In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00349-CV

CHARLES A. HOWELL, JR., INDEPENDENT EXECUTOR OF THE ESTATE OF VIRGINIA COLLIER HOWELL, Appellant

V.

ASPECT RESOURCES, LLC, Appellee

On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-165,028

MEMORANDUM OPINION

On motion for rehearing, we withdraw our opinion of August 11, 2011, and substitute this opinion.

Appellant, Charles A. Howell, appeals the trial court's grant of summary judgment in favor of Aspect Resources, LLC. Howell argues that genuine issues of material fact exist which preclude summary judgment in this case. We affirm the judgment of the trial court.

BACKGROUND

On September 28, 1999, Aspect Resources LLC (Aspect) entered into a lease agreement with Virginia Collier Howell (V.H.), whereby Aspect leased oil and gas interests in three separate tracts of land from V.H. On the first anniversary of the lease, Aspect failed to pay the delay rental required to perpetuate the lease in lieu of the commencement of drilling operations. Pursuant to its terms, the 1999 lease automatically terminated on September 28, 2000. In May 2001, V.H. filed suit alleging that after the 1999 lease terminated, Aspect offered her certain payments to execute new leases of her mineral interests in the three tracts of land previously leased by Aspect, as well as her mineral interests in a fourth tract of land. V.H. alleged that she accepted Aspect's offer to lease the four tracts, had leases prepared, and executed the new leases on February 1, 2001 (the 2001 leases). V.H. further alleged that after she executed the 2001 leases, Aspect "failed and refused to make such payment due thereunder and . . . failed and refused to release the prior lease which terminated on September 28, 2000."

Based on these alleged facts, V.H. asserted causes of action for declaratory relief seeking to have the court construe her rights under the leases, breach of contract, breach of the duty of good faith and fair dealing, and negligence. Aspect filed a general denial. The record before us indicates that no further action was taken in the case for several years. V.H. died in 2005 and her suit was dismissed for want of prosecution on July 28,

2008. The suit was reinstated in August 2008 on the motion of Charles A. Howell (Howell), as independent executor of the Estate of V.H.

In 2010, Aspect filed an amended answer and motion for traditional summary judgment and no evidence summary judgment. In its motion for summary judgment, Aspect argued that the statute of frauds precluded Howell's claim for breach of contract, that the claim for declaratory judgment failed because it was derivative of the breach of contract claim, that no written agreement supported Howell's claim for breach of the duty of good faith and fair dealing, that there was no fiduciary relationship between V.H. and Aspect, and there was no duty upon which the negligence claim could be based. The trial court granted summary judgment in favor of Aspect on all claims and this appeal followed.

STANDARD OF REVIEW

We review the trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). "In reviewing a traditional motion for summary judgment, we must determine whether the summary judgment proof establishes as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of the plaintiff's cause of action or whether the defendant has conclusively established all elements of an affirmative defense." *Garrod Invs., Inc. v. Schlegel*, 139 S.W.3d 759, 762 (Tex. App.—Corpus Christi 2004, no pet.); *see* Tex. R. Civ. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d

746, 748 (Tex. 1999). We review the evidence in the light most favorable to the nonmovant and indulge all reasonable inferences in favor of the nonmovant. *Dorsett*, 164 S.W.3d at 661.

A no-evidence motion for summary judgment must state there is no evidence to support one or more specific elements of a claim or defense on which the nonmovant has the burden of proof at trial. *See* Tex. R. Civ. P. 166a(i); *Thomas v. Omar Invs., Inc.*, 156 S.W.3d 681, 684 (Tex. App.—Dallas 2005, no pet.). We will affirm the trial court's granting of a no-evidence summary judgment if the record shows one of the following: (1) there is no evidence on a challenged element of a cause of action; (2) the evidence offered to prove the challenged element is no more than a scintilla; (3) the evidence establishes the opposite of the challenged element; or (4) the court is barred by law or the rules of evidence from considering the only evidence offered to prove the challenged element. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

ANALYSIS

On appeal, Howell argues that the trial court erred in granting summary judgment because genuine issues of material fact exist. Specifically, Howell argues the 1999 lease agreement executed by both parties, and the 2001 lease agreements, executed by V.H., preclude the application of the statute of frauds, or at the very least constitute partial performance, taking the agreements out of the statute of frauds. Howell argues

additionally that the negligence action is based on a recognized duty to release an expired lease.

Statute of Frauds

The statute of frauds is an affirmative defense. *Garrod Invs., Inc.*, 139 S.W.3d at 763. The statute of frauds requires a contract for the sale of real estate to be "(1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him." Tex. Bus. & Com. Code Ann. § 26.01(a)(1)-(2), (b)(4) (West 2009). Pursuant to the statute of frauds, the written agreement must be "complete within itself in every material detail and . . . contain all of the essential elements of the agreement so that the contract can be ascertained from the writings without resort to oral testimony." *EP Operating Co. v. MJC Energy Co.*, 883 S.W.2d 263, 267 (Tex. App.—Corpus Christi 1994, writ denied). Mineral interests and oil and gas leases concerning those interests are treated as real property interests subject to the statute of frauds. *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 436-37 (Tex. App.—Dallas 2002, pet. denied); *see also* Tex. Bus. & Com. Code Ann. § 26.01; *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 134 (Tex. App.—El Paso 1997, pet. denied); *EP Operating Co.*, 883 S.W.2d at 267; *see also Mobil Exploration & Producing U.S. Inc. v. McDonald*, 810 S.W.2d 887, 890 (Tex. App.—Beaumont 1991, writ denied). Whether a contract meets the requirements of the statute of frauds is a question of law. *Bratcher v. Dozier*, 346 S.W.2d 795, 796 (Tex. 1961); *West Beach Marina, Ltd. v. Erdeljac*, 94

S.W.3d 248, 264 (Tex. App.—Austin 2002, no pet.). It is the signature of the person to be charged with the promise that authenticates the document as reliable evidence of that person's agreement to the transaction. *Sterrett v. Jacobs*, 118 S.W.3d 877, 880 (Tex. App.—Texarkana 2003, pet. denied). The party to be charged with the promise in this case is Aspect.

The summary judgment record establishes that the 1999 lease was in writing and signed by both parties. Additionally, we note that Aspect concedes on appeal that it entered into the written lease with V.H. in 1999. However, the 2001 leases prepared by V.H. were never signed by Aspect. In his response to Aspect's motion for summary judgment, Howell submitted the following as evidence of Aspect's agreement to enter into the 2001 leases: (1) ownership reports establishing the mineral interests of Aspect in the three tracts of land under the 1999 lease, set to expire in 2002, (2) a fax addressed to Howell's attorney, Robert Wade, from Mike Dubisson,[1] (3) the 2001 leases prepared and executed by V.H., and (4) an affidavit executed by Howell.

The ownership reports on the original three tracts of land list Aspect's mineral interests in those tracts resulting from the 1999 lease, which was set to expire in 2002. The fax to Wade from Dubisson, which appears to have been sent in 2001, states, "I was told that this is another Howell tract to be leased. It may be identical to one already

[1] The summary judgment record does not establish the identity of Mike Dubisson. However, Aspect did not object to this summary judgment evidence and we presume that Mike Dubisson was Aspect's attorney or other authorized representative.

provided. (I lost my copy)." The fax is signed, "Mike[.]" An ownership report on a fourth tract of land owned by V.H. reflects no current lease on the property. In his affidavit, Howell stated that the 2001 leases and memos, attached to Howell's response motion as Exhibit E, were true and correct copies thereof and were negotiated and executed by him on February 1, 2001, as attorney-in-fact for his mother, V.H. Howell further stated that the leases were executed by him on behalf of V.H. "in acceptance of and in detrimental reliance on an offer by Defendant Aspect Resources, LLC to lease all four tracts described therein for $1,000.00 per acre."

The evidence submitted by Howell establishes only that the parties may have entered into negotiations for new mineral lease agreements. The written agreements are not signed by Aspect or any agents authorized to sign on behalf of Aspect. There is no written evidence of Aspect's offer or agreement to be bound by the transaction. *See Sterrett*, 118 S.W.3d at 880. We find the evidence submitted by Howell insufficient to establish compliance with the statute of frauds. *See EP Operating Co.*, 883 S.W.2d at 267-68.

Partial Performance

Howell argues alternatively that even if the offered evidence is insufficient to establish compliance with the statute of frauds, it is evidence of partial performance,

which prevents Aspect from asserting the statute of frauds as a defense.[2] "A contract containing mutual obligations that has been reduced to writing and signed by one of the parties can be accepted by the non-signing party by their conduct, thus making it a binding agreement on both parties." *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51, 62 (Tex. App.—San Antonio 2005, pet. denied). Under the partial performance exception to the statute of frauds, agreements that do not meet the requirements of the statute of frauds, but have been partly performed, may be enforced in equity if denial of enforcement would amount to a virtual fraud. *Elizondo v. Gomez*, 957 S.W.2d 862, 864 (Tex. App.—San Antonio 1997, writ denied).

> The fraud arises when there is strong evidence establishing the existence of an agreement and its terms, the party acting in reliance on the contract has suffered a substantial detriment for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit. The partial performance must be "unequivocally referable to the agreement and corroborative of the fact that a contract actually was made." The acts of performance relied upon to take a parol contract out of the statute of frauds must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced; otherwise, they do not tend to prove the existence of the parol agreement relied upon by the plaintiff.

Exxon Corp., 82 S.W.3d at 439-40 (citations omitted).

Howell argues that the 2001 leases prepared by V.H. are evidence of partial performance sufficient to raise a fact issue as to this exception and prevent Aspect from

[2] Aspect incorrectly argues that Howell did not raise a partial performance counter-defense in his response to Aspect's motion for summary judgment. Howell expressly raised this counter-defense in his response to Aspect's motion for summary judgment. Therefore, we will address the merits of this argument.

asserting the statute of frauds as a defense to the alleged lease agreements. The partial performance exception has been applied to take an agreement out of the statute of frauds when a lessee has (1) paid consideration, (2) taken possession of the lessor's land, and (2) made valuable improvements to the lessor's land such that the lessee would be defrauded if the agreement were not enforced. *See Hooks v. Bridgewater*, 229 S.W. 1114, 1116 (Tex. 1921); *see also Zeecon Wireless Internet, LLC v. McEwen*, No. 03-08-00214-CV, 2010 WL 521111, at *2 (Tex. App.—Austin Feb. 12, 2010, no pet.) (mem. op.); *Lovett v. Lovett*, 283 S.W.3d 391, 393-94 (Tex. App.—Waco 2008, pet. denied); *J & J Sys., Inc. v. Towers of Tex., Inc.*, 833 S.W.2d 532, 534 (Tex. App.—Eastland 1991), *rev'd on other grounds*, 834 S.W.2d 1 (Tex. 1992); *Carmack v. Beltway Dev. Co.*, 701 S.W.2d 37, 40 (Tex. App.—Dallas 1985, no writ).

The partial performance exception to the statute of frauds has also been applied to prevent application of the statute when the lessor fully performs and the lessee knowingly accepts the benefits of the lease and partly performs. *Carmack*, 701 S.W.2d at 40; *see also Reeves Furniture Co. v. Simms*, 59 S.W.2d 262, 263-64 (Tex. Civ. App.—Texarkana 1933, writ dism'd). A lessor may also be entitled to enforce an oral agreement if lessor shows performance of the agreement by delivery of possession to the lessee and a detrimental change of position for which the lessor has no adequate remedy. *See Carmack*, 701 S.W.2d at 40; *see also Newsom v. Newsom*, 378 S.W.2d 842, 844-45 (Tex. 1964).

We conclude the evidence presented in Howell's response to the summary judgment motion is insufficient to raise a genuine issue of material fact as to partial performance. Howell has not presented evidence that Aspect took possession of the four tracts following Howell's execution of the 2001 lease agreements or otherwise accepted any benefits under or partially performed under the 2001 lease agreements. While Howell asserts that Aspect caused its competitors to believe that the original three tracts would be leased by Aspect until 2002, this does not constitute evidence of a benefit received or performance under the alleged 2001 lease agreements, but rather relates to Howell's claim that Aspect did not timely release the 1999 leases after they terminated. The trial court properly found that Howell's breach of contract claim, as it relates to the alleged 2001 lease agreements, is barred by the statute of frauds.

Negligence

In his original petition, Howell asserted a general negligence cause of action. In its motion for summary judgment, Aspect argued it was entitled to judgment on Howell's negligence claim because no duty was breached under Texas law. In response, Howell argued that his negligence claim was based on Aspect's breach of a duty to release an expired lease.

"In determining whether a cause of action in negligence exists, the threshold inquiry is whether the defendants owed the plaintiffs a legal duty." *Smith v. Merritt*, 940 S.W.2d 602, 604 (Tex. 1997). In Texas, a lessee is under a duty to release of record an

expired oil and gas lease. *Kidd v. Hoggett*, 331 S.W.2d 515, 517 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.). If the duty is imposed by the parties' lease, the action rests in contract. *Id*.; *see also Holman v. Meridian Oil, Inc.*, 988 S.W.2d 802, 808 (Tex. App.—San Antonio 1999, pet. denied). However, a lessee remains subject to a common law duty to release an expired lease even when the lessee is not required to do so under the express provisions of the lease. *See Kidd*, 331 S.W.2d at 517. Generally, breach of this common law duty gives rise to a cause of action for slander of title. *Sw. Guar. Trust Co. v. Hardy Road 13.4 Joint Venture*, 981 S.W.2d 951, 954 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see also Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983) ("[A] cause of action to recover damages for the failure to release a purported, though not actual, property interest is a cause of action for slander of title."). To prove a cause of action for slander of title, a plaintiff must prove (1) the uttering and publishing of the disparaging words, (2) that they were false, (3) that they were malicious, (4) that the plaintiff sustained special damages as a result, and (5) that the plaintiff possessed an interest in the property disparaged. *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 616 (Tex. App.—Texarkana 2002, pet. denied) (citing *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 109-10, 115-16 (Tex. App.—El Paso 1997, pet. denied)). Additionally, to recover damages arising from breach of either a contractual or common law duty to release acreage under an expired mineral lease, a plaintiff must prove the loss of a specific sale.

Modern Exploration, Inc. v. Maddison, 708 S.W.2d 872, 877 (Tex. App.—Corpus Christi 1986, no writ); *see also Taub*, 75 S.W.3d at 616; *Holman*, 988 S.W.2d at 808.

Howell did not allege that Aspect breached any express provisions of the 1999 lease by its failure to release the expired lease. Likewise, Howell did not argue in the summary judgment proceedings that Aspect's duty to release the expired lease was contractual in nature. Rather, in response to Aspect's motion for summary judgment, Howell asserted that "[t]he duty to release an expired lease has been established in Texas case law[,]" and Aspect's "failure to satisfy that duty raises an issue of Defendant's negligence." Howell contended that but for V.H.'s reliance on Aspect's offer to execute the 2001 leases and Aspect's "misleading its competitors to believe that the three tracts would be under lease to [Aspect] until September 28, 2002, [V.H.] would have leased the tracts to [Aspect's] competitors[.]" In support of his response, Howell submitted an affidavit executed by Dick Shanor, "an independent contractor working for SKH Energy Partners, II, LP, and subsidiaries acquiring and holding for development oil and gas leases[.]" Shanor stated that had SKH known in late 2000 and early 2001 that Howell tracts were available, SKH would have offered and paid $1,000.00 per acre for the Howell tracts.

On appeal, Howell initially argued that Aspect breached its common law duty to release the expired lease creating a fact issue on Howell's negligence claim. In his reply brief, Howell argues for the first time, that Aspect's failure to release the 1999 lease

constituted a breach of the prior lease agreement. However, we may not reverse the trial court's grant of summary judgment based on grounds not expressly set forth in Howell's response to Aspect's motion for summary judgment. *Garrod Invs. Inc.*, 139 S.W.3d at 765 (citing Tex. R. Civ. P. 166a(c)); *see also City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979). We note additionally that Howell does not point to any specific provision of the 1999 lease that was purportedly breached by Aspect's failure to file a written release prior to the filing of this suit in 2001.

While the Shanor affidavit may have raised a fact issue on the damages element of a cause of action for breach of contract or slander of title based on Aspect's alleged failure to release the expired lease, Howell did not plead that Aspect's failure to release the expired lease constituted a breach of contract or slander of title. *See Modern Exploration*, 708 S.W.2d at 877; *see also Taub*, 75 S.W.3d at 616; *Holman*, 988 S.W.2d at 808. The pleadings define the lawsuit, give notice of the facts and legal theories of the case, restrict the trial court in rendering judgment, and form the basis of appellate review. *See Erisman v. Thompson*, 167 S.W.2d 731, 733 (Tex. 1943) (noting that pleadings define lawsuit and determine issues for trial). Howell pled his cause of action as one for negligence. That is the cause of action that was addressed by the parties in the summary judgment proceedings and the cause of action upon which the trial court granted judgment. Howell has cited no authority that supports his contention that he may maintain a cause of action in negligence for breach of the duty to release acreage under

an expired lease. Under these circumstances, we find the trial court properly granted summary judgment on Howell's negligence claim.

Conclusion

We find the trial court properly determined the alleged 2001 lease agreements were barred by the statute of frauds. Howell did not assert in the trial court that any provisions of the 1999 lease were breached. Therefore, the trial court properly granted summary judgment on Howell's breach of contract claim. Howell's breach of contract claim and request for declaratory relief fail as a matter of law. Howell failed to establish a viable cause of action in negligence for breach of the common law duty to release acreage under an expired lease. Therefore, the trial court properly granted summary judgment on Howell's negligence claim. We affirm the judgment of the trial court.[3]

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 30, 2011
Opinion Delivered September 22, 2011

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

[3] On appeal, Howell does not challenge the trial court's ruling on his claim for breach of the duty of good faith and fair dealing. Therefore we have not reviewed the court's ruling on this issue. *See McCoy v. Rogers*, 240 S.W.3d 267, 272 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see also* Tex. R. App. P. 38.1(e), (h).