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MEMORANDUM OPINION

Court of Appeals of Texas,
San Antonio.

CARGO PARTNERSHIP and
Henry B. Gonzalez, Jr., Appellants

v.

AMG ACQUISITIONS, INC., Carlisle Asset
Company, and C. Thomas Wright, Appellees.

No. 04-04-00830-CV. | Nov. 9, 2005.

From the 57th Judicial District Court, Bexar County,
Texas, Trial Court No. 2004-CI-16211; Fred Shannon,
Judge Presiding.

Attorneys and Law Firms

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for Appellant.

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Benjamin, L.L.P., [Ryan G. Anderson](#), McClenahan
and Anderson, P.L.L.C., San Antonio, for Appellee.

Sitting: [ALMA L. LÓPEZ](#), Chief Justice, [SANDEE
BRYAN MARION](#), Justice, [PHYLIS J. SPEEDLIN](#),
Justice.

Opinion

MEMORANDUM OPINION

Opinion by [SANDEE BRYAN MARION](#), Justice.

*1 Appellants, Cargo Partnership and Henry B. Gonzalez, Jr., appeal the trial court's order denying their application for a temporary injunction against appellees. In an opinion and judgment dated April 6, 2005, we affirmed the trial court's judgment in favor of appellees. Appellants filed a motion for rehearing. We vacate our earlier judgment, withdraw our earlier

opinion, and issue this opinion and judgment in their place. We overrule appellants' motion for rehearing, and affirm the trial court's judgment.

BACKGROUND

Carlisle Asset Company ("Carlisle") and Henry B. Gonzalez, Jr. ("Gonzalez") jointly own and lease a commercial property in downtown San Antonio through their partnership, Cargo Partnership ("Cargo"). Tom Wright ("Wright") owns Carlisle. In 1991, Carlisle, Gonzalez, Cargo, and Wright signed a written management agreement under which the partners and the partnership gave Wright limited authority to serve as an agent of the partnership. Pursuant to their partnership agreement, Gonzalez controls the second floor of the building through his lease with Cargo, and Carlisle controls the first floor through its lease with Cargo. The Gonzalez-Cargo lease provides that Gonzalez may use the top floor for an "office" and "for no other purpose." The Carlisle-Cargo lease provides that Carlisle may use the bottom floor for a "retail gallery and office" and "for no other purpose."

Carlisle itself has never occupied the ground premises, but has subleased the ground floor to two different art galleries. The underlying dispute arises from Carlisle securing a new sublease with AMG Acquisitions, Inc. ("AMG"), for operation of an "art lounge." As an "art lounge," AMG intends to operate an art gallery that also serves alcoholic beverages. Wright, as manager of Cargo and owner of Carlisle, approved the sublease. After executing the sublease in early September 2004, AMG began construction on the premises on September 15th.

Gonzalez objected to the sublease to AMG for use of the premises as a bar. On October 26, 2004, Cargo and Gonzalez sought a temporary injunction seeking to prevent AMG from operating the art lounge and to prevent Wright from taking further action as manager of Cargo. By the time of the November 3, 2004 temporary injunction hearing, the evidence established that construction was almost seventy percent complete, with AMG having spent approximately \$148,000 in construction expenses. The trial court denied Cargo

and Gonzalez's application for temporary injunction, and this appeal ensued.

STANDARD OF REVIEW

We review the grant or denial of a temporary injunction for a clear abuse of discretion without addressing the merits of the underlying case. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex.1993); *Ireland v. Franklin*, 950 S.W.2d 155, 157 (Tex.App.-San Antonio 1997, no writ). A trial court abuses its discretion when it misapplies the law to the “established facts or when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery.” *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex.1975). We will draw all reasonable inferences from the evidence in a manner most favorable to the trial court's judgment. *City of San Antonio v. Rankin*, 905 S.W.2d 427, 430 (Tex.App.-San Antonio 1995, no writ). A trial court does not abuse its discretion when it bases its decision on conflicting evidence in the record and the evidence reasonably supports its conclusion. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex.1978). When, as here, the trial court does not make findings of fact or conclusions of law, we must uphold the trial court's order on any legal theory supported by the record. *Universal Health Svcs., Inc. v. Thompson*, 24 S.W.3d 570, 577 (Tex.App.-Austin 2000, no pet.).

ANALYSIS¹

¹ The factual allegations underlying appellants' request for injunctive relief against AMG are based upon appellants' contention that AMG's operation of the bar will result in a change in the use and character of the property, thus causing irreparable injury. The factual allegations underlying appellants' request for injunctive relief against Wright are based upon Wright's approval of the sublease of the first floor for use as a bar. The factual allegations in appellants' application for injunctive relief and the evidence presented at the hearing on the application relate exclusively to the alleged injury to appellants' property from the operation of the bar. Therefore, our discussion is dispositive

as to appellants' request for injunctive relief against both AMG and Wright.

*2 An application for injunctive relief is a request that the trial court exercise its equitable jurisdiction. *In re Gamble*, 71 S.W.3d 313, 317 (Tex.2002). Therefore, a temporary injunction is an extraordinary remedy that does not issue as a matter of right. *Walling*, 863 S.W.2d at 57. In determining whether to grant injunctive relief, a trial court must balance the equities of the parties and the resulting conveniences and hardships. See *City of San Antonio v. Vakey*, 123 S.W.3d 497, 501 (Tex.App.-San Antonio 2003, no pet.); see also *Winfield v. LaMoyné*, 05-94-01851-CV, 1995 WL 634161, *13-14 (Tex.App.-Dallas Oct. 16, 1995, writ dism'd by agmt.) (not designated for publication) (balancing equities in determining whether to issue injunction to enforce deed restrictions); *Townplace Homeowners' Ass'n v. McMahon*, 594 S.W.2d 172, 176 (Tex.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.) (same). This is especially true in the context of a request for a temporary injunction because a “temporary injunction is issued before the merits are decided, [and] the possibility of error exists in predicting the result of the trial.” See *NMTC Corp. v. Conarroe*, 99 S.W.3d 865, 868 (Tex.App.-Beaumont 2003, no pet.).

However, the fact that enforcing the restriction may cause the nonmovant greater injury than the movant does not compel denial of injunctive relief. See *Collum v. Neuhoff*, 507 S.W.2d 920, 924 (Tex.Civ.App.-Dallas 1974, no writ). The disproportion between the harm the injunctive relief causes and the benefit it produces must be of considerable magnitude to justify a refusal to enforce the restrictions. *Cowling v. Colligan*, 158 Tex. 458, 312 S.W.2d 943, 946 (1958); *Gunnels v. North Woodland Hills Cmty. Ass'n*, 563 S.W.2d 334, 338 (Tex.Civ.App.-Houston [1st Dist.] 1978, no writ).

Here, Gonzalez asserts a bar beneath his law offices will substantially and continually alter the premises for a use not permitted on the property. Gonzalez testified that, prior to the formation of the Cargo partnership in 1991, he leased part of the top floor for his office, and the bottom floor housed an art gallery and antique retail space. Gonzalez described his office as “basically an art-gallery type setting,” and he said it was important to have an art gallery under his office to maintain a good surrounding environment similar to his office.

When the bottom floor space became available, Gonzalez said he understood the space would be leased by Boudro's, a near-by restaurant, "to have people come in and wait for their tables and facilities to be ready. They would use it as an observation gallery...." He later learned Boudro's had not been able to obtain use of the bottom floor, and instead, AMG would lease the space for use as a bar. Gonzalez said the noise level is "unbearable" because the builders removed the sheetrock and insulation from the walls. Although the noise about which Gonzalez complained was all during the on-going construction work on the bottom floor, he speculated that if the bar employed as many as thirteen people, the noise would be "a real problem." Gonzalez said the value of his upstairs office space has been "totally destroyed" with a bar downstairs and he did not believe he could rent the second floor to any other professional services firm.

*3 The record shows that a prior tenant of the ground floor, an art gallery, often had exhibitions at which alcohol was served. This prior tenant also occasionally rented its space to Boudro's for dinner parties. Finally, tenants in adjoining buildings operate as both bars and restaurants. These neighboring tenants share a common courtyard with the entrance to Gonzalez's property.

About four months before the expiration of the prior tenant's sublease, Wright contacted a commercial real estate broker to locate another tenant. Wright testified he discussed the AMG sublease with Gonzalez before entering into the sub-lease, and he told Gonzales AMG would use the premises as a bar. At this time, Gonzalez expressed concerns about the operation of a bar. However, although the sublease was signed in early September, Gonzalez was not provided with a copy until he requested one on September 30th. Wright said he informed AMG about Gonzalez's concerns prior to September 30th. AMG's representative, Ruben Herrera, Jr., testified he was aware of Gonzalez's concerns about music and obstruction of the upstairs entry. Herrera said he did not personally speak with Gonzales about his concerns because the bar/lounge would not open until after 5:00 or 5:30 p.m. Further, the entrance to AMG's business will be on the other side of the building, entirely separate from Gonzalez's entrance. Because Herrera believed

Gonzalez's concerns had been addressed, he proceeded with his project.

Herrera testified that he became aware of the availability of a lease on the property in August, and he made it clear to Wright and the real estate broker that AMG intended to open "an art gallery and mix that with a bar/lounge." Herrera said he never saw the Carlise-Cargo lease, and he was not aware that Gonzalez wanted construction stopped. Therefore, as soon as the lease was signed in September, AMG immediately commenced the build-out process and design work. He anticipated opening in early December 2004, and was obligated under his financing arrangement to begin loan repayments in January 2005. Herrera anticipated gross revenue of approximately \$100,000 per month. Herrera said a curator hired by AMG has begun to book artists and shows, and bring in artwork for sale. By the time of the temporary injunction hearing, the evidence established that construction was almost seventy percent complete, with AMG having spent approximately \$148,000 in construction expenses.

Following the hearing, the trial court stated on the record that it would deny the request for injunctive relief. Among its reasons for doing so, the court cited its determination that the injunction would cause a loss to not only AMG and Carlise, but to the partnership as well. Under an abuse of discretion standard, we cannot overrule the trial court's decision unless the court acted unreasonably or in an arbitrary manner, without reference to guiding principles. *Butnaru*, 84 S.W.3d at 211. We also cannot substitute our judgment for the trial court's reasonable judgment even if we would have reached a contrary decision. *Id.* The trial court does not abuse its discretion if some evidence supports the trial court's decision. *Id.* Viewing the evidence in the light most favorable to the trial court's order, we hold the trial court could have concluded that a balancing of the equities favored denial of the application for temporary injunctive relief. We conclude the trial court did not abuse its discretion in denying the application for temporary injunction.

CONCLUSION

*4 We overrule appellants' issue on appeal and affirm the trial court's judgment.

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