Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00718-CV

VR PARTNERS I, L.P.,
Appellant

v.

MIDTEX OIL, L.P. and Juniper Ventures of Texas, LLC,
Appellees

From the 25th Judicial District Court, Guadalupe County, Texas
Trial Court No. 19-0448-CV-C
Honorable William Old, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: May 20, 2020

AFFIRMED

Appellant VR Partners I, L.P. ("VR Partners") appeals the trial court's interlocutory order granting a temporary injunction in favor of appellees Midtex Oil, L.P. and Juniper Ventures of Texas, LLC (jointly, "Midtex"). We affirm the trial court's order.

Background

Midtex and CNL Income Fund IV, Ltd. ("CNL") owned adjoining properties in Guadalupe County near the intersection of FM 3009 and IH-35. In 1997, CNL granted Midtex an easement to construct and maintain on CNL's property a pedestal sign advertising the gas station business

operated on Midtex's property and gasoline prices. The easement agreement provides for an initial ten-year term expiring on February 5, 2007. Thereafter, the easement agreement gives Midtex the option to renew the easement for up to three additional ten-year terms by providing CNL prior written notification of its election to renew for another term and paying CNL ten dollars per term.

In 2005, CNL ceased to exist as the result of a merger. Midtex claims it did not receive notice of the merger and was not aware that another entity owned the CNL property at the end of the easement's first ten-year term in February 2007. The record is unclear whether Midtex sent payment or written notification of its intent to renew the easement for a second term to CNL or its successor entity. Midtex's corporate representative Rodney Fischer testified he did not "make any effort to find out whether or not [Midtex] had, in fact, given the notice in 2007 to renew that easement," but agreed that if he had, he would have discovered Midtex has no record of sending a renewal notice in 2007. Fischer testified neither CNL nor its successor entity raised any objection to Midtex's continued operation of the pedestal sign.

CNL's successor entity conveyed the CNL property to VR Partners in 2009. Unaware of the change in ownership of the property, Midtex continued to maintain and operate the pedestal sign, including spending approximately $10,000 to digitize the sign in 2016. At the end of the second ten-year term in February 2017, Midtex did not send VR Partners payment or written notification of its election to renew the easement for a third term. Midtex continued maintaining and operating the sign without complaint from VR Partners until November 2018.

In November 2018, VR Partners informed Midtex by letter that the easement had terminated as a result of Midtex's failure to renew and instructed Midtex to remove the sign within ninety days. Midtex sued VR Partners, seeking declaratory judgment that as a result of waiver, estoppel, laches, or promissory estoppel, the easement was not terminated. Midtex also sought a temporary injunction preventing VR Partners from removing the pedestal sign.

In September 2019, the trial court held a hearing on the application for a temporary injunction. At the conclusion of the hearing, the trial court signed an order granting a temporary injunction that precludes VR Partners from physically removing the sign or its supporting landscaping and from interfering with Midtex's ability to maintain and operate the sign. Although the order stated "[t]here is a probability that [Midtex] will suffer irreparable harm if [Midtex's] application for Temporary Injunction is not granted[,]" it did not specify the reasons why Midtex will suffer irreparable harm without an injunction. One month later, the trial court amended the order to state, in pertinent part:

> There is a probability that [Midtex] will suffer irreparable harm if [Midtex's] application for Temporary Injunction is not granted. Specifically, the Court finds that [Midtex] would be irreparably harmed if this temporary injunction was not granted as [Midtex's] loss of goodwill, customers, and damages would be difficult if not impossible to measure if the pedestal sign is dismantled or removed before the trial of this cause.

VR Partners filed this interlocutory appeal of the amended injunction order.

Standard of Review

A temporary injunction is an extraordinary remedy designed to preserve the status quo of the subject of litigation pending trial on the merits. *Camp Mystic, Inc. v. Eastland*, 399 S.W.3d 266, 272 (Tex. App.—San Antonio 2012, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993)). Although the party seeking an injunction is not required to establish it will prevail at trial, it must establish: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim if the injunction is not granted." *Id.* at 272–73 (citing *Butnaru*, 84 S.W.3d at 204; *Walling*, 863 S.W.2d at 58).

We review an order granting a temporary injunction for clear abuse of discretion. *Henry v. Cox*, 520 S.W.3d 28, 33 (Tex. 2017). "We limit the scope of our review to the validity of the order,

without reviewing or deciding the underlying merits, and will not disturb the order unless it is 'so arbitrary that it exceed[s] the bounds of reasonable discretion.'" *Id.* at 33–34 (quoting *Butnaru*, 84 S.W.3d at 204). The trial court does not abuse its discretion if some evidence reasonably supports its ruling, even if the evidence is conflicting. *Id.* at 34; *Khaledi v. H.K. Global Trading, Ltd.*, 126 S.W.3d 273, 280 (Tex. App.—San Antonio 2003, no pet.).

Discussion

In a single issue, VR Partners challenges the second and third prongs of the temporary injunction standard, arguing the trial court erred in granting the temporary injunction because Midtex failed to establish (1) a probable right to relief on its declaratory judgment claim and (2) a probable, imminent, and irreparable injury. We address each prong separately.

A. Probable right to relief

To establish a probable right to relief, the movant must plead a cause of action for which it may be granted relief. *Camp Mystic*, 399 S.W.3d at 273 (citing *Walling*, 863 S.W.2d at 58). Midtex pleaded a claim for declaratory judgment that the easement is not terminated due to waiver, among other theories. VR Partners argues Midtex failed to establish a probable right to recover on its waiver theory because there is no evidence in the record demonstrating VR Partners waived its right to enforce the terms of the easement agreement.

A party waives contractual rights by intentionally relinquishing them or by engaging in other intentional conduct inconsistent with claiming them. *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 593 S.W.3d 324, 334 (Tex. 2020) (citation omitted). "Waiver is a question of intent, examining whether a party's conduct, in light of the surrounding facts and circumstances, is unequivocally inconsistent with claiming that right." *Id.* at 334–35 (internal quotation marks and citation omitted). "Silence or inaction, for so long a period as to

show an intention to yield the known right, is also enough to prove waiver." *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996).

Here, although VR Partners acquired the CNL property in 2009, VR Partners did not take any action to alert Midtex that it intended to enforce the easement's renewal provisions until November 2018—twenty-one months after the February 2017 renewal deadline and more than nine years after VR Partners acquired the CNL property. Even if we assume Midtex was in compliance with the easement agreement's renewal provisions before February 2017, when it undisputedly failed to give notice of its intent to renew for a third term, VR Partners' silence or inaction for the following twenty-one months is evidence of its intent to waive its contractual rights under the easement agreement. *See id.* (holding party waived contractual right to receive delivery of 31,000 barrels of natural gas liquids per day by accepting delivery of substantially less than that amount for three years without complaint); *see also Nolan v. Hunter*, No. 04-13-00072-CV, 2013 WL 5431050, at *8 (Tex. App.—San Antonio Sept. 25, 2013, no pet.) (mem. op.) (holding party's failure to complain about violations of restrictive covenants between 1994 and 2011 was evidence he waived the right to seek to enforce them).

VR Partners also argues Midtex failed to establish a probable right to recover on its waiver theory because there is no evidence of detrimental reliance. Ordinary waiver, however, does not require a showing of detrimental reliance or prejudice. *See Perry Homes v. Cull*, 258 S.W.3d 580, 593–95 (Tex. 2008) (contrasting ordinary waiver with waiver of arbitration rights by litigation conduct, which, like estoppel, has an added component of prejudice). Rather, "[w]aiver 'is essentially unilateral in its character' and 'no act of the party in whose favor it is made is necessary to complete it.'" *Id.* at 594 (quoting *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967)). Regardless, it is undisputed that Midtex spent approximately $10,000 to digitize the sign in 2016 and, even after the February 2017 renewal deadline, continued

to maintain and operate the sign at its own expense in reliance upon VR Partners' silence or inaction.

Because the record "reasonably support[s]" Midtex's allegation that VR Partners waived its right to enforce the renewal provisions of the easement agreement, we conclude Midtex demonstrated a probable right to relief on its claim for declaratory judgment based on waiver. *See Camp Mystic*, 399 S.W.3d at 273 (holding the evidence supporting a temporary injunction "need only reasonably support the movant's complaints" to establish a probable right to relief). We therefore need not address whether Midtex established a probable right to recover on any other claim or theory.

B. Probable, imminent, and irreparable injury

"Probable injury is established by tendering evidence of imminent harm, irreparable injury, and an inadequate legal remedy." *Id.* (citing *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 597 (Tex. App.—Amarillo 1995, no writ)). "An irreparable injury is defined as an injury for which compensation cannot be made, or for which compensation cannot be measured by any certain pecuniary standard." *Id.* (citing *Tri–Star Petroleum Co. v. Tipperary Corp.*, 101 S.W.3d 583, 591 (Tex. App.—El Paso 2003, pet. denied)).

"Damage that cannot be easily calculated, such as the demise of an existing business, may constitute irreparable injury." *Khaledi*, 126 S.W.3d at 283 (citing *Miller Paper Co.*, 901 S.W.2d at 602). Accordingly, the probable, imminent, and irreparable injury prong may be satisfied with testimony that the threatened injury to an existing business's clientele, marketing, and goodwill, albeit not impossible to quantify, will be difficult to calculate or monetize. *See Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 896 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (affirming injunction based on testimony that loss of business reputation and goodwill would be "very difficult to calculate" and that it would be "rank speculation" to attempt

to calculate loss of future business); *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 227–28 (Tex. App.—Fort Worth 2009, pet. denied) (holding testimony that responding to the activity sought to be enjoined would "probably cost [the movant] significant goodwill" was specific, undisputed evidence of intangible harm to business); *Mabrey v. SandStream, Inc.*, 124 S.W.3d 302, 318–19 (Tex. App.—Fort Worth 2003, no pet.) (holding testimony that defendants' misappropriation of trade secrets "could impede" plaintiff's business, despite acknowledging that is "just speculati[on] right now," was sufficient evidence of irreparable injury); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd) (holding testimony that lost goodwill would be "immeasurable" without injunction was sufficient to show legal remedy was inadequate); *Miller Paper Co.*, 901 S.W.2d at 602 (holding testimony that "[w]e can kind of put our hands on what's happening to us now, but we have no way of assessing the damage that this is going to cause" was sufficient to show probable, irreparable injury).

Here, Midtex's representative Rodney Fischer testified that if the sign is removed, the damage to Midtex's business "would be very hard to quantify," explaining: "[T]he sign is pretty critical to business. I'm not sure even how to quantify how much to sue for. It's obviously the fact—I mean, it's important. It's important to business to have that bright sign out there." When asked "[t]o what extent is the pedestal sign . . . part of your marketing strategy for attracting customers," Fischer responded: "It's key."

Relying on this court's decision in *Auburn Investments, Inc. v. Lyda Swinerton Builders, Inc.*, VR Partners argues this testimony is "pure speculation" and insufficient to support a temporary injunction. *See* No. 04-08-00067, 2008 WL 2923643 (Tex. App.—San Antonio July 30, 2008, no pet.) (mem. op.). In *Auburn Investments*, we affirmed the trial court's order denying a temporary injunction where the movant offered no testimony connecting an ongoing decline in

hotel business to the neighboring construction activity sought to be enjoined. *Id.* at *3. Although we acknowledged "the loss of business goodwill may be sufficient to show irreparable injury for purposes of a temporary injunction," we held that because the movant was alleging it had already lost business due to dust and debris from neighboring construction, the movant was required to provide "objective facts, figures or data" connecting the decline in occupancy to the dust and debris. *Id.*

Here, in contrast, because the pedestal sign has not yet been removed, Midtex cannot provide objective facts, figures, or data connecting that removal to a loss in business. Rather, Midtex can only speculate to what extent removal of the sign will impact its business in the future. Rodney Fischer testified without objection that the impact on Midtex's business caused by removal of the sign is "very hard to quantify" prospectively. Therefore, we conclude Fischer's testimony is sufficient to support the trial court's finding in the amended injunction order that "[Midtex] would be irreparably harmed if this temporary injunction was not granted as [Midtex's] loss of goodwill, customers, and damages would be difficult if not impossible to measure if the pedestal sign is dismantled or removed before the trial of this cause."[1]

Because the evidence establishes (1) a probable right to relief on Midtex's declaratory judgment claim and (2) a probable, imminent, and irreparable injury, we overrule VR Partners' issue.

[1] Although VR Partners emphasizes the deficiency of the original injunction order, which does not specify the probable, imminent, and irreparable injury, we consider only the amended injunction order because it superseded the prior order. *See McDowell v. McDowell*, No. 02-16-00038-CV, 2016 WL 4141029, at *1 (Tex. App.—Fort Worth Aug. 4, 2016, no pet.) (mem. op.) (citing *Ahmed v. Shimi Ventures, L.P.*, 99 S.W.3d 682, 687–88 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Smith v. Smith*, 681 S.W.2d 793, 797 (Tex. App.—Houston [14th Dist.] 1984, no writ)); *see also Price Constr., Inc. v. Castillo*, 147 S.W.3d 431, 441 (Tex. App.—San Antonio 2004, pet. denied) (op. on reh'g) ("Any change in a judgment made during the trial court's plenary power is treated as a modified or reformed judgment that implicitly vacates and [supersedes] the prior judgment, unless the record indicates a contrary intent.").

Conclusion

Having overruled VR Partners' sole issue, we affirm the trial court's amended injunction order.

Irene Rios, Justice