In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00483-CV

GADV, INC. D/B/A L&L GENERAL CONTRACTORS, Appellant

V.

BEAUMONT INDEPENDENT SCHOOL DISTRICT AND MORGANTI TEXAS, INC., Appellees

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On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-190,626

MEMORANDUM OPINION

Appellant GADV, Inc. d/b/a L&L General Contractors ("GADV") filed a petition for temporary restraining order against appellees Beaumont Independent School District ("BISD") and Morganti Texas, Inc. ("Morganti"). GADV alleged that BISD violated the requirements of chapter 44 of the Texas Education Code in seeking proposals from contractors for an auditorium construction project and a field house construction project, and that BISD ultimately awarded both projects to Morganti. After conducting an evidentiary hearing, the trial court signed an order that temporarily enjoined further work

on the field house project, but declined to enjoin the auditorium project. In a letter ruling, which the trial judge incorporated by reference into his temporary injunction order, the trial judge explained his decision as follows:

> With regard to the Westbrook Auditorium project, the contract was awarded at the February 17, 2011 board meeting. Although this Court concludes that such was done contrary to the mandatory provisions, there was no objection to this process until August 3, 2011 when [GADV] filed its second petition seeking injunctive relief in connection with the second award of the contract for the Westbrook field house. . . . While the [field house] project is . . . in its second startup, its progress is significantly less than the auditorium project such that the Court finds that the benefit to the public (i.e. insisting on compliance with statutory mandates – especially after having once been chastised [by the federal court's entry of a permanent injunction]) does, in fact, outweigh any detriment.

GADV filed this appeal, in which it contends in two issues that the trial court erred by performing a balancing of the equities test and by not finding that GADV showed a probable violation of section 44.031(g) of the Texas Education Code. *See* Tex. Educ. Code Ann. § 44.031(g) (West Supp. 2011).[1] We affirm the trial court's judgment.

Section 44.032(f) of the Texas Education Code, which deals with enforcement of statutory purchase procedures, provides that a county attorney, district attorney, criminal district attorney, citizen of the county in which the school district is located, or any interested party "*may* bring an action for an injunction[,]" and "[a] court *may* enjoin performance of a contract made in violation of this subchapter." Tex. Educ. Code Ann. § 44.032(f) (West 2006) (emphasis added); *see also Daniels Bldg. & Constr., Inc. v.*

[1] Section 44.031 was amended effective September 1, 2011. However, the text of subsection (g) was not changed by the amendment. Therefore, we cite the current version of the statute.

Silsbee Indep. Sch. Dist., 990 S.W.2d 947, 950 (Tex. App.—Beaumont 1999, pet. dism'd). When the Legislature uses the word "may" in a statute, it "creates discretionary authority or grants permission or a power." Tex. Gov't Code Ann. § 311.016(1) (West 2005). On the other hand, the word "shall" imposes a duty. *Id*. 311.016(2). "The principles, practice[,] and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with these rules or the provisions of the statutes." Tex. R. Civ. P. 693.

Citing *Gulf Holding Corp. v. Brazoria Cnty.*, 497 S.W.2d 614 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.), *Town of Palm Valley v. Johnson*, 17 S.W.3d 281 (Tex. App.—Corpus Christi 2000, pet. denied), and *City of Corpus Christi v. Friends of the Coliseum*, 311 S.W.3d 706 (Tex. App.—Corpus Christi 2010, no pet.), GADV argues that when a public interest or protection statute authorizes injunctive relief based on a statutory violation, traditional or common law equitable principles do not apply. GADV also apparently argues that applying equitable principles violates public policy. We will examine in turn each of the cases cited by GADV.

In *Gulf*, the trial court temporarily enjoined obstruction of the use of a beach pursuant to the Open Beach Act. *Gulf Holding Corp.*, 497 S.W.2d at 619. As the *Gulf* court explained in its opinion, the Open Beach Act provided that obstructing free and unrestricted public use of a beach was "an offense against the public policy of this state[.]" *Id*. at 616. The Open Beach Act also stated that the Attorney General, as well as

any county attorney, district attorney, or criminal district attorney was "authorized and empowered, and it shall be his, or their duty to file . . . actions seeking either temporary or permanent court orders or injunctions to remove any obstruction . . . ." *Id.* In addressing the appellant's complaint that there was no evidence of irreparable injury, the *Gulf* court held that in light of the statute's provision "for a mandatory injunction to remove obstructions or barriers[,]" "[w]hen it is determined that a statute is being violated, it is the province and duty of the district court to restrain it, and the doctrine of balancing of equities does not apply." *Id.* at 619. As discussed above, section 44.032(f) uses "may" both in describing who is entitled to seek to enjoin performance of a contract and in describing the district court's ability to enjoin performance. Tex. Educ. Code Ann. § 44.032(f). Therefore, the *Gulf* court's holding that balancing of the equities does not apply is inapposite.

In *Palm Valley*, the trial court permanently enjoined the town of Palm Valley from "closing, obstructing, or otherwise denying public access to . . . a public street located within the town's boundaries." *Town of Palm Valley*, 17 S.W.3d at 283. The case involved sections 65.011 and 65.015 of the Texas Civil Practice and Remedies Code, which dealt with injunctions to prevent the governing body of an incorporated city from closing a street. *Id.* at 285. The court explained that section 65.015 provided that "[t]he grant or refusal of a permanent injunction is within the trial court's sound discretion[,]" while section 65.011 listed several grounds for obtaining injunctive relief, and did not

require a showing of irreparable injury. *Id*. at 285-86. The appellant in *Palm Valley* argued, among other things, that the trial court erred in granting injunctive relief because the appellee failed to establish that he had suffered an irreparable injury. *Id*. at 283, 285. The Court of Appeals noted that "[appellee]'s argument that no showing of irreparable injury is required is . . . supported by the principle that equitable requirements for obtaining an injunction are inapplicable when a right to injunctive relief is granted by statute or when an injunction is granted to prevent the violation of a statute." *Id*. at 286 (citing *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 805 (Tex. 1979), and *Gulf Holding Corp.*, 497 S.W.2d at 619).

We have already held that *Gulf*, upon which the *Palm Valley* court relied, is inapposite to the facts presented in this case. The *Palm Valley* court did not discuss the distinction between the discretionary language ("may") in the statute before it and the mandatory language ("shall") used in the statute at issue in *Gulf*. Additionally, although the Supreme Court denied the petition for review in *Palm Valley*, it did so in a per curiam opinion, in which the Court held that although section 65.011 does not expressly require lack of an adequate legal remedy as a prerequisite for injunctive relief, "this requirement of equity continues." *Town of Palm Valley v. Johnson*, 87 S.W.3d 110, 111 (Tex. 2001). The Supreme Court nevertheless denied the petition for review because it determined that "any error in the court of appeals' opinion did not result in an error in its judgment that should be corrected." *Id*. For all of these reasons, we decline to apply the Court of

Appeals' decision in *Palm Valley* to prohibit the trial court from balancing the equities in the case at bar.

We now turn to *City of Corpus Christi v. Friends of the Coliseum*. In *City of Corpus Christi*, the City appealed the trial court's temporary injunction restraining the City from demolishing a coliseum. *City of Corpus Christi*, 311 S.W.3d at 707. The City argued that the trial court erred by granting the temporary injunction because its order failed to meet the requirements of Rule 683 of the Texas Rules of Civil Procedure. *Id.* Appellee argued that a showing of irreparable harm was unnecessary because the injunction was granted pursuant to chapter 442 of the Texas Government Code and chapter 191 of the Texas Natural Resources Code. *Id*. at 707, 709. Section 442.012(a) of the Texas Government Code provided that "the attorney general or any resident of this state may file suit in district court to restrain and enjoin a violation or threatened violation of this chapter[.]" *Id*. at 709.

The Corpus Christi Court of Appeals stated that "the equitable requirements for obtaining an injunction -- such as the requirement that an applicant show it would suffer irreparable harm if the injunction is not issued -- are inapplicable when a right to injunctive relief is granted specifically by statute." *Id*. However, the Court held that because the trial court's order did not state that the temporary injunction was granted pursuant to statutory authority or state what violations justified injunctive relief, it violated the requirements of Rule 683 of the Texas Rules of Civil Procedure. *Id.* at 710.

The Court's decision was based upon the trial court's lack of compliance with Rule 683, not any application of equitable principles by the trial court. *Id.* In addition, we note that the Court of Appeals relied upon *Town of Palm Valley*, which relied upon *Gulf*. In doing so, the Court relied upon *Town of Palm Valley* (and, therefore *Gulf*) without explaining the distinction between the mandatory language of the statute involved in *Gulf* and the discretionary language contained in section 442.012(a). *See City of Corpus Christi*, 311 S.W.3d at 709. As explained above, neither *Town of Palm Valley* nor *Gulf* controls our decision in this case. Therefore, we decline to follow the *dicta* contained in our sister court's opinion in *City of Corpus Christi*.

GADV also relies upon this Court's holding in *Daniels*. In *Daniels*, we addressed "whether or not a school district that chooses to use the construction manager-at-risk method to build a school must comply with the publication of notice requirements of Tex. Educ. Code Ann. § 44.031(g)." *Daniels*, 990 S.W.2d at 948. We held that compliance with the statute was required and remanded the case for entry of an injunction. *Id*. at 948, 950. GADV contends that because we remanded the case for entry of an injunction without applying equitable principles, our holding was tantamount to applying the principle that balancing the equities does not apply regarding applications for statutorily-authorized injunctive relief. However, there is no indication that the application of equitable principles was at issue in *Daniels*. Rather, the sole issue before us in *Daniels* was whether a school district is required to comply with section 44.031(g) when building

a school pursuant to the construction manager-at-risk method. *Id*. *Daniels* does not support the position GADV advances in this appeal.

In this case, the trial court's order stated that in awarding the auditorium project to Morganti, BISD violated subchapter 44 of the Texas Education Code. Hence, it is unclear whether, as GADV alleges, the trial court declined to find that BISD violated section 44.031(g). *See* Tex. Educ. Code Ann. § 44.031(g). However, even if the trial court did not find a violation of section 44.031(g), it is clear that the trial court's decision to deny temporary injunctive relief with respect to the auditorium project was based upon a balancing of the equities involved, including the substantial progress already made toward construction and GADV's delay in filing suit concerning the project. Therefore, even if the trial court had expressly found a violation of section 44.031(g), the trial court's order and letter ruling indicate that it would have exercised its discretion to balance the equities in the same manner. *See generally* Tex. R. App. P. 44.1(a). For all of these reasons, we overrule issues one and two and affirm the trial court's order.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on November 4, 2011
Opinion Delivered December 15, 2011

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