

1620 HAWTHORNE LTD.,
Plaintiff

v.

MONTROSE MANAGEMENT DISTRICT,
Defendant

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

333rd JUDICIAL DISTRICT

OBJECTIONS BY DEFENDANT MONTROSE MANAGEMENT DISTRICT TO AFFIDAVIT OF ROBERT ROSE IN SUPPORT OF PLAINTIFF’S RESPONSE TO MONTROSE MANAGEMENT DISTRICT PLEA TO THE JURISDICTION

Defendant, Montrose Management District (“District”), files its objections to the Affidavit of Robert Rose submitted by Plaintiff in support of its Response to Montrose Management District’s Plea to the Jurisdiction.

I. BACKGROUND

On May 29, 2011, Plaintiff filed a response to the District’s plea to the Court’s jurisdiction and included an Affidavit of Robert Rose (“Rose Aff.”), which purported to repeat, apparently verbatim, most of the argumentation contained in Plaintiff’s Amended Petition and Response. The District objects to the Rose Affidavit for the reasons stated below.

II. AUTHORITY

The District bases its objections on the following well-settled principles of Texas procedural and evidentiary law applicable to summary judgment affidavits, because the Texas Supreme Court has analogized the procedure on a plea to jurisdiction to a summary judgment procedure:^{1/}

^{1/} *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

- To be competent, the evidence proffered must set forth such facts as would be admissible in evidence under the Texas Rules of Evidence.^{2/}
- Supporting affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.^{3/}
- Statements in an affidavit which are mere conclusions or which represent the affiant's opinion are insufficient.^{4/}
- An affidavit must set forth facts, not legal conclusions.^{5/}
- Conclusory statements in affidavits are not proper proof if there are no facts to support the conclusions. Put another way, a conclusory statement is one that does not provide the underlying facts to support the conclusion.^{6/}
- An affidavit of an interested party must be "clear, positive, direct, credible, free from contradiction and susceptible of being readily controverted."^{7/}

III. OBJECTIONS TO THE ROSE AFFIDAVIT

1. The District objects to the following portions of the Rose Affidavit which constitute unsupported factual and legal conclusions without any statement of admissible facts affirmatively showing that Rose is competent to testify about the matter:

- a. **Paragraph 9, which states "These Petitions, when added together, constituted more than 75% of the owners within MMD who were subject to the assessments of MMD."**

Rose provides no evidence affirmatively showing that he has personal knowledge of the total number of owners within the District subject to its assessment or the factual basis for his argumentative and self-interested conclusion.

^{2/} *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); TEX. R. CIV. P. 166a(f).

^{3/} TEX. R. CIV. P. 166a(f); *Ryland Group Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996).

^{4/} *Hall v. Rutherford*, 911 S.W.2d 422, 424 (Tex. App.—San Antonio 1995, writ denied).

^{5/} *Id.*

^{6/} *Nabigh v. Rizkallah*, 952 S.W.2d 580, 587 (Tex.App.—Houston [1st Dist.] 1997, no pet.); *1001 McKinney Ltd. v. Credit Suisse First Boston Mortgage Capital*, 192 S.W.3d 20, 27 (Tex.App.—Houston [14th Dist.] 2005, pet. denied).

^{7/} TEX. R. CIV. P. 166a(c).

- b. **Paragraph 9, which states “Moreover, these Petitions, when added together, constituted more than 75% of the assessed value of the property in the District based upon the most recent certified county property tax rolls.”**

Rose provides no evidence affirmatively showing that he has personal knowledge of the total assessed value of the property within the District subject to its assessment or the factual basis for his argumentative and self-interested conclusion that the petitioners “constituted more than 75%” of any such value.

In addition, to the extent that Rose claims that the Petitions constituted 75% of the total assessed value of the property in the District, it is demonstrably false as a factual matter. See Exhibit L to the District’s Plea, which quantifies in great factual detail that the petitions submitted comprised no more than 13.7% of that value.

To the extent that Rose is offering his disputed interpretation of Section 375.262(1) of the Texas Local Government Code, the statement is objectionable because it is a disputed legal issue for which a lay opinion is incompetent.

- c. **Paragraph 11, which states “Although the 75 percent requirement was met by the Petition to Dissolve, Defendant MMD refused, and continues to refuse, to dissolve.”**

Rose provides no evidence affirmatively showing that he has personal knowledge of the total assessed value of the property within the District subject to its assessment or the factual basis for his argumentative and self-interested conclusion that the petitioners “constituted more than 75%” of any such value.

In addition, to the extent that Rose claims that the Petitions constituted 75% of the total assessed value of the property in the District, it is demonstrably false as a factual matter. See Exhibit L to the District’s Plea, which quantifies in great factual detail that the petitions submitted comprised no more than 13.7% of that value.

To the extent that Rose is offering his disputed interpretation of Section 375.262(1) of the Texas Local Government Code, the statement is objectionable because it is a disputed legal issue for which a lay opinion is incompetent.

- d. **The portions of Paragraphs which allege that District improvements are “for the mutual benefit of many non-commercial property owners who were exempt from being assessed (§9); landscaping along the major thoroughfare in will have “benefit” “[t]ax exempt and non-paying residential individuals who own property within MMD . . . just as much as Plaintiff does” (§9); “only a subset percentage of the actual owners within an improvement district will bear the brunt of the tax that benefits everyone (§13).**

To the extent that Rose is offering his interpretation of what constitutes a “benefit” derived from District improvements, his statements are objectionable because they relate to a disputed legal issue for which a lay opinion is incompetent.

- e. **Paragraph 15, which states “[I]t is obvious that the 75 percent threshold clearly and unambiguously relates to 75 percent of the assessed value of the commercial properties within the District who have been assessed by the District, not by 75% of the owners within the geographical boundaries of the District who are not (and cannot ever legally be) assessed by the District but have been assessed by other instrumentalities of government”**

To the extent that Rose is offering his disputed interpretation of Section 375.262(1) of the Texas Local Government Code, the statement is objectionable because it is a disputed legal issue for which a lay opinion is incompetent.

- f. **Paragraph 14, which states “it is obvious that dissolution must be an option to those commercial landowners who are subject to the assessment and/or tax, such that 75 percent of that group may petition to obliterate the existence of the District if they so choose.”**

To the extent that Rose is offering his disputed interpretation of Section 375.262(1) of the Texas Local Government Code, the statement is objectionable because it is a disputed legal issue for which a lay opinion is incompetent.

- g. **Paragraph 16, which states that “not all of the owners who signed the petition in August 2009 were eligible to do so, as follows”**

Rose provides no evidence affirmatively showing that he has personal knowledge of the facts and circumstances of the petitioners in August 2009.

In addition, to the extent that Rose is offering his disputed interpretation of the legal sufficiency of the signature of any of those who signed the petitions, he is not competent to do so.

- h. **Paragraph 17, which states that “[p]rior to September 1, 2011, the only areas eligible to become and improvement district under 375.201 were those which existed in “an area devoted primarily to commercial development and business activities inside the boundaries of a municipality” and the statements that neither the West nor East Montrose Management Districts met those criteria because “this area was not devoted primarily to development and business activity.**

Rose is incompetent to opine about the applicability of a statutory section to the District. In fact, Section 375.201 is irrelevant to Plaintiff’s complaint,^{8/} and Section 375.021 is inapplicable to the District.^{9/}

- i. **Paragraph 18, in which Rose purports to make legal arguments concerning standing and the relief sought in this proceeding.**

Rose is incompetent to opine about either Plaintiff’s standing or its entitlement to relief.

- j. **Paragraph 18, in which Rose makes a series of conclusory and argumentative allegations that Plaintiff and other commercial property owners are subject to disparate and unequal treatment.**

Rose is incompetent to opine about these subjects.

- 2. **The statement in Paragraph 12 that “The purpose of an improvement district is to provide services and improvements to all property owners within the improvement district by taxing and/or assessing solely the owners of the commercial properties within its boundaries.”**

The purpose of the District is as stated in the special legislation enacted by the Texas Legislature and any purported “testimony” by Rose to the contrary is incompetent and lacks any legal foundation.

^{8/} Section 375.201 of the Texas Local Government Code, cited by Plaintiff in paragraphs 15 and 16(e) of the Petition is irrelevant to Plaintiff’s claims. That section concerns general obligation and revenue bonds. It appears that Plaintiff intended to refer to Section 375.021, which is also irrelevant here.

^{9/} Section 375.021, since repealed, does not apply to the District because the District was created by special legislation, not pursuant to a Chapter 375 petition under the Local Government Code. Section 375.021 purported to state certain requirements applicable to districts created under Chapter 375. That provision therefore is inapplicable to the legislatively-created District.

3. **The following hearsay statements:**
 - a. **Paragraph 9: “The persons signing the Petition for Dissolution were upset”**
 - b. **Paragraph 9: “Determined to eradicate what the signers believe”**
 - c. **Paragraph 13 regarding the purported motivation of non-commercial property owners in the District: “Their motivation is”**

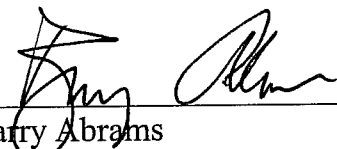
4. **The District also objects to the purely argumentative assertions which merely repeat the allegations in Plaintiff’s pleadings, specifically including the argument contained in the following paragraphs: 9, 11, 12, 13, 14, 15, 18.**

IV. CONCLUSION

For the reasons discussed above, the District requests that the Court strike the portions of the Rose Affidavit cited above and grant it such other and further relief, of any nature, to which it may be entitled.

Respectfully submitted,

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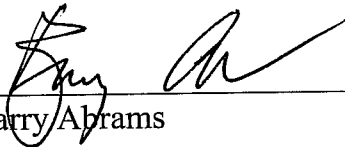
ATTORNEYS FOR DEFENDANT
MONTROSE MANAGEMENT DISTRICT

CERTIFICATE OF SERVICE

I certify that on May 31, 2012, I served a true and correct copy of the foregoing instrument on counsel of record, at the address and in the manner indicated below:

By Fax

Mr. Andy Taylor
ANDY TAYLOR & ASSOCIATES, P.C.
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Brenham, Texas 77833



Barry Abrams