintiffs nor WOWSC have claims to or rights in the 4.3 acre Property at issue and d) grant Friendship such other and further relief to which it is entitled.

Respectfully submitted,

/s/ Molly Mitchell

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been sent via the court's electronic filing system to counsel of record listed below on this the 31st day of August 2020.

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/s/ Molly Mitchell
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