Affirmed and Opinion filed April 6, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00494-CV

FRANCIS P. DOHERTY, Appellant

V.

THE OLD PLACE, INC., Appellee

On Appeal from the 412th District Court
Brazoria County, Texas
Trial Court Cause No. 42851

O P I N I O N

In this trespass to try title suit, appellant, Francis P. Doherty, appeals the summary judgment granted in favor of appellee, The Old Place, Inc. We affirm.

I. Background

On March 21, 1978, appellant and his wife were deeded 9.93 acres in Brazoria County, Texas. On April 3, 1978, appellant and his wife executed a deed conveying the 9.93 acres to appellant's five daughters, Mary Elizabeth Wisnoski, Annette Marie

Vavrecka, Kathleen Ann Doherty, Maureen Ann Doherty, and Estelle Anne Doherty.[1] The daughters subsequently formed appellee corporation and, on January 8, 1997, the daughters deeded the 9.93 acres to appellee.

In 1999, appellant filed suit against his daughters and appellee seeking, among other things, to set aside the deed to the daughters on the grounds of lack of consideration, fraud, and breach of fiduciary duty, as well as the subsequent deed conveying the property to appellee. Following a jury trial in November 2005, the trial court granted a directed verdict in favor of the daughters and appellee on appellant's claims of no consideration, fraud, and breach of fiduciary duty. Based on the jury's finding that appellant had delivered the deed to his daughters, the court rendered a take-nothing judgment against appellant and divested him of all right, title, and interest in the 9.93 acres. The court signed the final judgment on December 30, 2005. Appellant filed an appeal which was subsequently dismissed for want of prosecution due to appellant's failure to timely file a brief.[2]

On May 15, 2007, appellant filed the instant action in trespass to try title to real estate alleging that he had acquired title to the 9.93 acres through prior possession or, in the alternative, by adverse possession. Appellee filed no-evidence and traditional motions for summary judgment. On April 14, 2008, the trial court granted both motions. In its order, the court also granted appellee's requests for writ of possession against appellant barring him from entering the property and for a permanent injunction enjoining appellant from filing another lawsuit involving appellee or the property at issue.

[1] The deed was recorded on September 25, 1986.

[2] Thereafter, appellant filed a second suit naming four of his five daughters and appellee among the defendants. On March 14, 2007, the trial court signed an order sustaining the special exceptions filed by the daughters and appellee and dismissed them from the suit.

II. Standard of Review

To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Brown v. Hearthwood II Owners Ass'n*, 201 S.W.3d 153, 159 (Tex. App.—Houston [14th Dist] 2006, pet. denied). In reviewing a traditional summary judgment, we examine the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007). When a trial court's order granting summary judgment does not specify the grounds upon which it was granted, we will affirm the judgment if any of the theories advanced are meritorious. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

A no-evidence summary judgment will be granted when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003). In reviewing a no-evidence summary judgment, we apply the same standard, but consider only the evidence contrary to the motion. *See City of Keller v. Wilson*, 168 S.W.3d 802, 825 (Tex. 2005). When the motion for summary judgment presents both no-evidence and traditional grounds, appellate courts generally review the no-evidence grounds first. *See Kalyanaram v. Univ. of Tex. Sys.*, 230 S.W.3d 921, 925 (Tex. App.—Dallas 2007, pet. denied) (reviewing propriety of summary judgment under no-evidence standards of rule 166a(i) where motion presented both no-evidence and traditional grounds (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004))).

III. Analysis

In his first issue, appellant contends that the trial court erred in granting appellee's no-evidence motion for summary judgment because the motion failed to identify the elements of appellee's claims as to which there was no evidence. Appellant further argues that, even if appellee's motion is sufficient, appellant provided more than a scintilla of evidence to support his claims.

Under rule 166a(i), a no-evidence summary judgment motion must state the specific elements as to which there is no evidence; that is, it must not be general or conclusory. *See* TEX. R. CIV. P. 166a(i); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002). The purpose of the specificity requirement is to provide the non-movant with fair notice of the matters on which it must produce some evidence. *See Martin v. McDonnold*, 247 S.W.3d 224, 233 (Tex. App.—El Paso 2006, no pet.).

In its no-evidence motion, appellee stated that a plaintiff in a trespass to try title action "must establish any of the following: (1) title by recorded deed; (2) a regular chain of conveyances from the sovereign; (3) a superior title from a common source; (4) title by limitations; or (5) title by prior possession and not abandoned." Appellee then stated that "[appellant] was divested of 'all right, title and interest in and to the 9.93 acres' at issue in this suit by a court order entered on December 30, 2005. . . . [Appellant] has provided no evidence to support any required element of trespass to try title." We conclude that appellee's no-evidence motion was sufficiently specific in that it clearly identified the methods by which a plaintiff can prove title to land and appellee contended that appellant provided no evidence of any of these methods.

With regard to appellant's adverse possession claim, appellee stated in its summary judgment motion that a plaintiff must establish (1) actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another; and (2) under both the ten and twenty-five year statutes the real property must be held in peaceable and adverse possession by another who cultivates,

uses, or enjoys the property. Appellee defined "peaceable possession" as "possession of real property that is continuous and is not interrupted by an adverse suit to recover title." Appellee then stated "appellant cannot provide any evidence to support the required element of peaceable possession of the 9.93 acres at issue." Appellee's no-evidence motion clearly identifies peaceable possession as the element for which appellee provided no evidence. We therefore reject this portion of appellant's first issue.

Appellant next argues that the trial court erred in granting appellee's no-evidence motion because appellant provided more than a scintilla of evidence to raise a fact issue on the challenged elements. In both his summary judgment response and appellate brief, appellant points to his March 20, 2008 affidavit and accompanying exhibits attached to his no-evidence summary judgment response, and his second amended petition and accompanying exhibits, and concludes that these documents "collectively provide substantially more than a scintilla of evidence in support of [his] claims."[3] The exhibits, taken together, consist of (1) the March 1978 deed conveying the property to appellant and his wife; (2) the April 1978 deed conveying the property from appellant and his wife to appellant's five daughters; (3) the January 1997 deed conveying the property from the daughters to appellee; and (4) an affidavit executed by appellant on February 12, 2008.

Appellant's summary judgment evidence is insufficient to raise a genuine issue of material fact for several reasons. First, appellant's broad reference to his March 20, 2008 affidavit and exhibits as proof that there is more than a scintilla of evidence, without further explanation or argument, does not provide this Court with a clear indication about the evidence upon which he is relying. Appellant's statement fails to indicate as to which elements the documents raise a fact issue or even to which of appellant's claims—trespass

[3] Pleadings are ordinarily not considered competent summary judgment evidence. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). Thus, appellant's reliance on his second amended petition as summary judgment evidence is misplaced. However, the exhibits attached to his petition upon which appellant relies constitute competent summary judgment evidence. *See Mackey v. Great Lake Invests., Inc.*, 255 S.W.3d 243, 253 (Tex. App.—San Antonio 2008, pet. denied).

to try title or adverse possession—the evidence pertains. Broad conclusory statements are not valid summary judgment evidence. *See Velasquez v. Waste Connections, Inc*., 169 S.W.3d 432, 438 (Tex. App.—El Paso 2005, no pet.) (concluding that appellant's broad references to attached exhibits and deposition excerpts as proof of existence of genuine issues of material fact without further explanation or argument failed to rise to level of more than scintilla of evidence necessary to defeat no-evidence summary judgment).

Second, the March 20, 2008 affidavit attached to appellant's summary judgment response upon which he relies consists of conclusory statements without factual support. In his affidavit, appellant states as follows:

> I state further that I claim fee simple title to the 9.93 acres of land … through possession of said 9.93 acres of land, because I have possessed and used said 9.93 acres of land since that land was deeded to me and my wife on March 21, 1978 … and I have used, enjoyed, and possessed said 9.93 acres of land for my own use and benefit and have claimed said land as my own since March 21, 1978, without abandonment of such use and possession at any time. My prior possession of the 9.93 acres of land … commenced more than 29 years before the filing of the captioned lawsuit.
>
> In the alternative, I claim fee simple title to the 9.93 acres of land … by adverse possession, because I have occupied the Subject Property in peaceable and adverse possession and have used, enjoyed, and appropriated said 9.93 acres of land for my own use and benefit and have claimed said 9.93 acres of land as my own for more than twenty-five (25 years) before the filing of the captioned lawsuit …. My use and possession of the Subject Property … commenced on or before March 21, 1978, and has continued without abandonment until the present time.
>
> In the further alternative, I claim fee simple title to said 9.93 acres of land because I have possessed said 9.93 acres of land in peaceable and adverse possession and have used and appropriated said 9.93 acres of land for my own exclusive use and benefit and continuously have claimed that land as my own for more than ten (10) years next preceding the filing of the captioned lawsuit.

Appellant's statements that he claims "fee simple title" to the property based on his prior possession of the land without abandonment or, alternatively, his occupation of the land in peaceable and adverse possession are merely conclusory and unsupported by factual evidence. *See Mem'l Park Med. Ctr., Inc. v. River Bend Dev. Group, L.P.*, 264 S.W.3d 810, 819–20 (Tex. App.—Eastland 2008, no pet.) (concluding defendant failed to provide summary judgment evidence raising fact issue on affirmative defense of limitations where affidavit did not set forth statements of fact to support legal conclusion that defendant had exercised actual and visible appropriation of land for ten or more consecutive years). Conclusory statements without factual support are not credible, and are not susceptible to being readily controverted. *See* TEX. R. CIV. P. 166a(c); *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). These statements in appellant's affidavit do not constitute competent summary judgment evidence.

Third, the exhibits which appellant contends provide more than a scintilla of evidence of his claims appear to establish the exact opposite. Although the March 1978 deed conveying the 9.93 acres to appellant and his wife supports his claim that he was deeded the property on that date, the April 1978 deed conveying the property from appellant and his wife to appellant's five daughters, and the January 1997 deed conveying the property from the daughters to appellee, demonstrate that appellant has not held title to the property from April 1978 to the present. This evidence contradicts appellant's statements in his March 20, 2008 affidavit that he has continually possessed the property and claimed it as his own without abandonment from March 21, 1978 to the present. *See Chapman*, 118 S.W.3d at 750–51 (stating no-evidence summary judgment will be granted where evidence conclusively establishes opposite of vital fact).

Accordingly, the trial court did not err in granting appellee's no-evidence motion for summary judgment because appellant failed to present any evidence that created a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i). Issue one is overruled.[4]

IV. Conclusion

We affirm the judgment of the trial court.

/s/ Leslie Brock Yates
Justice

Panel consists of Justices Yates, Frost, and Brown.

[4] Because we find the trial court properly granted appellee's no-evidence motion for summary judgment, we need not address appellant's second issue challenging the granting of appellee's traditional summary judgment motion. *See Taylor v. Carley*, 158 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).