In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00326-CV

MICHAEL BRYER, Appellant

V.

THE WOODLANDS LAND DEVELOPMENT COMPANY, L.P., KWAW, LLC, MONTGOMERY COUNTY, WOODFOREST NATIONAL BANK, AND BRAZOS TRANSIT DISTRICT, Appellees

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On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 07-10-09934-CV

MEMORANDUM OPINION

In two issues, Michael Bryer challenges the trial court's judgment declaring an easement and the assessment of attorney's fees. We affirm the judgment of the trial court.

Bryer, The Woodlands Land Development Company, L.P. ("Woodlands"), KWAW, LLC ("Keller"), Montgomery County, Woodforest National Bank ("Woodforest"), and Brazos Transit District ("Brazos"), are owners or lienholders of property in the Isaac Mansfield Survey in Montgomery County, Texas. Bryer owns a

4.000 acre tract known as "Drill Site No. 3." Montgomery County owns a 4.000 acre tract known as the "Library Tract." Keller owns a 1.422 acre tract adjacent to the Library Tract. Woodforest financed Keller's purchase. Woodlands owns a tract of land adjacent to the Library Tract and Drill Site No. 3. The parties acquired their property interests through predecessors in common title Champion Realty Corporation ("Champion") and Land Locators of Texas, Inc. ("Land Locators"). Bryer contends that he holds a 30′ express easement over the Keller and Library Tracts through a deed from Champion to Land Locators. Champion retained the right to relocate the easement granted in the deed to Land Locators. Appellees contend that Woodlands purchased that right and relocated the easement to a new location on the Woodlands tract with direct access to Ashlane Way, a public road adjacent to the tracts owned by Woodlands, Montgomery County, and Keller.[1] Bryer contends the trial court erred in making a declaratory judgment that Bryer has no ingress or egress rights, express or implied, other than the easement relocated by Woodlands.

Prior to the conveyance to Land Locators in 1978, Champion executed a "Limited Surface Waiver Agreement and Easement" in which Malvolene B. Speed and other mineral interest owners of 1670 acres in the Isaac Mansfield and other surveys (collectively "Speed") relinquished their surface rights to Champion and reserved a 40′

[1]Woodlands filed a brief that Montgomery County, Keller, and Woodforest adopted. Brazos neither filed a brief nor adopted the brief filed by Woodlands. For ease of reference we refer collectively to the appellees in the body of this Opinion, but we are actually referring to the parties who filed or adopted Woodlands's brief. **(AeeBr 20-25)**

non-exclusive right of way for ingress and egress as an easement appurtenant. Bryer contends this easement was not reserved in any instrument in Bryer's chain of title and that the Speed Agreement created an inchoate easement right that came into being with the execution of the deed to Land Locators. Bryer also contends that the 40′ easement was shown on a plat of the Village of Sterling Ridge and thereby became dedicated to public use. Appellees contend that the deed to Land Locators made the conveyance subject to the Speed Agreement, which burdened Bryer's predecessor in title and created no easement rights to Bryer's benefit. Appellees also contend that the Sterling Ridge plat did not affect a public dedication because Woodlands did not own the property at issue at the time of the dedication and there is no evidence Montgomery County accepted a public easement.

Land Locators conveyed Drill Site No. 3 as part of a larger conveyance to La Cour du Roi, Inc., Defined Benefit Investment Fund Pension Plan ("LCdR Plan"). LCdR Plan conveyed the property to La Cour du Roi, Inc. ("LCdR"). LCdR conveyed Drill Site No. 3 to Bryer in 2006. Bryer contends that LCdR sold all of the property affected by Bryer's easement claim by reference to an unrecorded map of Indian Hills Subdivision and that the subsequent owners were put on notice of the 60′ easement depicted on the unrecorded map of Indian Hills Subdivision. Appellees contend Bryer cannot assert an implied easement because he possesses access to Drill Site No. 3 through an express easement, and that Bryer cannot assert an easement by reference because LCdR conveyed out all of

the subject property before Bryer purchased Drill Site No. 3. We shall address the parties contentions in light of the summary judgment standard.

Bryer sought a traditional summary judgment on two claims asserted in Woodlands's petition for declaratory judgment. First, Bryer contended that as a matter of law Woodlands did not have a right to relocate the 30′ easement. Second, Bryer contended that as a matter of law his property enjoys the benefit of a 30′ easement along the mid-point of the boundary between the Library Tract and the Keller Tract. Keller sought a no-evidence summary judgment on Bryer's claims for separate 30′, 40′, and 60′ easements through Keller's property. Woodlands and Montgomery County sought traditional summary judgment declaring that, due to the relocation of the 30′ easement created in the Land Locators deed, Bryer's 30′ easement access claim on the Montgomery County/Keller boundary had been extinguished. They also sought traditional summary judgment on all of Bryer's claims to an easement through the Library Tract and the Keller Tract.

A no-evidence motion for summary judgment "is essentially a motion for a pretrial directed verdict." *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). The nonmoving party must present evidence raising an issue of material fact as to the elements specified in the motion. *Id.* at 582; *see also* TEX. R. CIV. P. 166a(i). "We review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence

favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Id.* In a traditional motion for summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). "An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented." *Goodyear Tire & Rubber Co. v. Mayes,* 236 S.W.3d 754, 755 (Tex. 2007). "On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law." *City of Garland v. Dallas Morning News,* 22 S.W.3d 351, 356 (Tex. 2000). "When the trial court grants one motion and denies the other, the reviewing court should determine all questions presented" and "render the judgment that the trial court should have rendered." *Id.* at 356. "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). Likewise, "a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response." *Stiles v. Resolution Trust Corp.,* 867 S.W.2d 24, 26 (Tex. 1993). The construction of an unambiguous deed is a question of law. *Altman v. Blake,* 712 S.W.2d 117, 118 (Tex. 1986). A court will interpret a deed to ascertain the intent of the parties as expressed within the four corners of the instrument. *French v. Chevron U.S.A. Inc.,* 896 S.W.2d 795, 797 (Tex. 1995).

Bryer moved for summary judgment to establish a 30′ express easement from Drill Site No. 3 to Ashlane Way through the common boundary of the Library Tract and the Keller Tract as an "appurtenant right to access FM 2978 via the 30′ roadway described in the Land Locators deed." The grant of an express easement requires that "the intent of the parties, the essential terms of the easement, and an adequate description of the easement's location must be apparent from the face of the document, without reference to extrinsic evidence." *Cummins v. Travis County Water Control and Improvement Dist. No. 17*, 175 S.W.3d 34, 51 (Tex. App.--Austin 2005, pet. denied).

Bryer recites a section of the Restatement for the proposition that the rights and obligations appurtenant to property devolve to the separate owners upon subdivision. *See* RESTATEMENT (3D) OF PROPERTY (SERVITUDES) § 5.7 (2000). Champion conveyed to Land Locators a 181.467 acre tract "[t]ogether with the non-exclusive right of ingress and egress over existing roadways" and recites that "in connection with the above-described use of the private roadway owned by Grantor and Champion International Corporation, that Grantor and Champion International Corporation shall reserve the right to relocate such roadway so long as ingress and egress to and from FM 2978 . . . is made available to the Grantee. . . ." A map attached to the deed depicted existing roads at the time of conveyance. The express easement granted in the Land Locaters deed burdened the land Champion retained after the conveyance, not the 181.467 acre tract conveyed in fee to Land Locators. This is evident because Champion was the grantor, Land Locators was

the grantee, and the deed expressly burdens the land on which the private road owned by Champion was located. Title in fee simple to the Library Tract and the Keller Tract were conveyed to Land Locators in the deed from Champion; accordingly, the express easement granted by the Land Locators deed does not describe the Library and Keller Tracts. Thus, the express easement that devolved to Land Locator's successors in title benefitted but did not burden the Library and Keller Tracts.

Bryer also filed a motion for summary judgment declaring that Woodlands did not possess a right to relocate the easement described in the Land Locators deed. Relying on the precedent established by *Meredith v. Eddy,* Bryer asserted that an established easement cannot be relocated without the consent of the holder of the dominant estate. *See Meredith v. Eddy,* 616 S.W.2d 235, 240-41 (Tex. Civ. App.--Houston [1st Dist.] 1981, no writ) ("Once the location of a way of necessity is established, its location may be changed only with the expressed or implied consent of both parties."). Bryer argued that appellees, as owners of the dominant estate, could not relocate the easement without the consent of Bryer as another owner of the dominant estate. Woodlands did not assert the right of relocation through the interest it acquired through Land Locators: instead, Woodlands asserts that it acquired the rights of Champion expressed in the Land Locator's deed through an assignment effective December 1, 2007.

The motion for summary judgment filed by Woodlands and Montgomery County asserted that as a matter of law Woodlands had acquired and partially exercised

Champion's right to relocate the express easement granted to Land Locators and its successors in title in the Land Locators deed.[2] The movants supported their motion with a copy of an assignment from Champion to Woodlands and a "Declaration of Partial Roadway Relocation" in which Woodlands, joined by Montgomery County and Keller, relocated the Champions easement to a new 0.500 acre tract. This tract is owned by Woodlands and connects Drill Site No. 3 to Ashlane Way. In his reply to the motion for summary judgment, Bryer argued that the relocation was ineffective because the right of relocation lapsed prior to its assignment and no relocation could ever occur within the dominant estate. On appeal, Bryer contends that the relocation was unlawful.

First, Bryer argues that under *Meredith v. Eddy* an easement may not be relocated without the consent of the owner of the dominant estate. *See Meredith v. Eddy*, 616 S.W.2d at 240-41. That case concerned an easement by necessity. *Id.* Once an easement by necessity is established by use, it may not be relocated without consent of the holder of the dominant estate. *Id.* The 30′ easement asserted by Bryer is an express easement, not an easement by necessity, and when considering its terms we will apply the ordinary rules applicable to the construction of contracts. *See Marcus Cable Assoc., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002). An express easement is governed by the intent of the parties expressed within the four corners of the instrument that created the

[2] Keller's no-evidence motion for summary judgment also asserted that any easement over the Keller tract had been extinguished and that the easement granted in the deed to Land Locators had been relocated. On appeal, Bryer concedes that this issue may be determined as a matter of law. According to Bryer, motions and cross-motions for summary judgment seeking declaratory judgment were filed on all easement issues.

easement. *Bennett v. Tarrant County Water Control and Imp. Dist. No. One*, 894 S.W.2d 441, 446 (Tex. App.--Fort Worth 1995, writ denied). "When an easement is susceptible to only one reasonable, definite interpretation after applying established rules of contract construction, we are obligated to construe it as a matter of law even if the parties offer different interpretations of the easement's terms." *Krohn*, 90 S.W.3d at 703.

The Land Locators deed established the conditions under which the easement could be relocated. Champion reserved the right to relocate the roadway on which it had granted the easement "so long as ingress and egress to and from FM 2978 to the subject property is made available to the Grantee []such ingress and egress to be by right-of-way at least thirty (30) feet in width which shall not interfere with the orderly development of the above-described property."

Bryer concedes that except for him all of the owners of the subject property have access to FM 2978 through public roadways, that the easement is irrelevant to the other owners' access to a public road, and that the dispute concerns only Bryer's easement rights to access Ashlane Way. The 40′ access easement described in the "Declaration of Partial Roadway Relocation" provides access from Drill Site No. 3 to Ashlane Way. Thus, the relocated easement satisfies the condition expressed in the Land Locators deed: that the relocated roadway make available ingress and egress to FM 2978.

In his response to the motion for summary judgment Bryer argued that the easement could not be relocated within the 181.467 acre tract because that was the

dominant estate conveyed in the Land Locators deed. We note that the Library and Keller tracts also lie within the 181.467 acre Land Locators Tract. Moreover, at the time Woodlands relocated the roadway, Drill Site No. 3 had been severed from the servient estate created by the new instrument. Because the dominant and the servient estates were held by different owners, the appurtenant easement benefitting Drill Site No. 3 could not merge with the fee owned by Woodlands. *See Long Island Owner's Ass'n, Inc. v. Davidson,* 965 S.W.2d 674, 686 (Tex. App.--Corpus Christi 1998, pet. denied) ("An easement appurtenant is extinguished when unity of title is effected because a landowner cannot have an easement in his own land.").[3]

Bryer's motion for summary judgment concedes that Champions transferred its right to relocate the express easement in the Land Locator's deed to Woodlands, but contends that as a matter of law the assignment of that right was unlawful because Champion's power to relocate the easement is personal and not assignable. Bryer relies upon *Reagan National Advertising of Austin, Inc. v. Capital Outdoors, Inc.* for supporting authority. *See Reagan Nat'l Adver. of Austin, Inc. v. Capital Outdoors, Inc.* 96 S.W.3d 490, 496 (Tex. App.--Austin 2002, pet. granted, judgm't vacated w.r.m.). That case concerned a restrictive covenant contained within an expired billboard lease. *Id.* at 492. Noting that the former lessee was not arguing that the lease created an easement appurtenant, the appellate court held that because the former lessee did not retain any

[3] Bryer's response to the motion for summary judgment also contended that the relocated roadway would interfere with orderly development of the property, but he has not raised that argument on appeal.

interest in land that could benefit from the provision in the lease that prohibited landowner from leasing the land to any other advertiser for five years, as a matter of law the former lessee could not impose an equitable servitude on the premises. *Id.* at 495. The case before this Court concerns an easement, and the rights and obligations are governed by the instrument itself. *See Krohn*, 90 S.W.3d at 700-01.

Bryer relies upon Section 5.7(1) of the Restatement to support his position that each owner of a subdivided tract succeeds to the easement rights of the original owner. *See* RESTATEMENT (3D) OF PROPERTY (SERVITUDES) § 5.7. Champion's right to relocate the roadway related to the burden created by the express easement created by the Land Locator's deed, not the benefit created by that instrument. Section 5.7(4) of the Restatement provides that each separately owned parcel remains subject to the burden imposed by the servitude to the same extent as it was prior to the subdivision; provided, however, that "if the burden consists of acts that need not be performed on a specific part of the land, the obligation to perform the covenant is appropriately apportioned among the parcels." *Id.* So long as the road remained in its original position, the burden would be apportioned among the owners of the subdivided servient estate. *See id.* The subdivided land would remain burdened unless the roadway was relocated pursuant to the terms of the instrument that created the easement. Significantly, the Land Locators deed neither requires that the position of the roadway become fixed upon subdivision nor prohibits a third party from assuming Champion's obligation to provide a roadway to FM

2978. Although Bryer contends that the right to relocate the roadway must have been extinguished by the subdivision of the servient estate, the Land Locators deed placed no limitation on the exercise of that right. Bryer contends the continued existence of a right of relocation after subdivision of the servient estate necessarily depends upon continued ownership of the servient estate. We disagree. A grantor who subdivided tracts would continue to be interested in the orderly development of the subdivision, especially in light of the potential for liability regarding obligations incurred and representations made in the course of subdividing the property. In this case, the parties' continuing interest in the subdivided property is indicated by the express requirement in the Land Locators deed that the relocated roadway "shall not interfere with the orderly development of the above-described property."

The express easement created by the Land Locators deed was subject to relocation by Champion, and that right to change the location of the servient estate was neither limited by the passage of time or by subdivision or alienation of the servient estate, nor was Champion's power to relocate the easement expressly unassignable. Moreover, the Land Locators deed provided that the roadway could be relocated to another location that provided ingress and egress to FM 2978 and did not limit the situs of the relocated roadway to property owned by Champion at the time of the original conveyance. We hold that the trial court did not err by declaring that Bryer's ingress and egress rights to

Drill Site No.3 are described in a metes and bounds description of the 0.500 acre tract in the "Declaration of Partial Roadway Relocation."

Bryer also claims easement rights pursuant to the "Limited Surface Waiver Agreement and Easement" in which the mineral interest owner, Speed, relinquished the mineral interest owners' surface rights and reserved a 40′ non-exclusive right of way for ingress and egress as an easement appurtenant. Bryer contends the Speed Agreement created easement rights that were not reserved in any instrument in Bryer's chain of title. Although Champion owned the fee at the time the agreement was executed, Bryer contends the Land Locators deed effectively severed the property interests and allowed the easement rights to vest in Land Locators and its successors in title. Bryer's right to claim a 40′ easement through the Speed Agreement was challenged in the traditional motion for summary judgment filed by Woodlands and Montgomery County and the no-evidence motion for summary judgment filed by Keller.

In the Speed Agreement, Speed as grantor relinquished surface rights to Champion as grantee and surface estate owner of Speed's 1670 acre tract and an adjoining 846.608 acre tract. Speed waived ingress and egress on the surface but excepted two reservations of significance in this case. First, Speed reserved the right to use any and all of the surface of six 4-acres Surface Tracts for any purpose including drilling. Drill Site No. 3 is one of the six Surface Tracts in which Speed retained surface rights. Second, Speed reserved a right of way for ingress and egress to and from the Surface Tracts, and

provided that "[s]aid Road Right-of-Way shall be for the benefit of and as an easement appurtenant to any or all of said six (6) Surface Tracts, or any portion thereof." The agreement provided that "Grantors, their successors and assigns and Grantees, their successors and assigns, shall have the non-exclusive right to use such Road Right-of-Way as a means of ingress and egress to their respective tracts."

Bryer concedes that Champion cannot create an easement for itself in property it owns. Relying on *State v. Japage Partnership,* Bryer argues that the Speed Agreement created a reserved easement that became effective immediately upon subdivision of the property in the Land Locators deed. *See State v. Japage P'ship*, 80 S.W.3d 618, 622-23 (Tex. App.--Houston [1st Dist.] 2002, pet. denied). *Japage* was a condemnation case in which a party asserted an ownership interest in the appurtenant parking and access rights in its condemned property through a "Reciprocal Easement and Operating Agreement" between its predecessor in title and the adjoining landowner. *Id.* at 619. For the first time on appeal, the State argued that because the predecessor in title was the general partner of the adjoining landowner, unity of ownership prevented creation of the reciprocal easement because all of the land at issue was owned by Japage's predecessor in title. *Id.* at 622. The appellate court held the reciprocal easements took effect immediately upon the partition of the property, so that Japage could have reasonably relied upon the existence of the easements when it purchased the property. *Id.* at 623. The agreement in *Japage* concerned the owners of adjacent tracts and the unity of

ownership issue arose from the fact that the owner of one tract was the general partner of the owner of the other tract. *Id.* at 622. Here, the Speed Agreement was between two unrelated parties, Champion and Speed, who held different estates in the same real property. Such an agreement is construed under general contract principles. *Krohn,* 90 S.W.3d at 700. Any easement created by the agreement is governed by the intent of the parties expressed within the four corners of the document. *Bennett,* 894 S.W.2d at 446.

An examination of the Speed Agreement as a whole demonstrates that it was not the parties' intent to create an inchoate easement that would be effective upon subdivision of the estate belonging to one of the parties to the agreement. Bryer contends the Speed Agreement granted an appurtenant easement to the "surface tracts" which included Drill Site No. 3. As used in the Speed Agreement, however, "Surface Tracts" refers to the surface rights reserved by the mineral interest owners rather than to surface interests owned by Champion. The Speed Agreement reserves the mineral interest owners' right to ingress and egress as an easement appurtenant and the language in the agreement regarding use of the right of way by the grantee and its successors and assigns merely recognizes that the right-of-way reserved by Speed is nonexclusive and that the agreement binds the parties' successors and assigns. Champion and its successor Land Locators exercised a non-exclusive right-of-way by virtue of their ownership of the fee, not an easement granted by Speed. Accordingly, Bryer does not hold the dominant estate under the Speed Agreement.

In his responses to the motion for summary judgment filed by Woodlands and Montgomery County, Bryer claimed that a plat recorded by Woodlands on September 6, 2007, created a 40′ dedicated easement on the border of the Library and Keller tracts because the plat depicted such an easement and included language that a dedication for public use was intended. Woodlands conveyed the Library Tract to Montgomery County on August 13, 2003. Keller acquired its tract on June 13, 2007. Thus, when Woodlands filed the plat on September 6, 2007, it was not the record title holder of any part of the property that Bryer contends Woodlands dedicated to public use by filing the plat. A dedication to public use must be the act of the landowner; that is, the party who holds fee simple title to the dedicated property. *Broussard v. Jablecki,* 792 S.W.2d 535, 537 (Tex. App.--Houston [1st Dist.] 1990, no writ). Because Woodlands was not the fee owner of the property at issue in this appeal on the date the plat was filed, the plat did not create an enforceable easement right in Bryer. Accordingly, the trial court did not err in failing to declare that Bryer holds a 40′ easement running through the border of the Library and Keller tracts.

Bryer also contends that he enjoys the benefit of a 60′ easement running along the border between the Library and Keller tracts because a developer, LCdR, sold the affected property by reference to an unrecorded map of Indian Hills Subdivision, so that subsequent owners were on notice that an easement might be outstanding.

In his response to the motions for summary judgment filed by Woodlands, Montgomery County, and Keller, Bryer submitted his own affidavit in which he stated that "[f]rom the 1970's through the 1980's, [LCdR], Inc. sold lots in the Indian Hills Subdivision. I assisted in these sales. The lots were sold in reference to the Indian Hills Subdivision Map and related Muzzy Survey notes." Bryer's summary judgment response contends that "Mr. Bryer worked for the developer and sold the lots by reference to the map" and that "Mr. Bryer, a salesman for the developer, is competent to authenticate the unrecorded development map used in the sales." On appeal, Bryer contends that three deeds executed in 1985 demonstrate that the relevant tracts were conveyed with reference to the map in question.

First, Bryer argues that the deed from Land Locators to LCdR referred to the unrecorded map, thus putting subsequent purchasers Woodlands and Bryer on notice that prior purchasers had been shown a map with a 60′ easement when they purchased the property. In the LCdR deed, the conveyed property is described as "Tracts 79, 80, 98 and Drill Site #3 out of the Isaac Mansfield Survey A-344, Montgomery County, Texas," and the attached metes and bounds descriptions of the four tracts does not mention Indian Hills Subdivision. Thus, the deed could not have put subsequent purchasers on notice of the existence of the unrecorded map of Indian Hills Subdivision. Furthermore, the developer that Bryer claims sold lots in Indian Hills Subdivision with reference to the unrecorded map was the grantee LCdR and not the grantor Land Locators.

Bryer argues that the deed from LCdR Plan to Silvestre Salazar was also made with reference to Indian Hills Subdivision and therefore put Salazar's successors in title, Keller and Brazos, on notice that prior purchasers had been shown a map with a 60′ easement when they purchased the property. That deed describes the property, as "[a] tract of land out of a 2350 Acre Tract, more or less, a part of the Alexander Smith Survey, A-499, the Dickinson Garrett Survey, A-224, and the Isaac Mansfield Survey, A-344, Montgomery County, Texas" and contains a metes and bounds description that does not refer to the unrecorded map of Indian Hills Subdivision. This deed refers to another deed, from LCdR to LCdR Plan, but neither the general description nor the metes and bounds description for Tract 81A in the Salazar deed refers to the unrecorded Indian Hills Subdivision map. Thus, the deed could not have put subsequent purchasers on notice that the purchaser had been shown the unrecorded map of Indian Hills Subdivision.

The deed that Bryer contends demonstrates that Montgomery County purchased the property with notice that LCdR sold property to a predecessor in title of Montgomery County with reference to the unrecorded map of Indian Hills Subdivision is a deed from Bruce Larson, Trustee and Beau S. King to Redell Green. This deed executed on January 30, 1985, described the property in part as "Lot 99, of INDIAN HILLS, an unrecorded subdivision[.]" Bryer's affidavit refers to Larson and King as "agents of [LCdR]" but the Green deed does not state that Larson and King were acting on behalf of LCdR when they executed the deed. The recitals in the Green deed do not put subsequent purchasers

on notice that LCdR was selling lots with reference to the unrecorded map of Indian Hills Subdivision.

Bryer claims an easement arose pursuant to the precedent established by *Dykes v, City of Houston* and *City of San Antonio v. Olivares.* *See City of San Antonio v. Olivares,* 505 S.W.2d 526, 530 (Tex. 1974); *Dykes v. City of Houston,* 406 S.W.2d 176, 181 (Tex. 1966). Those cases concern situations in which private easement rights are acquired in public roads.

In *Dykes,* the City erected a barricade at the point where an improved street ended and a part of the street that had never been opened by the City began. *Dykes,* 406 S.W.2d at 178-79. Dykes sued the City to have the barricade removed and the way kept open. *Id.* The City argued that because the street had never been opened, the City was not required to obtain a release or condemn Dykes's property. *Id.* at 180. The court reasoned that when Dykes purchased his lot with reference to the subdivision plat, he immediately acquired private rights of easement over the streets shown on the plat as abutting his land whether or not the streets were ever accepted or opened by the City. *Id.* at 181. The City had the power to decide whether to open the street, but it was required to follow the statutory procedure for closing a street. *Id.* at 182-83. The court noted that Dykes owned the fee simple title in the property to the center of the street, nevertheless his rights and title were subject to the valid exercise of the City's police power. *Id.* at 182-83. Thus,

the court held that city ordinances required that Dykes request consent from city council to open the easement himself. *Id.*

Olivares concerned an alleyway dedicated for public use that the City closed to accommodate improvements constructed by a bank over the objections of a hotel operator who complained that the closure impaired his access to a particular street. *Olivares*, 505 S.W.2d at 527-28. The hotel operator's lease referred to a map that showed the closed alleyway to have been a public street since the 1800's. *Id.* at 529-30. Citing *Dykes*, the court noted that "This Court has consistently held that the conveyance of land by reference to a map or plat, upon which lots and streets are laid out, results in the purchaser or one holding under him, acquiring by implication a private easement in the alleys or streets shown on the plat." *Id.* at 530. The court recognized that abutting property owners have private rights in existing streets and alleys in addition to those rights held in common with the general public. *Id.* Because a newly dedicated alley provided access to a different public street, however, the court decided that the hotel operator's complaint concerned "circuity of travel, not access" and held as a matter of law that access to the hotel was not materially and substantially impaired by the closing of the public alleyway. *Id.*

Dykes cited *Drye v. Eagle Rock Ranch, Inc.* for the proposition that when a purchaser acquires an easement by virtue of having been shown a map that depicts a street, "[t]he right acquired by the purchaser is a private easement over those areas set

aside and designated as public ways, and this right attaches immediately upon his purchase of the property." *Dykes,* 406 S.W.2d at 181; *see also Drye v. Eagle Rock Ranch, Inc.,* 364 S.W.2d 196 (Tex. 1962). In *Drye,* purchasers of lots in a failed subdivision sought declaratory judgment establishing easements for pleasure and recreation across an adjacent ranch owned by the seller's alter ego. *Drye,* 364 S.W.2d at 198-201. The court considered whether the purchasers acquired rights by private dedication, by implied easements appurtenant, or by estoppel. *Id.* at 203-11. The court rejected the purchasers' argument regarding the creation of an easement by implication because the recreational easement was not necessary to the use of the dominant estate. *Id.* at 208.

The court then considered whether estoppel in pais should apply. *Id.* at 209. The court noted that easement by estoppel usually arises in cases concerning the dedication of a street. *Id.* According to *Drye,* the doctrine has been used in situations in which the owner sells land with reference to a map or plat on which streets are depicted. *Id.* at 210. When a purchaser, acting in reliance on the representations, "buys with reference thereto and spends money to make improvements, the seller will not be heard to say that such easements do not exist." *Id.* The *Drye* court found the particular easement in that case to have been too indefinite to be enforceable. *Id.* at 211.

Bryer's deed does not refer to the map of Indian Hills Subdivision, but he argues that "the sale, in which a map showing the tract with a roadway easement [is shown to the

purchaser], creates the easement, and the reference in the deed's description of the land merely puts subsequent owners such as Appellees on notice." Keller raised this element in its no-evidence motion for summary judgment, in which Keller contended that Bryer could produce no evidence supporting the first and third elements of Bryer's claim of an easement pursuant to *Dykes*. *See Dykes*, 406 S.W.2d at 181 ("[1] if one owning land, exhibit a map of it, [2] on which a street is defined, though not as yet opened, [3] and building lots be sold by him, with reference to a front or rear on that street, this operates as an immediate dedication of the street; and the purchasers of lots have a right to have the street thrown open forever.") (quoting *Oswald v. Grenet*, 22 Tex. 94, 100 (1858)).

This is clearly a claim of easement by estoppel, which is an equitable doctrine that prevents a wrongdoer from benefitting from his conduct. *See Oswald*, 22 Tex. at 102 ("The principle upon which the binding and irrevocable nature of a dedication rests, appears to be this: that when once a way, street, etc., has been laid out on the soil, or on a map, and property has been purchased in reference thereto, the resumption of the street, or way, by the proprietor, would be an act of bad faith, and a fraud upon any interests acquired upon the faith of its being left open."). Bryer contends he established that lots were sold by LCdR with reference to the unrecorded map of Indian Hills Subdivision because he worked for LCdR and assisted in those sales. Thus, he contends that a sale by agents of LCdR to Salazar put Keller on notice of an easement across Keller's property because another agent of LCdR, Bryer, showed the map to unidentified purchasers in the

subdivision. Unlike *Oswald,* in this case it is not the purchasers and their successors in title who are seeking to estop the seller from reclaiming land that had been dedicated to public use, but the agent of the seller who is seeking to impose an easement on the property of others based upon his own conduct. Under these circumstances, estoppel in pais will not lie to allow the seller to impose an easement on the purchaser. *See generally, Inimitable Group, L.P. v. Westwood Group Development II, Ltd.,* 264 S.W.3d 892, 903 (Tex. App.--Fort Worth 2008, no pet.); *Roberts v. Clark,* 188 S.W.3d 204, 213 (Tex. App.--Tyler 2002, pet. denied)("A person may not assert estoppel for the purpose of shielding himself from the results of his own dereliction of duty."); *Douglas v. Aztec Petroleum Corp.,* 695 S.W.2d 312, 317-18 (Tex. App.--Tyler 1985, no writ). ("[Estoppel] is for the protection of the innocent, and only the innocent may invoke it.").

As a matter of law, Bryer possesses no rights of ingress and egress upon the Library and Keller Tracts. The trial court did not err in granting Appellees' motions for summary judgment, denying Bryer's motions for summary judgment, and declaring the location of Bryer's easement on the Woodlands Tract. We overrule issue one.

Issue two contends that the declaratory judgment and award of attorney's fees should be reversed and remanded "[t]o the extent that the trial court erred in its summary judgment rulings[.]" *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 2008). Having ruled that the trial court did not err in declaring judgment against the appellant

and in favor of the appellees, we overrule issue two and affirm the judgment of the trial court.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on June 3, 2010
Opinion Delivered September 9, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.