In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00413-CV

GEORGE H. RUSSELL AND SUZANNE B. RUSSELL, Appellants

V.

WATERWOOD IMPROVEMENT ASSOCIATION, INC., Appellee

On Appeal from the 411th District Court
San Jacinto County, Texas
Trial Cause No. CV13,114

MEMORANDUM OPINION

This is an appeal from the trial court's grant of a temporary injunction restraining George and Suzanne Russell from interfering with the Waterwood Improvement Association's ("WIA") maintenance of Waterwood Parkway. Appellants argue that the trial court erred in finding that WIA established a probable right to recovery, in improperly restricting their right to free speech, and in drafting the temporary injunction order. We affirm the order of the trial court.

BACKGROUND

This dispute involves a portion of Waterwood Parkway in San Jacinto County. The County obtained an easement over Waterwood Parkway in 1979. The County maintained the road with contributions from the WIA. George and Suzanne Russell, defendants in the underlying lawsuit, own title to some of the property that is subject to the County's easement. The Russells do not want the easement mowed but desire it to be left in a more natural state. According to the evidence, the Russells's primary concern is the mowing down of their wildflowers. The evidence also established that at one time WIA paid the Russells rent pursuant to a lease agreement to use part of the Parkway. In May 2008 WIA sent written notice to the Russells that WIA was not going to renew the lease when it expired.[1]

In 2009, the County Commissioner's Court approved an agreement between the County and WIA for WIA to maintain Waterwood Parkway. WIA informed the Russells that it had entered into an agreement with the County to maintain Waterwood Parkway, and as part of that agreement, WIA intended to maintain the plants at the entrance signs and mow the easement. In an effort to alleviate the Russells's environmental concerns, WIA stated that it would preserve the areas where wild flowers and new trees were growing in the median, and delay mowing until the wild flowers had gone to seed. In

[1] The evidence established that WIA-owned Waterwood entrance signs were located on the Russells's property. However in 2008, the WIA Board of Directors determined those signs would be removed and allowed the lease to expire.

addition, WIA would avoid cutting new trees growing in the center of the medians. Nevertheless, the Russells continued to confront WIA employees attempting to mow the easement, stating that they were on the Russells's property and demanding that they stop mowing. On one occasion, Suzanne Russell accused WIA employees of trespassing and called law enforcement officers to the property in an attempt to have law enforcement officers stop the mowing. On another occasion, employees discontinued mowing to avoid being further harassed by Mr. Russell.

In June 2011, WIA brought the underlying suit requesting a declaratory judgment regarding its rights under the easement and its agreement with the County, and seeking injunctive relief. WIA sought a temporary injunction to enjoin the Russells from interfering with WIA's maintenance of Waterwood Parkway pursuant to its agreement with the County. After hearing evidence, the trial court entered an order granting the temporary injunction, and a writ of injunction. The trial court's order provides in pertinent part:

> Notwithstanding the Agreement [between WIA and San Jacinto County], Defendants have set upon a course of action to interfere with the rights of WIA under the Agreement. These have included interfering with employees of WIA and contractors for WIA. Most recently Defendants interfered with WIA's mowing of the Parkway, pursuant to the Agreement.
>
> The Court further finds that unless Defendants are restrained from interfering with the rights of Plaintiff under its Agreement with San Jacinto County, Texas, that Plaintiff will suffer irreparable injury, to wit: interference by Defendants resulting in Plaintiff's breach of its Agreement with San Jacinto County, Texas to maintain the Waterwood Parkway.

. . . .

> It is therefore ordered that the temporary injunction requested be and is granted as requested, and that the clerk of this court issue a writ of injunction, pending final hearing and determination of this case, restraining and enjoining defendant from interfering with the rights of Plaintiff, and those persons acting under the direction of Plaintiff, in performance of Plaintiff's duties under its Agreement with San Jacinto County, identified above, and Defendants are ordered not to interfere with Plaintiff's mowing of the Waterwood Parkway, including but [not] limited to the mowing of the right of ways which are part of the easement of San Jacinto County, as set forth above. The Defendants are ENJOINED from physically going on the Waterwood Parkway easement while the Waterwood Improvement Association, Inc. is fulfilling its contractual obligations.

Following the court's issuance of the temporary injunction, the Russells filed this appeal.

ISSUE ONE

To obtain a temporary injunction, an applicant must plead and prove (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. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). In issue one, the Russells contend the trial court's issuance of the injunction was improper because WIA failed to present sufficient evidence to show a probable right of recovery in its suit for declaratory judgment.[2] Specifically, the Russells argue (1) the right to maintain Waterwood Parkway is a governmental function that the County could not legally assign to WIA, and (2) the agreement between the County and WIA constitutes a taking of the Russells's property in violation of the Texas Constitution.

[2] In their brief, the Russells also state that WIA failed to produce any evidence to support the trial court's finding of "probable injury." The Russells do not present an argument or cite any authority in support of this assertion; therefore, we decline to address the merits of this contention on appeal. Tex. R. App. P. 38.1(h).

WIA argues that the Russells failed to preserve this issue for appellate review. The Russells did not argue in the trial court that the injunction was improper because the agreement between the County and WIA was void, or that it constituted a taking of their property in violation of the Constitution. However, in a nonjury case, a complaint regarding the legal or factual sufficiency of the evidence may be raised for the first time on appeal. Tex. R. App. P. 33.1(d). Therefore, we will address the merits of the Russells's first issue.

Validity of Agreement

The Russells contend that the right to maintain Waterwood Parkway is a governmental function, and the County lacked authority to transfer its responsibility to maintain Waterwood Parkway to WIA; therefore, the agreement is void. Generally, agreements entered into by the County cannot result in abrogation or delegation of the County's governmental authority. *See Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977); *see also San Antonio River Auth. v. Shepperd*, 299 S.W.2d 920, 927 (Tex. 1957); *City of Arlington v. City of Fort Worth*, 844 S.W.2d 875, 878 (Tex. App.—Fort Worth 1992, writ denied). Further, a governmental entity's police power cannot be abdicated or bargained away. *Banker v. Jefferson Cnty. Water Control & Improvement Dist. No. One*, 277 S.W.2d 130, 134 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.). However, this rule does not prevent the County from lawfully entering into contracts in order to fulfill its duties and obligations to the public.

See San Antonio River Auth., 299 S.W.2d at 926-27; *see also Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 843 (Tex. 2010).

While a governmental entity cannot bind itself in a manner that restricts the free exercise of its reserved powers, not every contract entered into by a governmental entity has this effect. *See Clear Lake City Water Auth.*, 549 S.W.2d at 391; *see also Kirby*, 320 S.W.3d at 843. Only those agreements that have the effect of potentially controlling and embarrassing a governmental entity in the exercise of its governmental power are improper. *Clear Lake City Water Auth.*, 549 S.W.2d at 392; *see also Kirby*, 320 S.W.3d at 843; *Brubaker v. Brookshire Mun. Water Dist.*, 808 S.W.2d 129, 132-33 (Tex. App.—Houston [14th Dist.] 1991, no writ). The Texas Supreme Court has recognized that an agreement that is terminable at will does not infringe upon a governmental entity's free exercise of its police power, and is valid until terminated by one party. *Clear Lake City Water Auth.*, 549 S.W.2d at 391-92; *see also City of Corpus Christi v. Taylor*, 126 S.W.3d 712, 723 (Tex. App.—Corpus Christi 2004, pet. withdrawn) (citing *Clear Lake City Water Auth.*, the Court recognized that unless the agreement was treated as terminable at will it would have the impermissible effect of being void); *ECO Res., Inc. v. City of Austin*, No. 03-00-00353-CV, 2001 WL 23197, at *5-6 (Tex. App.—Austin Jan. 11, 2001, pet. denied) (concluding ECO's contracts with the MUDs "terminable only for cause in instances of material breach" were improper delegations of government authority) (not designated for publication).

The Russells cite *Pittman v. City of Amarillo*, 598 S.W.2d 941 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.), in support of their contention that the agreement between the County and WIA is void. In *Pittman*, the court found significant that the agreement in question purported to obligate the municipality to "grant a free tap and free sewer service to the occupants of improvements located on the premises, apparently *for so long as those improvements exist*." *Id.* at 945 (emphasis added). The court concluded that "[a] grant of that nature is a bargaining away of the municipality's governmental power to regulate and control its sewer system and to charge and collect for its use." *Id.* *Cf. City of Arlington*, 844 S.W.2d at 878 (recognizing that a City's agreement to provide sewer services for a definite period of time is enforceable; whereas an agreement to provide such services indefinitely is not).

Unlike the agreement in *Pittman*, the agreement at issue in the present case is terminable at will by either party upon thirty days written notice. Moreover, the agreement does not obligate the County to act in a certain manner with regard to maintenance of Waterwood Parkway; it simply allows WIA to maintain the Parkway. We hold the agreement in question is not an improper abrogation of the County's police power. *See Clear Lake City Water Auth.*, 549 S.W.2d at 391-92; *see also Kirby*, 320 S.W.3d at 843.

Constitutional Taking

In conjunction with issue one, the Russells argue the agreement between the County and WIA constitutes an illegal taking of the Russells's property in violation of the Texas Constitution. According to the Russells, this alleged constitutional violation undermines the sufficiency of WIA's evidence of a probable right to recovery at trial.

The Texas Constitution provides that, "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person[.]" Tex. Const. art. I, § 17. "An inverse condemnation may occur if, instead of initiating proceedings to condemn property through its powers of eminent domain, the government intentionally physically appropriates or otherwise unreasonably interferes with the owner's right to use and enjoy his or her property." *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010). An inverse condemnation suit is the proper vehicle for a landowner to attempt to recover compensation for lost or impaired rights resulting from the government's unreasonable interference with the landowner's rights. *See id*. The Russells have not pleaded a takings claim or brought suit for inverse condemnation.

WIA presented evidence at the temporary injunction hearing that the developer conveyed an easement over Waterwood Parkway to San Jacinto County. Additionally, the record establishes that the developer dedicated Waterwood Parkway to the public in 1995. On appeal, the Russells do not dispute that Waterwood Parkway is a County road.

A landowner cannot exercise his fee title rights in a manner that interferes with a government's easement over a public roadway. *See Pittman*, 598 S.W.2d at 944 (citing *Hill Farm, Inc. v. Hill County*, 436 S.W.2d 320, 323 (Tex. 1969)) (holding the Pittmans's property right was inferior to the City's property right in dedicated public street, therefore, no taking had occurred). Regardless, whether the Russells may be entitled to compensation pursuant to a takings claim would not affect the validity of the agreement or WIA's rights under the agreement.

We are unpersuaded by the Russells's argument that there is insufficient evidence in the record to support the trial court's finding that WIA established a probable right to the relief sought. We overrule issue one.

ISSUE TWO

In issue two, the Russells argue that the injunction improperly restricts their right to free speech in violation of the First Amendment. The temporary injunction does not restrict the Russells's speech or expression; it merely prohibits the Russells from interfering with WIA's maintenance and mowing of the Parkway. *See, e.g., Greenpeace, Inc. v. Exxon Mobil Corp.*, 133 S.W.3d 804, 810, n.1 (Tex. App.—Dallas 2004, pet. denied). Moreover, even assuming the injunction is a restriction of protected speech, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner." *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 86, 92 (Tex. 2003). Protected speech may be subject to reasonable time, place, and manner

restrictions. *Id*. Restrictions on the time, place, or manner of the exercise of free speech rights do not violate constitutional protections if the restrictions are "'justified without reference to the content of the regulated speech,'" and are "'narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)). To the extent the injunction could be interpreted as a restriction of protected speech, we conclude that it is a reasonable restriction on the time, place and manner of such speech.[3] *See id*. We overrule issue two.

ISSUE THREE

In issue three, the Russells argue that the trial court failed to comply with Rule 683 of the Texas Rules of Civil Procedure and the order is invalid on its face. "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained. . . ." Tex. R. Civ. P. 683. Rule 683 requires a trial court to state the reasons it believes the

[3] The evidence presented at the temporary injunction hearing established that Mr. Russell is a "prolific" emailer and has sent numerous written communications to the WIA protesting its mowing of Waterwood Parkway. The injunction does not prevent the Russells from continuing to send emails or otherwise expressing their environmental concerns to WIA in a manner that does not interfere with WIA's performance of its contractual obligations.

applicant will suffer an imminent and irreparable injury if the court does not grant an injunction. *Murray v. Epic Energy Res., Inc.*, 300 S.W.3d 461, 470-71 (Tex. App.—Beaumont 2009, no pet.); *see also Fasken v. Darby*, 901 S.W.2d 591, 592-93 (Tex. App.—El Paso 1995, no writ) (citing *State v. Cook United, Inc.*, 464 S.W.2d 105, 106 (Tex. 1971)); *Transport Co. of Tex. v. Robertson Transports, Inc.*, 261 S.W.2d 549, 556 (Tex. 1953). The specificity required by Rule 683 is not satisfied by "the mere recital of no adequate remedy at law and irreparable harm." *Int'l Bhd. of Elec. Workers Local Union 479 v. Becon Constr. Co.*, 104 S.W.3d 239, 244 (Tex. App.—Beaumont 2003, no pet.). The Russells argue the order fails to identify the injury the injunction will prevent, and fails to explain why the injury is irreparable. The trial court's order identifies the irreparable injury as interference by the Russells with a governmental function, i.e. the maintenance and upkeep of the public roadway easement by WIA under its agreement with the County. At the hearing on the temporary injunction, there was evidence presented that while the mowing of the roadway easement certainly has an aesthetic purpose, it is also a matter of safety for the driving public. While the trial court may have included further details, we conclude under the circumstances presented in this case, the trial court's order identifies the probable interim injury and adequately sets forth the reasons for the issuance of the temporary injunction. Tex. R. Civ. P. 683; *Transport*, 261 S.W.2d at 556.

The Russells argue additionally that the order is overbroad in enjoining them from "interfering" with the rights of WIA without defining the term "interference." A temporary injunction order must apprise the defendant of what is prohibited in reasonable detail. *See* Tex. R. Civ. P. 683. An injunction order must be as definite, clear, and precise as possible to inform the defendant of the acts he is restrained from doing without the need for him to draw inferences or conclusions. *Metra United Escalante, L.P. v. Lynd Co.*, 158 S.W.3d 535, 544-45 (Tex. App.—San Antonio 2004, no pet.). However, an injunction "must be in broad enough terms to prevent repetition of the evil sought to be stopped, whether the repetition be in a form identical to that employed prior to the injunction or in somewhat different form calculated to circumvent the injunction as written." *Id*. at 545. Several of our sister courts have upheld temporary injunctions restraining a defendant from "interfering" with activities or relationships of the plaintiff. *See Vaughn v. Intrepid Directional Drilling Specialists, Ltd.*, 288 S.W.3d 931, 938-39 (Tex. App.—Eastland 2009, no pet.) (upholding order restraining defendants from "any other interference" and "any conduct calculated to interfere with" Intrepid's business relationships); *Breithaupt v. Navarro Cnty.*, 675 S.W.2d 335, 339-40 (Tex. App.—Waco 1984, writ ref'd n.r.e.) (upholding injunction ordering defendants to stop "directly or indirectly interfering with the use of [a public] road"); *Browning v. Mellon Exploration Co.*, 636 S.W.2d 536, 539 (Tex. App.—San Antonio 1982, writ dism'd) (upholding injunction enjoining defendants from "interfering in any way with any drilling

operations"). We conclude that the trial court's order is sufficiently specific. *See* Tex. R. Civ. P. 683.

Finally, the Russells argue that the temporary injunction order sets forth an overbroad remedy because it prohibits the Russells from being physically present on the Waterwood Parkway easement during mowing. The Russells contend that they have a right to use their property in any manner which does not interfere with the use and maintenance of the Parkway as a public roadway. However, evidence was presented at the temporary injunction hearing that supports WIA's claim that the Russells were using their property in a manner that does interfere with the maintenance of the Parkway. We conclude the temporary injunction order is not void for being vague or overly broad. We hold the temporary injunction order meets the requirements of Rule 683. *See* Tex. R. Civ. P. 683. We overrule issue three.

Having overruled all three of the Russells's appellate issues, we affirm the order of the trial court granting the temporary injunction.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on October 19, 2011
Opinion Delivered November 17, 2011

Before Gaultney, Kreger, and Horton, JJ.