



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00002-CV

OHIO DEVELOPMENT, LLC,
Appellant

v.

TAPATIO SPRINGS HOMEOWNERS ASSOCIATION and Unknown Owners or Claimants
of Interest in Land,
Appellees

From the 451st Judicial District Court, Kendall County, Texas
Trial Court No. 15-405CCL
Honorable Bill R. Palmer, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 31, 2017

AFFIRMED

Ohio Development, LLC appeals the trial court's order denying its application for a temporary injunction. We hold Ohio has not shown the trial court abused its discretion in denying the order.

BACKGROUND

In 2014, Ohio Development bought 370 acres of undeveloped property immediately north of the Tapatio Springs subdivision in Kendall County. Ohio plans to develop the property, and it submitted an application for preliminary approval of a subdivision plat with a Kendall County

Commissioner. The Commissioner declined to approve the preliminary application until Ohio could establish the location of its southern boundary line and that Ohio has a right of access to the southern part of its property using an existing road located in the Tapatio Springs subdivision.

A portion of the southern boundary of Ohio's property borders the northern boundary of the Tapatio Springs subdivision. Some evidence supports that the southern boundary of Ohio's property is a straight east to west line. However, there is a fence that bows south of that line for a little more than half of a mile, and there is some evidence that supports the fence line is the southern boundary of Ohio's property. The cumulative area between the straight line and the fence is about 1.628 acres, and is referred to as the "strip."

Wild Turkey Blvd. runs along much of the northern side of the subdivision, property administered by appellee, Tapatio Springs Homeowners Association (TSHOA). For a length of about one-half mile, immediately south of the strip, the road runs roughly parallel to the fence, at some points as close as three feet. There are three gates in various places within the fence along this stretch.

In September 2015, Ohio filed a trespass to try title action and a request for declaratory relief against TSHOA. In its live pleading, Ohio asserted it has fee simple record title to the strip or, alternatively, it has title to the strip by adverse possession. Ohio also alleged that by virtue of an express grant in deeds to it and its predecessor, it has a non-exclusive perpetual access easement to use Wild Turkey Blvd. and to cross the property between the road and the southern boundary of Ohio's property for ingress and egress. The easement allegedly includes the right to access the gates and to cross the strip if Ohio is found not to own it. Ohio pled alternatively that it has a prescriptive easement. Among other things, TSHOA denied the existence of an easement.

While the litigation over title and access to the property was pending, Ohio entered into a two-year lease with a hunting group to allow wild boar hunting on Ohio's property for no fee. Ohio

told the hunters to use Wild Turkey Blvd. through the Tapatio Springs subdivision and the gates along the fence to access Ohio's 370 acres. TSHOA learned of the agreement from residents who noticed hunters driving through the subdivision in flatbed trucks carrying all-terrain-vehicles and equipment such as feeders and traps. TSHOA objected to such unrestricted use of "its private roads, gates, and property," and attempted to negotiate an agreement for terms of use. When discussions yielded no agreement, TSHOA sent a letter to Ohio, stating Ohio would need to obtain TSHOA's permission to use the road, property, and gates and that it intended to put locks on the gates to prohibit further use without TSHOA's prior permission. The letter noted that one person, Willie Stricker, had TSHOA's permission to use the road, property, and gates for occasional access to Ohio's property for his horseback riding operation, as he had done in the past. In response, Ohio filed the application for a temporary injunction to restrain TSHOA from denying Ohio and its licensees access to Ohio's property from Wild Turkey Blvd. and through the gates, including prohibiting the installation of chains and locks on the gates. The trial court held a hearing and denied the application for a temporary injunction. Ohio filed this interlocutory appeal.

STANDARD OF REVIEW

In support of its application for a temporary injunction, Ohio was required to plead and prove: (1) a cause of action against the defendants; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The decision to grant or deny a temporary injunction is a matter wholly within the trial court's sound discretion, and we will reverse only for a clear abuse of that discretion. *Id.* In our review of the trial court's order, we cannot substitute our judgment for that of the trial court, even if we would have reached a contrary conclusion. *Id.* at 204, 211; *Amend v. Watson*, 333 S.W.3d 625, 627 (Tex. App.—Dallas 2009, no pet.). Instead, we view the evidence in the light most favorable to the trial court's order, indulging every reasonable inference in its

favor, and determine whether the order is so arbitrary that it “exceed[s] the bounds of reasonable discretion.” *Butnaru*, 84 S.W.3d at 204; *Frey v. CST Props., LLC*, No. 04-13-00450-CV, 2014 WL 783324, at *5 (Tex. App.—San Antonio Feb. 26, 2014, no pet.); *Amend*, 333 S.W.3d at 627. Because we are reviewing the trial court’s ruling solely to determine whether there has been a clear abuse of discretion by the trial court in denying the temporary injunction, the merits of the underlying case are not presented for appellate review. *Davis v. Huey*, 571 S.W.2d 859, 861-62 (Tex. 1978). We will not find an abuse of discretion in denying an application for temporary injunction if the applicant did not prove one of the requirements for a temporary injunction or if the trial court bases its decision on conflicting evidence. *Id.* at 862; *Frey*, 2014 WL 783324, at *5.

DISCUSSION

The parties do not dispute that Ohio pled a cause of action. Ohio contends on appeal that it showed it had a probable right to relief on its claim that it holds either an express easement or an implied easement by necessity to access its property by way of Wild Turkey Blvd.¹ Ohio’s Fourth Amended Petition did not include a pleading that it has an implied easement by necessity. However, Ohio presented evidence at the temporary injunction hearing that the only road access to its property is by using Wild Turkey Blvd. and then crossing from the road to Ohio’s property, and Ohio contends the issue of an easement by necessity was thus tried by consent. Ohio did not present any argument to the trial court setting out the legal requirements for an easement by necessity, did not assert that the requirements were met by the evidence or tried by consent, and did not request the court grant relief based on the probable existence of an implied easement by necessity. We will not hold the trial court abused its discretion in failing to sustain an argument that was not presented to it.

¹ Ohio’s Fourth Amended Petition included an alternative pleading of an easement by prescription; however, Ohio’s brief on appeal does not include an argument that it proved a probable right to relief on this theory.

Ohio's claim to an express easement is based on an easement purportedly conveyed to Ohio's predecessor in interest by Tapatio Springs Development Company, Inc., a successor in interest to the original developer of the Tapatio Springs subdivision. TSHOA contends Tapatio Springs Development Company, Inc. did not have rights to an easement over Wild Turkey Blvd. and property to the north of the road that it could validly convey to Ohio's predecessor in interest. The validity of the express easement appears to depend on the nature and extent of an easement reserved by the original developer in the subdivision Declarations filed in 1982. The parties dispute whether that reserved easement was in gross (and thus not transferable) or appurtenant. If appurtenant, the parties further dispute whether the easement was for the benefit of the unsold parcels in the subdivision, other adjoining or neighboring parcels owned at that time by the declarant developer, or all land abutting any part of the subdivision, including the ranch the 370 acres was part of in 1982. Although the Declarations and the relevant deeds and conveyances were made a part of the record at the temporary injunction hearing, the parties did not develop their legal and factual arguments regarding the interpretation, scope, and extent of the original reserved easement, thus providing little guidance for the trial court on this issue.

Ohio also had the burden to establish an imminent and irreparable injury pending a trial on the merits. "For purposes of a temporary injunction, an injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204. At the hearing on the application for a temporary injunction, Ohio did not present any evidence or argument that it had been or would suffer any property damage, lost income, or other harm from denial of access to the hunters over Wild Turkey Blvd. and through the gates. There was no evidence that Willie Stricker had been or would be denied access over the road. Further, Ohio did not present any evidence of any other current or proposed use of its 370 acres that required using Wild Turkey Blvd., the property north

of the road, and the gates. It did not present any evidence or argument that there was any planned use of the asserted easement before trial, which if denied or restricted would cause injury that is not reparable in damages. At the conclusion of the evidence, the trial court asked Ohio's attorney what was "the irreparable injury that has to be stopped today." Counsel responded that the injury was that TSHOA wants to "dictate terms to the rest of the world" and "tell Ohio how to use its property." TSHOA's counsel responded that TSHOA is only attempting to control how *its* property is used, not how Ohio's 370 acres is used. The trial court then denied the application.

An applicant for a temporary injunction must present evidence of a probable, imminent, and irreparable injury pending trial. *Id.* Without evidence of such injury, we cannot conclude the trial court abused its discretion and will not reverse an order denying a temporary injunction. *See Amend*, 333 S.W.3d at 629 (declining to find inherent imminent and irreparable injury or that trespass constitutes irreparable injury as a matter of law).

We may not substitute our judgment for that of the trial court, and the only question is whether the trial court clearly abused its discretion. *See Davis*, 571 S.W.2d at 862; *Argo Grp. US, Inc. v. Levinson*, 468 S.W.3d 698, 705 (Tex. App.—San Antonio 2015, no pet.). Where there is conflicting evidence on the probability of a right to relief or where one of the elements for a temporary injunction has not been shown, the trial court's decision cannot be held to be an abuse of its discretion. *See Davis*, 571 S.W.2d at 862; *Frey*, 2014 WL 783324, at *5. In light of the evidence and arguments before the trial court, we hold there is at least some basis on which the trial court could have properly concluded Ohio was not entitled to a temporary injunction pending final hearing. *See Amend*, 333 S.W.3d at 630. We therefore affirm the trial court's order.

Luz Elena D. Chapa, Justice