In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00524-CV

THE MANSIONS IN THE FOREST, L.P. AND THE ESTATES–WOODLAND, L.P., Appellants

V.

MONTGOMERY COUNTY, TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Montgomery County, Texas
Trial Cause No. 07-08-08150 CV

MEMORANDUM OPINION

Montgomery County filed a petition in condemnation seeking to acquire portions of property owned by The Mansions in the Forest, L.P. ("The Mansions") and The Estates-Woodland, L.P. ("The Estates"). The special commissioners found the fair market value of the property to be $345,215, and the trial court granted the County's motion for writ of possession. Appellants objected to the award on grounds that it fell below market value. The County filed a combined motion for no-evidence summary judgment and traditional summary judgment. In response, appellants provided the

affidavit of Matthew Hiles, Vice President of The Mansions and The Estates. Hiles opined that the total amount for just compensation and diminution in the fair market value of the property exceeded $800,000. The County objected to Hiles's affidavit and the trial court excluded the affidavit, granted the County's traditional summary judgment motion, awarded fee simple title to the County, and awarded $326,215 to appellants. Appellants appealed the trial court's decisions to exclude Hiles's affidavit and grant summary judgment.

On original submission of this case, the County argued, for the first time on appeal, that Hiles's affidavit was invalid for lack of an oath or jurat and an averment that the facts are "true and correct." *Mansions in the Forest, L.P. v. Montgomery Cnty.*, 365 S.W.3d 356, 358 (Tex. App.—Beaumont 2010) (mem. op.), *rev'd*, 365 S.W.3d 314 (Tex. 2012). We held that the lack of a jurat could be raised for the first time on appeal, that Hiles's affidavit was invalid, and that the trial court did not abuse its discretion by excluding the affidavit or granting the County's summary judgment motion. *Id*. at 358-59. The Texas Supreme Court reversed our judgment and held:

> [N]either the Government Code nor Rule 166a requires such an affidavit to contain a jurat. When the record lacks any indication that a purported affidavit was sworn to by the affiant, however, the written statement is not an affidavit under the Government Code, but such a defect is waived if not raised in the trial court.

Mansions in the Forest, L.P. v. Montgomery Cnty., 365 S.W.3d 314, 315 (Tex. 2012). The Supreme Court remanded the case for further proceedings. *Id.* On remand, we

consider appellants' other arguments supporting their contentions that Hiles's affidavit was improperly excluded and summary judgment was improperly granted. We affirm the trial court's judgment.

In three issues, appellants contend that the trial court improperly excluded Hiles's affidavit because (1) a landowner may testify to the fair market value of his property; (2) as the representative of a named party, Hiles was not required to be designated as a witness, the County was not unfairly surprised or prejudiced by Hiles's testimony, and exclusion of Hiles's affidavit constitutes an impermissible death-penalty sanction; and (3) Hiles's affidavit created a genuine issue of material fact. In the trial court and on appeal, the County argued that Hiles's affidavit should be excluded because he was not timely disclosed as a witness and because his affidavit was conclusory and insufficient regarding market value. We review a trial court's exclusion of summary judgment evidence for abuse of discretion. *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 499 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

Assuming without deciding that Hiles could testify as the representative of the named party appellants and was not required to be timely designated, we conclude that the trial court did not abuse its discretion by excluding Hiles's affidavit. A property owner can be shown to be qualified to testify to the value of his property even if he is not an expert and would not be qualified to testify to the value of other property. *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 852-53

(Tex. 2011). "[W]hen an entity's agent testifies to the market value of the organization's property, the legal effect is that the actual owner of the property is testifying." *Id.* at 853. "[T]he Property Owner Rule is limited to those witnesses who are officers of the entity in managerial positions with duties related to the property, or employees of the entity with substantially equivalent positions and duties." *Id.* at 849. The witness must be personally familiar with the property and its fair market value, but the Property Owner Rule creates a presumption as to both. *Id*.

In his affidavit, Hiles explained that appellants would not benefit from the County's project and that, to leave appellants' amenities undisturbed, it would be better if the County took different parcels of the property. Hiles stated that the County's taking harmed appellants "in ways, when measured in terms of value, for which the County is proposing to not pay just compensation[.]" According to Hiles, in an eight-year period, he has been involved in the building and management of numerous developments like The Mansions and The Estates. He stated that an earthen berm or brick/stucco wall is usually built to separate the projects from a frontage road for purposes of safety and attractiveness. Hiles believed that customers prefer a landscaped earthen berm because it is less urbanized, and he explained that such a berm was chosen for The Mansions and The Estates developments. Because of the property being taken by the County, Hiles opined that part of the existing berm will be destroyed and the remainder will be useless. Hiles concluded that this loss would result in a diminution in the fair market value of the

property that remains after the taking. Hiles opined that the total amount of required compensation, which included compensation for the property being taken and diminution in the fair market value of the remaining property, exceeds $800,000.

Hiles's affidavit demonstrates that he is an officer of appellants' business entities and has managerial duties related to appellants' property. *See id*. at 849, 853. "The general rule for determining fair market value is the before-and-after rule, which requires measuring the difference in the value of the land immediately before and immediately after the taking." *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002). When a partial taking occurs, the before-and-after rule still applies, but compensation is measured by the market value of the part taken plus any diminution in value to the remainder of the land. *Id*. We presume that Hiles is personally familiar with the property and its fair market value. *See Reid Rd. Mun. Util. Dist. No. 2*, 337 S.W.3d at 849. However, Hiles did not identify the market value of the property before the taking, the market value of the remainder after the taking, or explain the facts supporting his opinion. *See Zwahr*, 88 S.W.3d at 627; *see also LeBlanc v. Lamar State College*, 232 S.W.3d 294, 301 (Tex. App.—Beaumont 2007, no pet.) ("Statements are conclusory if they fail to provide underlying facts to support their conclusions."). Under these circumstances, Hiles's affidavit failed to create a genuine issue of material fact sufficient to survive a motion for summary judgment, and the trial court did not abuse its discretion by excluding the affidavit. *See Chrismon v. Brown*, 246 S.W.3d 102, 109 (Tex. App.—Houston [14th]

Dist. 2007, no pet.) ("[C]onclusory statements do not raise a genuine issue of material fact precluding summary judgment."); *see also Aldridge v. De Los Santos*, 878 S.W.2d 288, 296 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.) ("Affidavits containing conclusory statements unsupported by facts are not competent summary judgment proof."). For these reasons, we overrule appellants' three issues and affirm the trial court's judgment.

AFFIRMED.

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STEVE MCKEITHEN
Chief Justice

Submitted on July 16, 2012
Opinion Delivered September 6, 2012
Before McKeithen, C.J., Kreger and Horton, JJ.