COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00298-CV

RAYMAX MANAGEMENT, L.P. — APPELLANT

V.

AMERICAN TOWER CORPORATION; AMERICAN TOWER ASSET SUB II, LLC; AND METROPCS TEXAS, LLC — APPELLEES

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 153-279896-15

MEMORANDUM OPINION[1]

Appellant RayMax Management, L.P. (RayMax) appeals from the trial court's summary judgment in favor of Appellees on RayMax's claims for a declaratory judgment, trespass, and unjust enrichment. We affirm.

[1]*See* Tex. R. App. P. 47.4.

I. BACKGROUND

A. THE 1994 LEASE

On March 24, 1994, Charles Ray Hawkins leased a portion of a tract of real property, which he owned, to Dallas SMSA Limited Partnership (SMSA) "for the purpose of construction, operation, and maintenance of a radio transmission facility." The parties attached to the lease a metes and bounds description of Hawkins's tract (the tract) and labeled it "Exhibit 'A'" and "PROPERTY DESCRIPTION." The tract was triangular and roughly bordered by Lois Street to the south, Highway 287 to the east, and Vaughn Boulevard to the west.[2] The portion of the tract to be leased (the leased premises), however, was not described by metes and bounds. Instead, the parties attached to the lease a picture—labeled as "Exhibit 'A'" and "ILLUSTATION"—that used SMSA's handwritten notations to indicate the boundaries of the leased premises within the tract. The leased premises, designated by parallel hatch marks within the tract, were defined to the east by a billboard tower pole, to the west by Vaughn Boulevard, and to the south by Lois Street. Vaughn Boulevard and Lois Street intersected at the southwest corner of the leased premises.

The lease gave SMSA the right to survey the leased premises, which "if made, shall become Exhibit 'B' to the [lease]." The lease also acknowledged that SMSA's use of the leased premises was contingent on SMSA obtaining "all of the

[2]Vaughn Boulevard and Highway 287 intersected to form the northern point of the tract.

certificates, permits, and other approvals that may be required by any federal, state[,] or local authorities." Hawkins and SMSA contemporaneously recorded a memorandum of the lease agreement with the county clerk of Tarrant County. To comply with the approvals condition, SMSA filed construction plans (the site plan) for the leased premises with the City of Fort Worth in 1994. The filed site plan was a scale drawing of the leased premises and included metes and bounds descriptors along its boundary lines. On August 1, 1995, Hawkins conveyed the entire tract to RayMax through a warranty deed.[3]

B. SUCCESSORS IN INTEREST, THE WALKER SURVEY, AND 2007 LEASE AMENDMENT

The lease allowed SMSA to sell, assign, transfer, or sublease, and at some point, SBC Tower Holdings, LLC (SBC Holdings) became SMSA's successor in interest. On December 14, 2000, SBC Holdings subleased the leased premises to Southern Towers, Inc. (Southern), which had Dennis Walker survey the leased premises (the Walker survey). The Walker survey described the leased premises by metes and bounds, which matched the metes and bounds descriptions included in the site plan SMSA filed with the City of Fort Worth in 1994. A metes and bounds description of the leased premises, which tracked the Walker survey, was attached as a supplement to the sublease with Southern.

[3]The record indicates that Hawkins is the president of RayMax.

In 2005, Southern entered into an agreement with appellee MetroPCS Texas, LLC (Metro) under which Metro agreed to install, operate, and maintain telecommunications equipment on the leased premises. Attachment B to their agreement was a metes and bounds description of the premises upon which Metro could install its equipment, which was consistent with the site plan and the Walker survey. Southern and Metro filed a memorandum of this agreement with the county clerk on September 13, 2005. After receiving a building permit on December 2, 2005, Metro installed telecommunications equipment on concrete pads in the disputed area in 2006 and stated that it "used" the portion of the tract described in attachment B "and no other." As such, Metro moved the eastern boundary of its fence, which enclosed the equipment and the leased premises, to encompass an additional 425 square feet shown by the Walker survey. The locations of the equipment and the fence undisputedly were "not hidden" and "very visible."

On February 28, 2007, Southern merged into Spectrasite Communications, Inc.—a subsidiary of appellee American Tower Corporation (ATC)—and assigned its lease of the leased premises to appellee American Tower Asset Sub II, LLC (Asset Sub). Asset Sub, like Spectrasite, is a subsidiary of ATC. On December 11, 2007, SBC Holdings, as lessee, and Hawkins, as lessor, amended the lease of the leased premises to extend the lease term and increase the rent. Under the express terms of the amendment, the remaining

provisions of the 1994 lease "remain in full force and effect and are hereby ratified and affirmed."

On March 22, 2012, ATC sent Hawkins a letter requesting an amended agreement "to reflect Ray[M]ax['s] . . . ownership of the leased parcel." The metes and bounds description of the leased premises attached to ATC's proposed amended agreement comported with the descriptions in the site plan, the supplement to the agreement between SBC Holdings and Southern, and the agreement between Southern and Metro. Again, these descriptions followed the Walker survey. Hawkins did not sign the amended agreement and later came to "understand this document . . . would have expanded the scope of the Leased Premises."

C. THE INSTANT DISPUTE

In March 2013, Hawkins began discussions with ATC "over encroachments on a similar cell tower lease . . . that [ATC was] managing on [his] property." As a result of these discussions, ATC sent Hawkins a copy of the Walker survey, which ATC informed Hawkins "show[ed] no encroachment." In April 2013, Hawkins began trying to sell the tract, including the leased premises, and "went down [to the tract] and noticed that . . . the fence had been moved." As a result, Hawkins sent the Walker survey to John Grant "to determine whether the current tenant was using more property than what was set out in the Lease Agreement in 1994 and whether the [Walker] survey was correct." Grant determined that the eastern boundary of the leased premises, which was marked

by a billboard pole in the 1994 lease-agreement illustration, had been expanded by 425 square feet in the Walker survey (the disputed area).

In 2013, RayMax filed suit against SBC Holdings, Asset Sub, ATC, and Metro, raising a claim for trespass, a claim for unjust enrichment, and requesting that the trial court grant declaratory relief in eleven different respects, which essentially would declare the boundaries between the tract and the leased premises and, thus, the parties' rights and obligations in the leased premises. On appeal, RayMax succinctly summarizes its request for declaratory relief as being one "to determine the boundary lines or holding that the Grant Survey was Exhibit B" to the 1994 lease. RayMax also raised a claim for breach of contract against SBC Holdings. RayMax pleaded for general damages, injunctive relief, exemplary damages, and attorney's fees.[4]

RayMax filed a motion for partial summary judgment seeking judgment as a matter of law on its claims for a declaratory judgment, trespass, and breach of contract.[5] *See* Tex. R. Civ. P. 166a. SBC Holdings, Metro, ATC, and Asset Sub

[4]RayMax's live pleadings at the time the trial court subsequently considered the various summary-judgment motions were its sixth amended petition, supplemental petition, and second supplemental petition. *See* Tex. R. Civ. P. 69. We use those pleadings to determine the nature and scope of RayMax's claims.

[5]RayMax did not seek summary judgment on its requests for injunctive relief and damages.

sought summary judgment on all of RayMax's claims.[6] ATC, Asset Sub, and Metro also filed objections to RayMax's summary-judgment evidence. At some point after June 2014, Hawkins "learned that an additional structure was placed on the . . . tract within the fenced in area."

On July 8, 2015, the trial court denied RayMax's motion for summary judgment and granted the summary-judgment motions filed by Metro, ATC, and Asset Sub, without stating the specific grounds upon which the summary judgments were based other than explaining that the rulings were "based as a matter of law and upon undisputed facts." The trial court granted SBC Holdings' summary-judgment motion regarding RayMax's claims for trespass and for a declaratory judgment, but denied SBC Holdings' motion as to RayMax's breach-of-contract claim.[7] Finally, the trial court did not address and denied as moot ATC and Asset Sub's objections to RayMax's summary-judgment evidence. The trial court then severed out RayMax's claims against ATC and Asset Sub, making the summary-judgment order final as to ATC and Asset Sub, and entered final judgment as to ATC and Asset Sub. *See* Tex. R. Civ. P. 41; *Guidry v. Nat'l*

[6]Each of these motions was a hybrid motion, raising both no-evidence and traditional summary-judgment arguments. *See* Tex. R. Civ. P. 166a(c), (i).

[7]The trial court recognized that the summary-judgment order regarding SBC Holdings was interlocutory. As a result, SBC Holdings is not a party to this appeal. RayMax's claims against SBC Holdings, which later were disposed of based on a take-nothing jury verdict in SBC Holdings' favor, are the subject of a separate appeal currently pending in this court. *See RayMax Mgmt., L.P. v. SBC Tower Holdings, LLC*, No. 02-16-00013-CV.

Freight, Inc., 944 S.W.2d 807, 812 (Tex. App.—Austin 1997, no writ). The trial court later severed out RayMax's claims against Metro as well into the previously severed case regarding ATC and Asset Sub and entered final judgment as to Metro. RayMax appeals the summary judgments granted in favor of ATC, Asset Sub, and Metro.

II. STANDARD AND SCOPE OF REVIEW

In its first issue, RayMax argues that none of the grounds raised by ATC, Asset Sub, or Metro in their summary-judgment motions were meritorious; thus, the trial court erred by granting summary judgment in their favor and by not granting RayMax's requested relief.[8] We review a trial court's summary judgment de novo. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Here, the parties filed hybrid, cross-motions for summary judgment. We therefore consider the entire record and determine whether there is more than a scintilla of probative evidence raising genuine issues of material fact on each element of the

[8]RayMax's issue on appeal does not clearly challenge the trial court's denial of its summary-judgment motion. *See generally* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 52 Hous. L. Rev. 773, 878 (2015) ("A party appealing the denial of a summary judgment, however, must properly preserve this issue on appeal by raising the failure to grant the motion in the brief."). But a careful reading of its brief shows that RayMax arguably challenges the trial court's failure to grant the relief requested in its summary-judgment motion and, thus, fairly includes a challenge to the trial court's denial of its summary-judgment motion. *See* Tex. R. App. P. 38.1(f). Accordingly, we will review all summary-judgment issues presented by the parties to the trial court and necessary to the disposition of this appeal.

challenged claims and on all questions presented by the parties. *See* Tex. R. Civ. P. 166a(c), (i); *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013); *Buck v. Palmer*, 381 S.W.3d 525, 527 & n.2 (Tex. 2012); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). In short, our "ultimate question is simply whether a fact issue exists." *Buck*, 381 S.W.3d at 527 n.2. When, as here, a trial court's summary-judgment order does not specify the ground or grounds relied on for its ruling, we will affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious.[9] *See Provident Life*, 128 S.W.3d at 216.

III. REQUEST FOR DECLARATORY RELIEF

ATC, Asset Sub, and Metro argued in the trial court and again on appeal that declaratory relief as requested by RayMax was unavailable as a matter of law because RayMax sought to remedy an ongoing trespass by the requested declaration. Indeed, a landowner is not entitled to declaratory relief if he is seeking relief for a past trespass that duplicates the relief sought for the trespass.

[9]Approximately three months before the trial court signed the summary-judgment order, the trial court issued a letter ruling to the parties that specified the exact reasons it found to support the denial of RayMax's motion and grant of ATC's, Asset Sub's, and Metro's motions. We may only look to the order granting summary judgment to determine the trial court's reasons for its rulings and, therefore, we are not limited in our review to only those grounds stated in the letter ruling. *See Strather v. Dolgencorp of Tex., Inc.*, 96 S.W.3d 420, 426 (Tex. App.—Texarkana 2002, no pet.); *see also U.S. Lawns, Inc. v. Castillo*, 347 S.W.3d 844, 847–48 (Tex. App.—Corpus Christi 2011, pet. denied); *Bush v. Coleman Powermate, Inc.*, No. 03-04-00196-CV, 2005 WL 1241075, at *8 (Tex. App.—Austin May 26, 2005, no pet.) (mem. op.).

See Etan Indus., Inc. v. Lehmann, 359 S.W.3d 620, 624 (Tex. 2011). Because the purpose of a declaratory judgment is remedial and determines the parties' rights before a wrong has been committed, neither duplicative relief nor relief to address past harm may be sought in a declaratory judgment. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.002(b) (West 2015); *Etan Indus.*, 359 S.W.3d at 624.

First, Metro placed its equipment and moved the fence into the disputed area before RayMax filed suit. The relief sought by RayMax was not preventative but sought redress for alleged injuries it had already sustained. Second, RayMax raised a claim for trespass as well as a request that the trial court declare the boundaries of the leased premises. Both claims necessarily required a determination of the boundary of the leased premises, rendering the relief sought in the declaratory-judgment claim duplicative of the trespass claim. These two facts result in declaratory relief being unavailable to RayMax as a matter of law.[10] *See, e.g.*, *City of Justin v. Rimrock Enters., Inc.*, 466 S.W.3d 269, 288–89 (Tex. App.—Fort Worth 2015, pet. denied). The trial court did not err by granting ATC, Asset Sub, and Metro judgment as a matter of law on RayMax's request for declaratory relief or by denying RayMax's motion directed to that same claim.

[10]RayMax's attempts to distinguish the similar facts found in *Etan Industries* and, thereby, circumvent its clear holding are unavailing.

IV. TRESPASS

In the trial court, ATC, Asset Sub, and Metro argued that RayMax's trespass claim was barred by the applicable two-year statute of limitations, which begins to run "after the day the cause of action accrues." *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West Supp. 2016). The characterization of an injury to real property as permanent or temporary determines when limitations accrues. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 275, 279 (Tex. 2004) (holding characterization of injury to real property as temporary or permanent "determines when limitations accrues").

A. STATUTE OF LIMITATIONS: PERMANENT OR TEMPORARY INJURY

If the injury arising from the alleged trespass was permanent as a matter of law, as ATC, Asset Sub, and Metro argue, RayMax's trespass claim accrued "upon the first actionable injury." *Atlas Chem. Indus., Inc. v. Anderson*, 524 S.W.2d 681, 684 (Tex. 1975); *see also Waddy v. City of Hous.*, 834 S.W.2d 97, 102 (Tex. App.—Houston [1st Dist.] 1992, writ denied). RayMax argues, however, that its injury was temporary. The question of whether an injury to real property is temporary or permanent is a question of law for the trial court to decide when, as here, the operative facts regarding the nature of the injury are undisputed. *See Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474, 480–81 (Tex. 2014); *see also Etan Indus.*, 359 S.W.3d at 623.

An injury to real property, such as a trespass, is permanent (1) if it cannot be repaired, fixed, or restored or (2) even if the injury can be repaired, fixed, or

restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur such that future injury can be reasonably evaluated. *Gilbert Wheeler*, 449 S.W.3d at 480. But an injury to real property "need not be eternal" to be considered permanent; it need only be "ongoing, continually happening, or occurring repeatedly and predictably." *Id.*; *Schneider*, 147 S.W.3d at 277. On the other hand, an injury to real property is temporary if (1) it can be repaired, fixed, or restored and (2) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. *Gilbert Wheeler*, 449 S.W.3d at 480. A temporary injury arising from a trespass, therefore, occurs when it "is not continuous but is sporadic and contingent upon some irregular force such as rain . . . and wind." *Atlas Chem.*, 524 S.W.2d at 685.

We conclude that the undisputed facts of the nature of RayMax's alleged injury show as a matter of law that it was a permanent injury. *See, e.g.*, *Gates ex rel. Triumph Mortg., Inc. v. Sprint Spectrum, L.P.*, 349 F. App'x 257, 259–60 (10th Cir. 2009) (applying Texas law and concluding cell-phone antenna on an electricity-transmission tower was permanent injury arising from trespass claim). RayMax contended in the trial court that the encroachment into the disputed area "has been going on since 2007 and possibly earlier" and that Metro began to "use" the disputed area after it applied for building permits in September 2005. In its brief on appeal, RayMax stated that Metro installed its equipment in the disputed area and moved the eastern portion of the fence in 2006. The record

reflects that Metro installed telecommunications equipment on concrete pads in the disputed area and moved the fence to encompass this equipment in 2006. There is no evidence that any use of the disputed area stopped or was in any way intermittent after Metro installed its equipment in the disputed area. Indeed, RayMax was able to determine its specific damages from the alleged trespass by calculating the rental rate for the additional 425 square feet for each year up to 2033, the end of the current lease term if all options are exercised. *See Schneider*, 147 S.W.3d at 281 (holding injury is deemed permanent if it "is sufficiently constant or regular (no matter how long between occurrences) that future impact can be reasonably evaluated"). RayMax was able to estimate its future injury from the alleged trespass with reasonable certainty, which shows the injury was permanent, not temporary. *See id.*

RayMax asserts that its injury is temporary because Metro's equipment and fence did not permanently damage the disputed area and because the "lease agreement will not go on indefinitely." Whether the land is permanently damaged is not the proper inquiry. The proper inquiry is whether the alleged injury is sufficiently constant such that the future impact of the trespass can be reasonably evaluated even though the injury can be repaired, fixed, or restored. *See Gilbert Wheeler*, 449 S.W.3d at 480. Thus, although the injury to the disputed area may be repaired, the reasonable certainty with which RayMax can evaluate the injury's future impact renders the injury permanent. Similarly, the fact that the lease will eventually expire does not equate to a temporary injury—a

permanent injury does not have to be everlasting or interminable. *See id.*; *Schneider*, 147 S.W.3d at 277.

B. STATUTE OF LIMITATIONS: ACCRUAL

Because the injury was permanent as a matter of law, RayMax's claims accrued "at the time of the first actionable injury" or, in other words, "when facts exist that authorize a claimant to seek judicial relief." *Schneider*, 147 S.W.3d at 279; *Atlas Chem.*, 524 S.W.2d at 684. As with the characterization of the injury resulting from a trespass to real property, the determination of the date on which a cause of action accrued is a question of law for the court. *See Schneider*, 147 S.W.3d at 274–75.

As we previously mentioned, the undisputed summary-judgment evidence reveals that Metro installed its equipment in the disputed area and moved the fence in 2006. RayMax concedes as much in its brief. RayMax argues, however, that the continuing-tort doctrine excepts its trespass claim from the limitations deadline and allows for the recovery of damages incurred during the two years before it filed suit. *See Krohn v. Marcus Cable Assocs., L.P.*, 201 S.W.3d 876, 880 (Tex. App.—Waco 2006, pet. denied); *W.W. Lauback Trust v. Georgetown Corp.*, 80 S.W.3d 149, 159 (Tex. App.—Austin 2002, pet. denied). But the continuing-tort doctrine does not apply to a permanent injury arising from a trespass. *See Krohn*, 201 S.W.3d at 881; *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 443 (Tex. App.—Fort Worth 1997, pet. denied). Similarly, RayMax's apparent arguments that the discovery rule tolls the accrual date are

unavailing because the trespass was open and obvious, which RayMax does not dispute, and could have been discovered through the exercise of due diligence upon the first actionable injury, i.e., the installation of the equipment and fence in the disputed area. *See Yalamanchili v. Mousa*, 316 S.W.3d 33, 38, 40 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (noting that "courts have used a substantially similar analysis in addressing whether a nuisance is permanent and whether a trespass injury is permanent"); *see also Schneider*, 147 S.W.3d at 279 (recognizing discovery rule as limited exception to accrual when injury is "both inherently undiscoverable and objectively verifiable" and noting its application in nuisance cases is "rare"). Because RayMax's trespass claim accrued in 2006, its attempts to raise it in 2013 were time-barred.

On appeal, RayMax argues that ATC, Asset Sub, and Metro did not address in their summary-judgment pleadings the "separate" trespass caused by an "additional structure," which RayMax contends was a generator ATC installed in the disputed area in 2014. RayMax asserts this new trespass, even if permanent, started the limitations clock anew, rendering its entire suit timely filed. But RayMax's live pleadings did not allege a separate or new trespass based on this "additional structure" and merely sought a declaration voiding an "emergency generator agreement" between SBC Holdings and Asset Sub because Asset Sub "operates" in the disputed area and requesting that an unspecified "Defendant remove *all* of their [sic] property from the disputed area that is on the parent tract." [Emphasis added.] *See, e.g.*, *Tennessee Gas Transmission Co. v.*

Fromme, 269 S.W.2d 336, 337 (Tex. 1954) (holding trespass claims based on permanent injury to land must be brought within two years of first actionable injury); *Krohn*, 201 S.W.3d at 881 (recognizing continuing-tort doctrine does not apply to a permanent trespass because "a permanent injury to land will generally arise from a single tortious act which causes continuing injury to the landowner"). With a permanent injury to real property, as occurred here, the limitations period does not begin anew with each subsequent trespass or injury. *Cf. ACCI Forwarding, Inc. v. Gonzalez Warehouse P'ship*, 341 S.W.3d 58, 63–64 (Tex. App.—San Antonio 2011, no pet.) (recognizing temporary trespass claim "accrues anew with each successive trespass" under the continuing-tort doctrine).

Accordingly, ATC, Asset Sub, and Metro established the affirmative defense of limitations as a matter of law, and the trial court did not err by granting summary judgment in their favor or by denying RayMax's motion regarding RayMax's trespass claim. Because this ground supported the trial court's judgment on RayMax's trespass claim, we need not address the other grounds raised by ATC, Asset Sub, and Metro in their summary-judgment motions. *See Provident Life*, 128 S.W.3d at 216; *see also* Tex. R. App. P. 47.1.

V. UNJUST ENRICHMENT

A. RAISED SUMMARY-JUDGMENT GROUNDS

We now turn to RayMax's claim for unjust enrichment. In the trial court, one of the bases upon which Metro moved for judgment as a matter of law on

this claim was that it was time-barred. Metro argued that because the unjust-enrichment claim was "based on the alleged trespass . . . and thus [as ATC and Asset Sub discussed regarding trespass], accrued more than two years prior to the filing of this lawsuit," it was filed outside the applicable statute of limitations. In addressing limitations as applicable to RayMax's trespass claim, Metro adopted ATC and Asset Sub's limitations arguments raised in their summary-judgment motion.

Initially, RayMax raised this claim solely against Metro. But in RayMax's second supplemental petition, which it filed at least four months before the trial court considered the summary-judgment motions and to which no party objected, it seemed to raise this claim against ATC, Asset Sub, and SBC Holdings as well. *See Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 54 (Tex. 2003) (holding when supplemental pleading adds matter outside the scope of Tex. R. Civ. P. 69, the adverse party must object or the error is waived). Even after RayMax filed its second supplemental petition, RayMax and Metro continued to address unjust enrichment as if it had been raised solely against Metro.[11] Because RayMax filed its second supplemental petition after ATC and Asset Sub filed their motion for summary judgment, ATC and Asset Sub obviously did not address unjust

[11]ATC and Asset Sub filed no additional pleadings after RayMax filed its second supplemental petition but before the trial court granted summary judgment in their favor on all claims.

enrichment in their motion.[12] Only Metro sought summary judgment on the unjust-enrichment claim. On appeal, Metro, ATC, and Asset Sub brief the issues as if the unjust-enrichment claim were not pleaded against ATC and Asset Sub. RayMax's appellate brief, however, extends its unjust-enrichment arguments to ATC's and Asset Sub's alleged actions in the disputed area.

Of course, a trial court may grant a party summary judgment only on a ground raised in that party's motion. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). Although a trial court generally commits reversible error by granting summary-judgment on an extra-motion ground or on a claim not addressed in the motion, such error is rendered harmless if "the omitted cause of action is precluded as a matter of law by other grounds raised in the case." *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 298 (Tex. 2011). Similarly, when a summary-judgment movant fails to amend its motion after an amended or supplemental petition, we may affirm the summary judgment if (1) the amended or supplemental petition essentially reiterates previously pleaded causes of action, (2) a ground asserted in the motion for summary judgment conclusively negates a common element of the newly and previously pleaded claims, or (3) the original motion is broad enough to encompass the newly asserted claims.

[12]And in RayMax's response to ATC and Asset Sub's motion for summary judgment, which it filed after its second supplemental petition, RayMax did not point out that the final summary judgment requested by ATC and Asset Sub would be inappropriate based on RayMax's unaddressed unjust-enrichment claim against ATC and Asset Sub.

Bridgestone Lakes Cmty. Improvement Assoc., Inc. v. Bridgestone Lakes Dev. Co., 489 S.W.3d 118, 123 (Tex. App.—Houston [14th Dist.] 2016, pet. filed).

Here, ATC and Asset Sub's limitations argument, raised in their motion for summary judgment and directed to RayMax's trespass claim, would similarly apply to bar RayMax's unjust-enrichment claim. Indeed, Metro argued in the trial court that as limitations barred RayMax's trespass claim, so too would limitations bar the unjust-enrichment claim. On appeal, Metro relies on ATC and Asset Sub's limitations argument regarding RayMax's trespass claim to support the summary judgment on RayMax's unjust-enrichment claim. We conclude the error, if any, by the trial court in rendering summary judgment in favor of ATC and Asset Sub on RayMax's unjust-enrichment claim against them was rendered harmless. *See, e.g.*, *G & H Towing*, 347 S.W.3d at 297–98; *see also Zarzosa v. Flynn*, 266 S.W.3d 614, 621 (Tex. App.—El Paso 2008, no pet.) (holding reversal would be meaningless because questioned recovery precluded as a matter of law).

B. STATUTE OF LIMITATIONS

As with trespass, unjust-enrichment claims are governed by a two-year statute of limitations. *See Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007). RayMax's unjust-enrichment claim was based on the alleged trespass in the disputed area. Because the trespass claim is time-barred, so is RayMax's unjust-enrichment claim. *See Marty's Food & Wine, Inc. v. Starbucks Corp.*, No. 05-01-00008-CV, 2002 WL 31410923, at *8 (Tex. App.—

Dallas Oct. 28, 2002, no pet.) (op. on reh'g) (not designated for publication) ("For limitations purposes, any claim for damages to property is subject to the same accrual rules, that is, determination of the accrual date depends upon whether the damage is characterized as temporary or permanent."). The trial court did not err by granting summary judgment in favor of ATC, Asset Sub, and Metro or by denying RayMax judgment as a matter of law on this claim.

VI. CONCLUSION

Because RayMax sought to remedy a trespass by requesting declaratory relief and because RayMax filed suit more than two years after its permanent-trespass and unjust-enrichment claims accrued, the trial court did not reversibly err by granting ATC, Asset Sub, and Metro judgment as a matter of law on RayMax's claims against them. Because ATC, Asset Sub, and Metro were entitled to judgment as a matter of law on RayMax's claims, the trial court did not err by denying RayMax's summary-judgment motion directed to those same claims. *See, e.g.*, *Matheson Tri-Gas, Inc. v. Maxim Integrated Prods., Inc.*, 444 S.W.3d 283, 288 (Tex. App.—Dallas 2014, pet. denied). We overrule RayMax's first issue. We need not address its second issue because it was conditioned on this court's grant of RayMax's requested remand in issue one and because RayMax's arguments directed to what the trial court can and cannot have a jury decide on remand are rendered moot by this court's decision that judgment as a matter of law on all claims was appropriate. *See* Tex. R. App. P.

47.1. Accordingly, we affirm the trial court's judgment. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: GARDNER, GABRIEL, and SUDDERTH, JJ.

SUDDERTH, J., filed a concurring opinion.

DELIVERED: August 11, 2016