

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**Elwyn D. Shumway v. Whispering Hills of Comal County Texas
Property Owners Association, Inc.**

Shumway · No. No. 03-15-00513-CV · Decided August 16, 2016

SUMMARY

The Texas Court of Appeals affirmed the trial court’s dismissal under Texas Rule of Civil Procedure 91a of Elwyn D. Shumway’s declaratory action concerning whether his subdivision lots could be used for commercial purposes. The trial court’s written order did not specify its grounds, and Shumway challenged only the limitations ground on appeal. Because he did not challenge the alternative ground that his pleadings established the lots were restricted to residential use, the appellate court affirmed on that unchallenged ground.

CASE DETAILS

COURT	Texas Court of Appeals, Third District, at Austin
WRITING FOR THE COURT	Scott K. Field; Chief Justice Rose; Justice Pemberton; Justice Field
JURISDICTION	Texas
DECIDED	August 16, 2016
DOCKET	No. 03-15-00513-CV
DISPOSITION	affirmed
PROCEDURAL POSTURE	Shumway appealed the district court's order granting the Association's motion to dismiss under Texas Rule of Civil Procedure 91a.
STANDARD OF REVIEW	The appellate court reviewed whether the trial court could properly sustain the Rule 91a dismissal on any unchallenged ground. An appellant attacking an order that does not specify its grounds must challenge every ground upon which the trial court could have relied.
PRECEDENTIAL VALUE	published memorandum opinion; precedential status is not otherwise specified in the opinion text
PARTIES	Elwyn D. Shumway v. Whispering Hills of Comal County Texas Property Owners Association, Inc.

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QUESTIONS PRESENTED

1. Whether the trial court's written order granting a Rule 91a motion to dismiss could be affirmed on an unchallenged ground when the order did not specify its basis.
2. Whether Shumway was required to challenge every ground on which the trial court could have granted the Rule 91a dismissal.
3. Whether the appellate court should affirm because Shumway failed to challenge the ground that his pleadings and attached documents established that the lots were restricted to residential use.

HOLDINGS

1. When a trial court's order granting a Rule 91a motion to dismiss does not identify the ground on which it relied, the appellant must challenge every ground upon which the trial court could have granted the motion; failure to challenge one such ground requires affirmance on that unchallenged ground.
2. The dismissal must be affirmed because Shumway did not challenge the ground that his own pleadings and attached documents established that the lots were restricted to residential use and therefore did not entitle him to the requested declaration permitting commercial use.

KEY QUOTATIONS

"In each situation, he must negate the validity of each ground upon which the trial court could have relied. If he fails to address any particular ground, we must uphold the [order] on the unchallenged ground." (at 4)

FACTUAL BACKGROUND

Shumway owned two lots in the Whispering Hills Subdivision that he intended to use commercially. The recorded deed restrictions and contract for deed limited the property to residential use except for tracts designated for business purposes on the subdivision plat, and no such designations were made. After the Association refused to agree that the lots could be used commercially, Shumway sued for a declaration permitting commercial use.

PROCEDURAL HISTORY

Shumway filed suit seeking a declaration that his subdivision lots could be used for residential or commercial purposes. The district court granted the Association's Rule 91a motion to dismiss after permitting Shumway to amend his pleadings, ordered that Shumway take nothing, and awarded the Association \$3,375 in attorney's fees. Although the court orally stated that limitations had run, its written order did not specify the ground for dismissal. On appeal, Shumway challenged only limitations.

DISPOSITION

affirmed

CASES CITED

- HB Turbo, L.P. v. Turbonetics Eng'g & Servs., No. 13-06-00083-CV, 2007 WL 1629949, at *2 (Tex. App.—Corpus Christi June 7, 2007, pet. denied) (mem. op.)
- Hyperion Holdings, Inc. v. Texas Dep't of Hous. & Cmty. Affairs, No. 03-05-00563-CV, 2006 WL 367141, at *3 (Tex. App.—Austin Feb. 16, 2006, no pet.) (mem. op.)
- Bush v. Coleman Powermate, Inc., No. 03-04-00196-CV, 2005 WL 1241075, at *8 (Tex. App.—Austin May 26, 2005, no pet.) (mem. op.)
- Strather v. Dolgencorp of Tex., Inc., 96 S.W.3d 420, 426 (Tex. App.—Texarkana 2002, no pet.)
- Mansfield State Bank v. Cohn, 573 S.W.2d 181, 184-85 (Tex. 1978)
- Parkhurst v. Office of Attorney Gen. of Tex., 481 S.W.3d 400, 402 (Tex. App.—Amarillo 2015, no pet.)
- Blizzard v. Select Portfolio Servicing, No. 03-13-00716-CV, 2015 WL 5096710, at *4 (Tex. App.—Austin Aug. 27, 2015, no pet.) (mem. op.)
- Adams v. First Nat'l Bank of Bells/Savoy, 154 S.W.3d 859, 875 (Tex. App.—Dallas 2005, no pet.)
- Guillory v. Seaton, LLC, 470 S.W.3d 237, 240 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)