

MODIFY and AFFIRM; and Opinion Filed April 6, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00741-CV

**DENNIS TOPLETZ, INDIVIDUALLY AND AS HEIR OF HAROLD TOPLETZ
D/B/A TOPLETZ INVESTMENTS, ET AL., Appellants**

V.

**CITY OF DALLAS, JAMES CHOICE AND RENEKA TOWERS, INDIVIDUALLY AND
AS REPRESENTATIVES OF THOSE SIMILARLY SITUATED, Appellees**

**On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-13993**

MEMORANDUM OPINION

**Before Justices Lang-Miers, Myers, and O'Neill¹
Opinion by Justice O'Neill**

This is an interlocutory appeal of the trial court's order granting a temporary injunction requested by appellees, James Choice, Reneka Towers, and the City of Dallas. In six issues, appellants contend the trial court erred in granting the temporary injunction. Appellants contend the injunction should be vacated because appellees did not meet the requirements for an injunction. Appellants also challenge the injunction order as written, asserting it improperly enjoins lawful activities, exceeds the scope of the pleadings, imposes a de facto receivership on appellants' properties, and imposes an unconstitutional prior restraint on appellants' speech. The first four pages of the temporary injunction order contain the trial court's findings in eight

¹ The Honorable Michael J. O'Neill, Justice of the Court of Appeals for the Fifth District of Texas—Dallas, Retired, sitting by assignment.

numbered paragraphs (“findings paragraphs”); the remainder of the temporary injunction order contains the trial court’s injunctive orders in five numbered paragraphs (“injunction paragraphs”). We modify the temporary injunction order to delete injunction paragraph three, and affirm the trial court’s order as modified.

I. BACKGROUND

Harold Topletz and Jack Topletz formed a general partnership, Topletz Investments, to own and manage a number of residential rental properties in Dallas. At some point, Dennis Topletz became a partner in Topletz Investments. Upon the death of Harold Topletz and Jack Topletz, ownership of the properties allegedly passed to their heirs, including Dennis Topletz, Casey Topletz, Vickie Topletz, and Steven Topletz. Dennis Topletz testified that he owns and/or manages approximately 225 rent houses. But he gave conflicting testimony regarding the status of Topletz Investments and whether it continues as a partnership or is now Dennis Topletz d/b/a Topletz Investments. Marvin Levin, individually and as the executor of Jack Topletz’s estate, owns several houses that Topletz Investments manages.

The City of Dallas filed suit against the Topletz heirs, Topletz Investments, Marvin Levin, Monarch Development Corporation, and several real properties allegedly owned by them, for a variety of code violations and for maintaining nuisance properties. The City sought temporary and permanent injunctive relief, civil penalties, and the appointment of a receiver. After the City filed its lawsuit, Topletz Investments sent a letter to its tenants with the caption “WE ARE UNDER ATTACK!!!!” The letter directed tenants to refuse to allow any City inspectors to enter their houses and to tell City inspectors there were no issues with their houses that needed to be addressed.

James Choice and Reneka Towers (Tenants) intervened in the City’s lawsuit, individually and as representatives of all others similarly situated, namely all persons who, from April 10,

2012 to date, resided in a property leased by Topletz Investments. Tenants alleged violations of the Texas Property Code and the Deceptive Trade Practices Act (DTPA). Shortly after Towers intervened in the City's suit, Topletz Investments sent someone to her home on two different occasions, asking her to sign a letter stating that her rent house complied with City codes and that she was satisfied with the condition of the house. Thereafter, Tenants amended their petition in intervention and class action petition to include an application for a temporary restraining order, temporary injunction, and permanent injunction. In their request, Tenants claimed intimidation and retaliation and sought to prohibit the defendants from (1) intimidating, retaliating, discouraging, harassing, punishing, communicating, stalking, emailing, texting, defaming, or directing any other conduct against their tenants for participating in this litigation or exercising their legal rights, including charging them for repairs or stating rents will be raised if they cooperate with the City; (2) communicating with any tenants represented by counsel in the litigation; (3) raising any tenant's rent without approval of the court; or (4) entering any tenant's premises except for purposes of required repairs, health, and safety, as directed by a governmental authority or with consent of the tenant.

The City joined in the Tenants' application for a temporary restraining order and a temporary injunction. The trial court granted the relief requested by the Tenants—first granting a temporary restraining order and approximately one month later, granting Tenants' request for a temporary injunction. This interlocutory appeal followed.

II. STANDARD OF REVIEW AND APPLICABLE LAW

A temporary injunction is an extraordinary remedy, the purpose of which is to preserve the status quo of the litigation's subject matter pending trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993); *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 743 (Tex. App.—Dallas 2011, no

pet.). The status quo is defined as, “the last, actual, peaceable, non-contested status which preceded the pending controversy.” *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding). To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 65.011 (West 2008). An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. *Butnaru*, 84 S.W.3d at 204; *El Tacaso*, 356 S.W.3d at 743.

We review a trial court’s order granting a request for a temporary injunction under an abuse of discretion standard. *Butnaru*, 84 S.W.3d at 204; *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 916 (Tex. App.—Dallas 2006, no pet.). The reviewing court must not substitute its judgment for the trial court’s unless the trial court’s action was so arbitrary that it exceeded the bounds of reasonable discretion. *Butnaru*, 84 S.W.3d at 204; *Davis v. Huey*, 571 S.W.2d 859, 861–62 (Tex. 1978). We view the evidence in the light most favorable to the trial court’s order and indulge every reasonable inference in its favor. *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 478 (Tex. App.—Dallas 2010, no pet.). The trial court does not abuse its discretion if some evidence reasonably supports the trial court’s decision. *Davis*, 571 S.W.2d at 862. Nor does the trial court abuse its discretion by making a decision based on conflicting evidence. *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 883 (Tex. App.—Dallas 2003, no pet.). However, the trial court abuses its discretion when it misapplies the law to established facts or when the evidence does not reasonably support the trial court’s determination of the existence of probable injury or probable right of recovery. *Id.* We review de novo any

determinations on questions of law that the trial court made in support of the order. *Marketshare Telecom*, 198 S.W.3d at 916.

III. ANALYSIS

In six issues, appellants contend the temporary injunction should be vacated or modified because: (1) appellees have no probable right of recovery; (2) there is no evidence appellees will suffer probable, imminent, and irreparable harm in the absence of a temporary injunction; (3) the injunction improperly enjoins appellants from engaging in lawful activities and exceeds the scope of the pleadings; (4) the injunction unlawfully imposes a de facto receivership on appellants' properties; (5) the injunction imposes an unconstitutional prior restraint on appellants' speech; and (6) alternatively, the injunction should be vacated as to all appellants other than Dennis Topletz.

A. No Probable Right To Relief Sought

In the temporary injunction order, the trial court stated that after considering the evidence presented, taking judicial notice of the court's file, and hearing the arguments of counsel, the trial court found that Tenants established a probable right of recovery against appellants for their pleaded causes of action and claims. In their first issue, appellants assert the trial court abused its discretion in granting the temporary injunction because Tenants did not prove they had a probable right to the relief sought. Appellants contend: (1) Tenants did not comply with the six statutory prerequisites to suit set forth in property code section 92.056(b), and (2) the lease does not violate property code section 92.006. In response, Tenants assert appellants waived their statutory prerequisites argument by failing to make this objection to the trial court. Tenants further contend the statutory prerequisites in section 92.056(b) apply only to a claim for a landlord's failure to make repairs and not to a claim for unlawful lease terms. Tenants explain that they do not seek recovery for Topletz's failure to make repairs; instead, they seek recovery

for unlawful terms in the Topletz lease that shift the burden of making repairs from the landlord to the tenant. Tenants contend they have stated a claim pursuant to property code section 92.0563(b) for a violation of property code section 92.006(c). According to section 92.0563(b): “A landlord who knowingly violates Section 92.006 by contracting orally or in writing with a tenant to waive the landlord’s duty to repair under this subchapter shall be liable to the tenant for actual damages, a civil penalty of one month’s rent plus \$2,000, and reasonable attorney’s fees.” TEX. PROP. CODE ANN. § 92.0563(b) (West 2014).

As applicants for injunctive relief, Tenants had the burden of establishing they had a probable right to the relief sought. *Butnaru*, 84 S.W.3d at 204. They were required to allege a cause of action and offer evidence that tends to support the right to recover on the merits. *Walling*, 863 S.W.2d at 58. They were not required to establish they will prevail on final trial because the ultimate merits of the case were not before the trial court. *Id.*; *Graham Mortg. Corp.*, 307 S.W.3d at 477. The question before the trial court was whether appellees were entitled to preservation of the status quo pending trial on the merits. *Walling*, 863 S.W.2d at 58.

The Topletz standard lease form was admitted into evidence. Dennis Topletz testified that Topletz Investments has used the same standard lease form since 1960, with minor modifications, for all of the properties it owns, manages, or controls. He also testified that he drafted the lease form and had never had it reviewed by an attorney. Although Dennis Topletz shares office space with his cousin, Marvin Levin (also an appellant), and Levin has been a real estate attorney for over fifty years, Dennis Topletz testified that he had never asked Levin to review the Topletz standard lease form for compliance with Texas law.

The Topletz lease requires a tenant to pay rent in a timely manner. It also requires a tenant to: (i) hold Topletz harmless from any damage caused by any defects, repairs, or improper construction of the premises; (ii) make all minor repairs at tenant’s expense; (iii) be

responsible for all broken windows and all broken and stopped up pipes; and (iv) accept the property in “as is” condition. Tenants testified they signed lease agreements with Topletz, using the standard Topletz lease form, and these leases were admitted into evidence at the hearing. Accordingly, we conclude that Tenants established they had a probable right to recover on their claim that their leases violated property code section 92.006. The trial court did not abuse its discretion if some evidence reasonably supports the trial court’s decision. *Davis*, 571 S.W.2d at 862. We overrule appellants’ first issue.

B. No Probable, Imminent, Irreparable Injury

In their second issue, appellants assert the trial court abused its discretion in granting the temporary injunction because Tenants did not prove they would suffer probable, imminent, and irreparable injury absent the injunction. Appellants argue that Tenants can be adequately compensated with monetary damages and point to several judicial remedies available under chapter 92 of the property code. Such remedies include: an order directing the landlord to repair or remedy the condition; an order reducing the tenant’s rent; a judgment against the landlord for a civil penalty of one month’s rent plus \$500; a judgment against the landlord for the tenant’s actual damages; and court costs and attorney’s fees. *See* TEX. PROP. CODE § 92.0563(a).

Tenants, however, contend that the probable, imminent, and irreparable injury is to the court’s core functions, the parties, the class, and the integrity of the process. They argue the trial court always has the power to issue an injunction to protect the status quo.

In findings paragraph two, the trial court stated that Tenants would suffer probable, imminent, and irreparable harm unless a temporary injunction was granted against appellants. The trial court described the harm that would occur—harassment, threats, retaliation, and intimidation of the Tenants by the defendants—and stated: “[t]his harm is not speculative, as the Defendants have already demonstrated such conduct.” The trial court described the harm as not

only affecting Tenants, but also affecting all potential class member tenants. And the trial court elaborated that defendants' conduct was intended to discourage, intimidate, harass, or threaten Tenants and other potential class member tenants to keep them from cooperating with the City of Dallas code enforcement officers, to falsely advise them of their rights and obligations under the law, and to keep them from providing factual information regarding Tenants' claims. In findings paragraph six, the trial court stated that defendants' conduct met the parameters of section 65.011(2) of the Texas Civil Practice and Remedies Code, and defendants' conduct interfered with the core functions of the court and the court's power to regulate the conduct of the parties to the litigation.

We view the evidence in the light most favorable to the trial court's order and indulge every reasonable inference in its favor. *Graham Mortg.*, 307 S.W.3d at 478. The trial court does not abuse its discretion if some evidence reasonably supports the trial court's decision. *Davis*, 571 S.W.2d at 862. We conclude the trial court did not abuse its discretion in finding that Tenants would suffer probable, imminent, and irreparable injury absent the injunction. We resolve this issue against appellants.

C. Enjoins Lawful Activities and Exceeds Scope of Pleadings

Appellants contend the trial court abused its discretion by granting a temporary injunction that is so broad it enjoins appellants from activities that are a lawful and proper exercise of their rights, such as raising rent, properly initiating eviction proceedings when a tenant fails to pay rent, and communicating with tenants. An injunction should be broad enough to prevent a repetition of the evil sought to be corrected, but not so broad as to enjoin a defendant from lawful activities. *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 384 (Tex. App.—Dallas 2009, no pet.) "Where a party's acts are divisible, and some acts are permissible and some are not, an injunction should not issue to restrain actions that are legal or about which there is no

asserted complaint.” *Id.* (citing *Hellenic Inv., Inc. v. Kroger Co.*, 766 S.W.2d 861, 867 (Tex. App.—Houston [1st Dist.] 1989, no pet.)). Thus, the entry of an injunction that enjoins lawful as well as unlawful acts may constitute an abuse of discretion. *See Computek Computer & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217, 221 (Tex. App.—Dallas 2005, no pet.).

Injunction paragraph three prohibits appellants from raising rent, properly initiating eviction proceedings, or evicting any Tenant or potential class member tenant without leave of the trial court. We conclude that the injunction enjoins activities the appellants otherwise have a legal right to perform, and thus the injunction is too broad. *See id.* Because we agree that the trial court abused its discretion by entering a temporary injunction that is overly broad, we resolve appellants’ third issue in their favor.

D. De Facto Receivership

In their fourth issue, appellants assert the temporary injunction imposes a de facto receivership on the appellants’ properties by taking away appellants’ ability to manage and control their properties and giving that authority to the court. Tenants respond that this issue was not presented to the trial court and thus, has not been preserved for appeal. “To preserve a complaint for appellate review, a party generally must present it to the trial court by timely request, motion, or objection, stating the specific grounds, and obtain a ruling.” *Shaw v. Cnty. of Dallas*, 251 S.W.3d 165, 174 (Tex. App.—Dallas 2008, pet. denied) (citing TEX. R. APP. P. 33.1(a)). If a party fails to do this, error is not preserved. *Id.*; *see also Knapp v. Wilson N. Jones Mem’l Hosp.*, 281 S.W.3d 163, 170 (Tex. App.—Dallas 2009, no pet.) (“a party’s argument on appeal must comport with its argument in the trial court”).

At the hearing on the application for temporary injunction, appellants did not argue that a temporary injunction would impose a de facto receivership on their properties. As a result, we

conclude that appellants' fourth issue was not preserved for appellate review. We resolve appellants' fourth issue against them.

E. Unconstitutional Prior Restraint on Speech

In their fifth issue, appellants assert the temporary injunction should be vacated or modified because it imposes an unconstitutional prior restraint on speech. Tenants respond that appellants did not preserve this issue for appellate review because they did not raise their constitutional challenge in the trial court. The record fails to show that this complaint was brought to the trial court's attention. Because the constitutional argument was not presented to the trial court, this issue has not been preserved for appellate review. TEX. R. APP. P. 33.1(a); *see Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.—Amarillo 1995, no writ). We resolve appellants' fifth issue against them.

F. Appellants Other Than Dennis Topletz

In their sixth issue, appellants assert the trial court abused its discretion by entering a temporary injunction against anyone other than Dennis Topletz. They contend the trial court should not have entered a temporary injunction against Casey Topletz, Vickie Topletz, Steven Topletz, Marvin Levin, and Monarch Development Corporation because there is no evidence to justify an injunction against them. We disagree.

The record contains evidence to support extending the temporary injunction to Marvin Levin. At the temporary injunction hearing, Levin testified that he has been a real estate attorney for approximately fifty years. He represented Jack Topletz and Harold Topletz for many years; he now represents and shares an office with his cousin, Dennis Topletz. Levin testified that he owns houses that are managed by Dennis Topletz. He stated that he defers to Dennis Topletz for management issues, uses the same lease form, and has no knowledge of Topletz Investments' communications with the tenants. When asked about the November 2015 letter Topletz

Investments sent to all tenants after the City filed this lawsuit, Levin stated he had no objection to the letter. In addition to being sued in his individual capacity, Levin was sued, and has answered, in his capacity as the executor of the estate of Jack Topletz. The record contains evidence suggesting that some of the rent houses named as in rem defendants in this suit are owned by the estate of Jack Topletz. According to the evidence, Dennis Topletz manages these properties as well.

Although appellants contend there was no evidence presented at the hearing regarding Monarch Development Corporation, the record contains contradictory testimony by Dennis Topletz who first testified that Monarch owned fifty homes. He later testified that Monarch did not own the homes; they were owned by Topletz Investments. With respect to Casey, Vickie, and Steven Topletz, appellants argue the record contains no evidence who these individuals are and what action these individuals may have taken, illegal or not. According to the record, Vickie Topletz was sued individually and as an heir of Harold Topletz. Steven Topletz was sued individually and as an heir of Harold Topletz. And Casey Topletz was sued because he is the record owner of at least one rental property, 3803 Octavia Street, Dallas, Texas, that was listed as an in rem defendant in this suit.

The record is vague, confusing, and contradictory with respect to the current ownership status of the rent houses. However, Dennis Topletz, Casey Topletz, Vickie Topletz, Steven Topletz, Marvin Levin, and Monarch Development Corporation are all named parties to the action and received actual notice of the temporary injunction. The rules governing injunctive relief provide that an injunction “is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” TEX. R. CIV. P. 683. The record contains some evidence that Dennis Topletz is the agent for all

of the Topletz family members that own, or may have inherited an ownership interest in, the rent houses. Accordingly, we conclude the trial court did not abuse its discretion by entering a temporary injunction order against all of the defendants. We resolve appellants' sixth issue against them.

IV. CONCLUSION

In accordance with our disposition of appellants' third issue, we modify the temporary injunction order to delete injunction paragraph three. In all other respects, we affirm the trial court's temporary injunction order.

/Michael J. O'Neill/
MICHAEL J. O'NEILL
JUSTICE, ASSIGNED

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

DENNIS TOPLETZ, IND. & AS HEIR OF
HAROLD TOPLETZ D/B/A TOPLETZ
INVESTMENTS, Appellant

No. 05-16-00741-CV V.

CITY OF DALLAS, JAMES CHOICE AND
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Opinion delivered by Justice O'Neill.
Justices Lang-Miers and Myers
participating.

In accordance with this Court's opinion of this date, the temporary injunction order of the trial court is **MODIFIED** to delete injunction paragraph three.

It is **ORDERED** that, as modified, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 6th day of April, 2017.