In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00508-CV

RICKY LIGHTFOOT, Appellant

V.

HUGH KELLEY, KELLY KELLEY, KELLEY FAMILY INVESTMENTS, LTD., AND ALLIED ELECTRICAL CONTRACTORS OF BEAUMONT, INC., Appellees

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On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-181,168

MEMORANDUM OPINION

Ricky Lightfoot sued Hugh Kelley, Kelly Kelley, Kelley Family Investments, Ltd., and Allied Electrical Contractors of Beaumont, Inc. for trespass arising out of appellees' alleged entry onto Lightfoot's property to enlarge an existing drainage ditch. The parties proceeded to trial, but after Lightfoot rested his case, the trial court granted a directed verdict in favor of appellees. The trial court subsequently denied Lightfoot's motion for new trial, in which he challenged the granting of appellees' directed verdict. In one issue on appeal, Lightfoot challenges the trial court's decision to grant appellees'

motion for directed verdict and the trial court's denial of his motion for new trial. We affirm the trial court's judgment.

We review a trial court's ruling on a motion for directed verdict under a legal sufficiency standard. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). We consider "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827. We review the evidence in the light most favorable to the finding and indulge every reasonable inference that would support it. *Id.* at 822. We credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not. *Id.* at 807, 827. A directed verdict for a defendant may be proper when the plaintiff (1) "fails to present evidence raising a fact issue essential to the plaintiff's right of recovery[;]" or (2) "admits or the evidence conclusively establishes a defense to the plaintiff's cause of action." *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000).

We review a trial court's denial of a motion for new trial for abuse of discretion. *In the Interest of R.R.*, 209 S.W.3d 112, 114 (Tex. 2006). A trial court abuses its discretion when it acts without reference to any guiding rules and principles. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004). We will reverse only if the trial court's ruling is arbitrary or unreasonable. *Id.* at 839.

Trespass occurs when a person enters another's land without consent. *Wilen v. Falkenstein*, 191 S.W.3d 791, 797 (Tex. App.—Fort Worth 2006, pet. denied). A

plaintiff must prove that (1) he owns or has a lawful right to possess real property, (2) the defendant entered the land and the entry was physical, intentional, and voluntary, and (3) the defendant's trespass caused injury. *Id.* at 798. "[A] plaintiff must prove that the defendant intentionally committed the act that constitutes a trespass[.]" *Stukes v. Bachmeyer*, 249 S.W.3d 461, 466 (Tex. App.—Eastland 2007, pet. denied).

The Kelley property is located across from the Lightfoot property. Lightfoot testified that he maintains a ditch on his property for drainage purposes. The City of Beaumont has a drainage easement which entitles the City to maintain the ditch. According to Lightfoot, Hugh and Kelly sought Lightfoot's permission to use the ditch for drainage. Appellees had begun developing their property. Lightfoot refused to give appellees permission to use the ditch. Lightfoot testified that appellees subsequently entered his property to enlarge the ditch. Lightfoot testified that a photograph depicted a bulldozer, which Lightfoot understood belonged to a contractor hired by appellees, near the ditch. Lightfoot admitted that he did not know who enlarged the ditch.

Hugh testified that he is president of Allied Electrical. Hugh explained that he and Kelly are the only partners involved with Kelley Family Investments, which owns the subdivision across from the Lightfoot property. Hugh testified: "Well, Allied Electric didn't have anything to do with the project. And, actually, I didn't have anything to do with it, other than I'm one of the partners in the limited partnership that did the work -- or had the work done."

The record reflects that, at the time of the alleged trespass, the Lightfoot property was titled in the name of Lightfoot's mother, but that Lightfoot lived on the property and managed the property. Accordingly, the parties dispute whether Lightfoot had a right to possess the property at the time of the alleged trespass. Additionally, Lightfoot contends that the evidence establishes trespass because he denied appellees permission to enlarge the ditch, the ditch was subsequently enlarged, and Hugh's testimony regarding the "project" referred to enlargement of the ditch rather than the development of the subdivision on the Kelley property.

Assuming without deciding that Lightfoot had a lawful right to possess the property, we conclude that the evidence is legally insufficient to establish that appellees physically, intentionally, and voluntarily entered Lightfoot's property. *See Wilen*, 191 S.W.3d at 798. "'When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.'" *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). "'[I]n cases with only slight circumstantial evidence, something else must be found in the record to corroborate the probability of the fact's existence or non-existence.'" *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (quoting *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (Phillips, C.J., concurring and dissenting)). The circumstantial evidence of appellees' involvement in the alleged trespass is, in legal

effect, no evidence that appellees physically, intentionally, and voluntarily entered Lightfoot's property. *See Jelinek*, 328 S.W.3d at 532. The record is devoid of evidence corroborating the probability that appellees impermissibly entered Lightfoot's property to enlarge the drainage ditch. *See Pitzner*, 106 S.W.3d at 729. Under these circumstances, we conclude that Lightfoot failed to establish that appellees intentionally committed an act constituting trespass, and we need not address whether the alleged trespass caused injury. *See Stukes*, 249 S.W.3d at 466; *see also* Tex. R. App. P. 47.1.

Because we conclude that Lightfoot failed to present evidence raising a fact issue essential to his right to recover on his trespass claim, the trial court properly directed a verdict in favor of appellees. *See Prudential*, 29 S.W.3d at 77. We, therefore, cannot say that the trial court abused its discretion by denying Lightfoot's motion for new trial. *See R.R.*, 209 S.W.3d at 114; *see also Cire*, 134 S.W.3d at 838-39. We overrule Lightfoot's sole issue and affirm the trial court's judgment.

AFFIRMED.

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STEVE MCKEITHEN
Chief Justice

Submitted on October 6, 2011
Opinion Delivered November 3, 2011

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