NO. 12-11-00121-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

HOWARD L. STRAILY AND TOMMIE J. STRAILY, APPELLANTS	***§***	***APPEAL FROM THE 294TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
LAWYERS TITLE INSURANCE CORPORATION, APPELLEE	***§***	***VAN ZANDT COUNTY, TEXAS***

MEMORANDUM OPINION

Howard L. Straily and Tommie J. Straily (the Strailys) appeal the trial court's summary judgment entered in favor of Lawyers Title Insurance Corporation (LTI). In one issue, the Strailys argue that the trial court erred in entering summary judgment for LTI. We affirm.

BACKGROUND

The Strailys own a home built on a pier and beam foundation. Upon noticing that water had pooled beneath their home and believing the source of the pooling to be a water leak, the Strailys hired a plumber, Wayne Wilson, to investigate the problem. Wilson pumped the water from beneath the Strailys' home and conducted a visual inspection of the area, at which point he discovered an uncapped sewer line that was depositing a large quantity of sewage and water onto the Strailys' property.

Thereafter, Wilson contacted the City of Van (the City) to report the problem. The City sent workers to the Strailys' house, and they determined that the main sewer line ran directly beneath the house. John Beall, Director of Public Works for the City, directed the City's contractors and workers to reroute the main sewer line around the Strailys' house and cap it.

The City never removed the main sewer line from beneath the Strailys' house. It also did not claim that it was entitled to keep this portion of its main sewer line located there. Moreover, the City disclaimed any easement or other interest in the Strailys' property. The City searched Van Zandt County's records but could not find a recorded easement.

Because the City's main sewer line was located under their home, on June 4, 2007, the Strailys presented a claim to LTI under a title insurance policy covering the property. Unable to resolve their claim with LTI, the Strailys filed suit against LTI claiming that LTI breached its contract with them. LTI filed a no evidence motion for summary judgment in which it claimed that the Strailys have (1) no evidence that they had a covered loss under the title insurance policy when they made their claim, (2) no evidence that LTI breached its duties under the title insurance policy, and (3) no evidence that the alleged breach by LTI caused the Strailys' alleged damages. In response, the Strailys argued that they demonstrated that LTI failed to detect an easement existing on their property because the City's main sewer line was located under their house. The Strailys further contended that LTI's failure to detect the easement caused their damages. Finding that the Strailys had presented no evidence that LTI breached the contract or that LTI's alleged breach caused the Strailys' damages, the trial court granted LTI's motion. This appeal followed.

NO EVIDENCE MOTION FOR SUMMARY JUDGMENT

In their sole issue, the Strailys argue that the trial court erred in granting LTI's no evidence motion for summary judgment.

Standard of Review

After an adequate time for discovery, a party without the burden of proof at trial may move for summary judgment on the ground that the nonmoving party lacks supporting evidence for one or more essential elements of its claim. *See* TEX. R. CIV. P. 166a(i). Once a no evidence motion has been filed in accordance with Rule 166a(i), the burden shifts to the nonmovant to bring forth evidence that raises a fact issue on the challenged elements. *See* ***Ford Motor Co. v. Ridgway***, 135 S.W.3d 598, 600 (Tex. 2004). We review a no evidence motion for summary judgment under the same legal sufficiency standards as a directed verdict. ***King Ranch, Inc. v. Chapman***, 118 S.W.3d 742, 750–51 (Tex. 2003). A no evidence motion is properly granted if the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact pertaining to an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* ***id.*** at 751. If the evidence supporting a finding rises to a level that would enable reasonable, fair minded persons to differ in their conclusions, then more than a scintilla of evidence exists. ***Id.*** Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence. ***Id.***

We review de novo the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. ***Sudan v.***

Sudan, 199 S.W.3d 291, 292 (Tex. 2006); ***KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.***, 988 S.W.2d 746, 748 (Tex. 1999). All theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. *See* TEX. R. CIV. P. 166a(c).

Applicable Law

To establish a breach of contract, the Strailys were required to prove (1) the existence of a valid contract, (2) their performance or tendered performance under the contract, (3) breach of the contract by LTI, and (4) damages as a result of the breach. *See* ***Wincheck v. Am. Express Travel Related Servs. Co.***, 232 S.W.3d 197, 201 (Tex. App.–Houston [1st Dist.] 2007, no pet.). A title insurance policy is a contract of indemnity, imposing a duty to indemnify the insured against losses caused by defects in title. ***Chicago Title Ins. Co. v. McDaniel***, 875 S.W.2d 310, 311 (Tex. 1994). Defects in title covered by a title insurance policy involve an encumbrance on the ownership rights in the property. ***Hanson Bus. Park, L.P. v. First Nat'l Title Ins. Co.***, 209 S.W.3d 867, 870 (Tex. App.–Dallas 2006, pet. denied). A defect in the condition or value of the property is not covered by a title insurance policy. ***Id***. ("We refuse to equate a defect in the condition of the property with a defect in title to the property.").

An easement is an encumbrance on title because it relinquishes a property owner's right to exclude someone from their property. *See* ***Marcus Cable Assocs., L.P. v. Hrohn***, 90 S.W.3d 697, 700 (Tex. 2002). An easement is a nonpossessory interest that authorizes its holder to use the property of another for a particular purpose. ***Id***. One type of easement is an express easement; one that as the name suggests is conveyed by an express grant. ***Id***.

An easement also can be created without an express grant. *See* ***Drye v. Eagle Rock Ranch, Inc.***, 364 S.W.2d 196, 203 (Tex. 1963). For instance, a prescriptive easement is created by a "claimant's adverse actions under color of right." ***Allen v. Allen***, 280 S.W.3d 366, 377 (Tex. App.–Amarillo 2008, pet. denied) (quoting ***Lakeside Launches, Inc. v. Austin Yacht Club, Inc.***, 750 S.W.2d 868, 872 (Tex. App.–Austin 1988, writ denied)). To establish a prescriptive easement, the Strailys were required to prove that the City used their property in a manner that was open, notorious, continuous, exclusive, and adverse for the requisite time. *See* ***Brooks v. Jones***, 578 S.W.2d 669, 673 (Tex. 1979). The absence of any of these elements is fatal to the claim of a prescriptive easement. ***Allen***, 280 S.W.3d at 377.

Open use is a use not made in secret or stealthily, and notorious use is a use actually known to the property owner or widely known in the area such that the property owner would reasonably be expected to know of it. ***Cambridge Holdings, Ltd. v. Cambridge Condos Council of Owners***, No. 03-08-00353-CV, 2010 WL 2330356, at *10 (Tex. App.—Austin June 11, 2010, no pet.) (mem. op.) (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.17 cmt. h

(2000)). When the property owner and the claimant of the easement both use the property, the claimant's use is not exclusive of the owner's use and, thus, is not considered adverse. *See* ***Allen***, 280 S.W.3d at 377. A prescriptive easement requires adverse possession for a period of ten years. ***Mack v. Landry***, 22 S.W.3d 524, 531 (Tex. App.–Houston [14th Dist.] 2000, no pet.).

Application

The Strailys' title insurance policy with LTI protects the Strailys if someone else owns either an interest in their property or an easement on their property. Because the flooding on their property caused by the City's main sewer line is a defect in the condition of the property and not necessarily a defect in the title, the Strailys cannot rely solely on the flooding as evidence that LTI breached the contract. As a result, we must determine whether the Strailys presented any evidence that an easement existed, which resulted in an encumbrance to their title.

Even though the City is not claiming any interest in the Strailys' property, the Strailys argue that their title is encumbered. The Strailys have not argued that LTI failed to discover an express easement in favor of the City. And there is no evidence of any writing granting the City an easement to any portion of the Strailys' property.

Instead, the Strailys argue that they presented evidence that the City has a prescriptive easement that encumbers their title to the property. The record reflects that the City laid the main sewer line in the 1950s. Accordingly, the main sewer line had been in place much longer than the necessary ten years to establish a prescriptive easement when the Strailys made their claim to LTI. However, the other elements of a prescriptive easement are not all demonstrated by the summary judgment record, and the absence of any one element is fatal to the claim of a prescriptive easement. *See* ***Allen***, 280 S.W.3d at 377. Here, by the Strailys' own admission, the sewer line was a hidden easement. To be a prescriptive easement, the easement must have been open and notorious. Accordingly, we conclude that the Strailys failed to present evidence that the City has a prescriptive easement encumbering the Strailys' property.

The Strailys cite ***San Jacinto Title Guaranty Co. v. Lemmon***, 417 S.W.2d 429 (Tex. Civ. App.–Eastland 1967, writ ref'd n.r.e.), in support of their position that LTI breached its contract with them. However, in ***Lemmon***, the parties stipulated to the existence of an easement. *See* ***id***. at 430. The only issue in ***Lemmon*** was whether the easement constituted an exception to the risks insured against. *See* ***id***. at 431. Therefore, the facts in ***Lemmon*** are distinguishable from the facts in the case at hand.

Based on our review of the summary judgment record, we conclude that there is no evidence that the Strailys' property was encumbered by an easement. Because there was no encumbrance to the Strailys' title, there was no breach of contract by LTI. Therefore, we hold

that the trial court properly granted LTI's no evidence motion for summary judgment on this ground.[1] The Strailys' sole issue is overruled.

DISPOSITION

Having overruled the Straily's sole issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered December 21, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

[1] Because we have held that the trial court properly granted LTI's no evidence motion for summary judgment based on the Strailys' presenting no evidence of LTI's breach, we need not consider whether the trial court properly found that the Strailys presented no evidence that their damages were caused by LTI's breach. *See* TEX. R. APP. P. 47.1.