



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-18-00086-CV

ESTATE OF BERT HUGHES GIBBS, DECEASED

On Appeal from Probate Court No. 2
Tarrant County, Texas
Trial Court No. 2005-0000126-2-C

Before Sudderth, C.J.; Gabriel and Birdwell, JJ.
Memorandum Opinion by Justice Birdwell

MEMORANDUM OPINION

Jeri Lynn Bell appeals from a final summary judgment for Kenneth Gibbs, as executor of Bert Hughes Gibbs's estate, in Bell's suit arising from a trust agreement she and Bert entered into over twenty years before his death. Bell raises three issues challenging the summary judgment on her declaratory judgment claim and her request for the trial court to impose a constructive trust on income from the real property that is the subject of the trust agreement. We reverse and remand.

Background

In 1990, Bell and Bert signed a written agreement (the Trust Agreement) under which Bell would give Bert \$13,845.16 for him to use as a down payment on thirty acres that Bert would own as trustee for Bert's three children and Bell. The Trust Agreement provided that Bell and Bert, as trustee, would bear the property's expenses equally but would also share the property's net proceeds equally upon any sale. Bell understood that Bert was purchasing the property for investment purposes and intended to flip it within ninety days. Bell paid Bert according to the agreement, and Bert completed the purchase. The recorded deed lists the grantee as "Bert H. Gibbs, Trustee." Bert financed the rest of the purchase and executed a deed of trust to secure the lien on the property; he signed the recorded deed of trust as "Bert H. Gibbs, Trustee." No one recorded the Trust Agreement in the property records. Bert did not sell the property as quickly as he and Bell had anticipated, and Bert and Bell continued to pay the lien and property taxes.

Bert sold the eastern half of the property in 1992. He used the proceeds to pay off the debt and pay himself a commission; he split the remaining profit with Bell and paid her back part of the original down payment she had given him. Shortly thereafter, Bert also told Bell they “were now equal partners in the remaining acres.”

Over the next decade, Bert attempted to sell the remaining fifteen acres (the Real Property) at least once that Bell knew of, and he also tried to buy out Bell’s share. In July 2000, Bert told Bell that he had conveyed his one-half interest in the Real Property in 1997. But he assured Bell that the conveyance did not affect her one-half interest he held in trust.

Bert died on December 31, 2004. Bell was not concerned about the Real Property when she found out because she thought that because Bert had owned her one-half interest as trustee she “would be located” by his heirs. But when no one representing Bert’s estate contacted her by 2006, Bell hired an attorney to investigate the Trust Agreement’s status. As a result, Bell discovered that around 2000 or 2001, Bert had conveyed the remaining one-half interest in the Real Property to another trust. She also discovered (1) that the court that heard Bert’s 2003 divorce had voided both of Bert’s partial conveyances of the Real Property for fraud on the community and awarded the Real Property to Bert’s ex-wife Kathryn Gibbs and (2) that the co-

guardians of Kathryn's estate¹ had leased the oil, gas, and minerals on the Real Property in 2005.

On March 29, 2007, Bell sued Kip and Sandra Gibbs as co-guardians of Kathryn's estate, and Kenneth as executor of Bert's estate, in Denton County district court seeking (1) "a declaratory judgment that [she] is the owner of a one-half undivided interest in" the Real Property and (2) "damages in an amount equal to one-half of all royalties and any other payment made pursuant to" the 2005 oil and gas lease. Bell also brought a claim for conversion, sought an accounting of all revenue received and expenses incurred by any of the Real Property owners, and asked the trial court to impose a constructive trust on her one-half of any funds received from the Real Property, plus interest and earned income. Although Bell served Kip and Sandra, she did not serve Kenneth at this time.

The trial court abated the suit so that Kenneth and Kathryn's co-guardians could resolve title issues between the two estates. As part of their 2008 settlement, the Real Property was conveyed to Bert's estate. Afterwards, in 2009, Bert's estate conveyed all of its interest in the Real Property's mineral estate to unrelated third parties.

¹The Denton County probate court had appointed Kip and Sandra Gibbs Kathryn's temporary co-guardians in 2001 and permanent co-guardians in 2004. *In re Guardianship of the Estate of Gibbs*, No. 2-05-460-CV, 2008 WL 1777859, at *1 (Tex. App.—Fort Worth Apr. 17, 2008, pet. dism'd) (mem. op.).

After the trial court reinstated the case, Bell served the original petition on Kenneth’s attorney. Kip and Sandra, who are not parties to this appeal, filed a motion for summary judgment, which the trial court granted.² After the 431st District Court held a bench trial and ruled in Bell’s favor on her declaratory judgment claim—but deferred a ruling on the amount of an attorney’s fees award—and before that court signed a written judgment, Kenneth challenged the district court’s subject matter jurisdiction. The case was then transferred to Tarrant County Probate Court Number 2.

Three years later, Kenneth filed a combined traditional and no-evidence motion for summary judgment on all of Bell’s claims against him. After a nonevidentiary hearing, the visiting trial judge stated on the record that he was granting only the traditional motion, but he later signed a final judgment for Kenneth that did not distinguish between the no-evidence and traditional motions. On appeal, Bell challenges the summary judgment on her declaratory judgment claim and constructive trust request only.

Bell Has Challenged All Possible Grounds For Summary Judgment on Her Declaratory Judgment and Constructive Trust Claims

Because Bell did not file a response to Kenneth’s motions for summary judgment, she may only complain on appeal that the motion or Kenneth’s evidence supporting the motion are insufficient as a matter of law. *See Rhone-Poulenc, Inc. v. Steel,*

²Bell has not challenged that summary judgment.

997 S.W.2d 217, 223 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). And she is required to make either a general assignment of error covering all possible summary judgment grounds on the claims for which she contends summary judgment was in error (a “*Malooly* issue”) or specific assignments of error for each individual ground. *See Malooly Bros. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). Because Kenneth moved for summary judgment on both traditional and no-evidence grounds—and because the trial court signed a general judgment that does not state whether it was granting either the no-evidence or traditional summary judgment—Bell must have challenged both the traditional and no-evidence motions on the declaratory judgment and constructive trust claims in her briefing. *See id.*; *Miller v. El Campo Holdings, LLC*, No. 02-15-00388-CV, 2017 WL 370936, at *4 (Tex. App.—Fort Worth Jan. 26, 2017, no pet.) (mem. op.) (holding that if trial court signs general summary judgment order that does not specify whether court is granting summary judgment on one type of motion to the other’s exclusion, appellant must challenge both motions in its briefing).

Bell’s briefing regarding the scope of her challenge to the summary judgment is confusing and contradictory. On one hand, her issues refer only to the traditional motion, and she specifically disclaims challenging the no-evidence motion because the trial judge stated on the record that he was granting only the traditional motion. But elsewhere in her brief, Bell raises a general challenge to both the no-evidence and traditional summary judgment motions, as well as a challenge to the sufficiency of

Kenneth’s motion: “The only legal theories *properly* advanced by [Kenneth] to deprive [Bell] of her interest under the Trust Agreement were that (1) she should have asserted a trespass-to-try-title action instead of a declaratory judgment action and that (2) she should have sued [Bert/Kenneth] or the Estate sooner.” [Emphasis added.] In the argument on her constructive trust issue, she identifies each element of her claim and identifies evidence in support. Because the supreme court has repeatedly admonished courts of appeals not to elevate form over substance—and to construe briefs liberally so that issues are decided on their merits rather than procedural irregularities—we conclude that Bell has adequately challenged all grounds on which the trial court could have granted summary judgment. *See, e.g.,* Tex. R. App. P. 38.1(i); *Weeks Marine, Inc. v. Garza*, 371 S.W.3d 157, 162 (Tex. 2012) (“Weeks Marine did not separately and specifically present its no evidence challenge in the issues listed in its appellate brief. But a fair reading shows it argued that there was no evidence of a separate injury to support the unreasonable-failure-to-pay award.”); *Perry v. Cohen*, 272 S.W.3d 585, 587–88 (Tex. 2008).

Additionally, a no-evidence summary judgment on the declaratory judgment and constructive trust claims would have been improper for several reasons. First, Kenneth’s “no evidence” argument on the declaratory judgment claim is the same as his argument in the traditional motion: that Bell cannot bring a declaratory judgment

claim as a matter of law.³ This is the very ground Bell disputes in her first issue on appeal. Second, Kenneth's no-evidence ground on the constructive trust claim is that the imposition of a constructive trust is not a proper remedy under these factual circumstances; this is an equitable determination for the trial court. *See Burrow v. Arce*, 997 S.W.2d 229, 245 (Tex. 1999); *Sam Rayburn Mun. Power Agency v. Gillis*, No. 09-16-00339-CV, 2018 WL 3580159, at *9 (Tex. App.—Beaumont July 26, 2018, pet. denied) (mem. op.); *cf. McCracken v. MonoSol RX, LLC*, No. 02-12-00151-CV, 2014 WL 4937997, at *8 (Tex. App.—Fort Worth Oct. 2, 2014, no pet.) (mem. op.) (holding that no-evidence summary judgment on purely legal question is improper). Third, Kenneth's motion is insufficient on both claims because it does not identify each element for which Bell did not raise evidence. Such a general motion cannot support a no-evidence summary judgment. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 695 (Tex. 2017); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). Thus, we conclude that Bell did appeal all possible summary judgment grounds in her briefing, and we will review whether the trial court's judgment was proper on any of those grounds.

³Kenneth's motion lists Bell's declaratory judgment claim under the no-evidence section, but he never raises as a ground that Bell could provide no evidence of a declaratory judgment claim, just that she had impermissibly attempted to plead a trespass to try title claim as a declaratory judgment claim. Our conclusion that Bell did not plead a trespass to try title claim resolves this ground.

Standard of Review

We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008). A defendant is entitled to summary judgment on an affirmative defense if the defendant conclusively proves all elements of that defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010); *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant must present summary judgment evidence that conclusively establishes each element of the affirmative defense as a matter of law. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

Declaratory Judgment Claim

Bell's first issue challenges whether the trial court erred by deciding that as a matter of law, she was required to bring her claims as a trespass to try title action rather than a declaratory judgment claim, the ground raised in both the no-evidence and traditional motions. Kenneth argued in his motion that Bell's petition seeks to establish an undivided one-half ownership interest in the Real Property, that title to real property can be established only in a trespass to try title claim, that Bell has not

pleaded such a claim, and that even if she had pleaded such a claim, the statute of limitations on that claim has expired.⁴

A person “interested under” a written contract, including a contract involving real property, may seek a declaration of her rights or status vis a vis the contract. Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a). But a claimant seeking to establish or obtain ownership of, or a possessory right in, real property must file a trespass to try title action. *See* Tex. Prop. Code Ann. § 22.001(a); *Lance v. Robinson*, 543 S.W.3d 723, 735–36 (Tex. 2018). Thus, the plaintiff in a trespass to try title action must plead and prove the right to present possession of the land. *Lance*, 543 S.W.3d at 736.

The parties dispute the nature of Bell’s pleaded claim: Kenneth contends that Bell is seeking a present possessory one-half undivided ownership interest in the Real Property⁵ while Bell claims she is seeking only a declaration that the Trust Agreement gave her a one-half equitable interest in the Real Property—the right to share in the net profits from ownership or sale—without the present right of possession. Thus, we must examine Bell’s petition to determine the nature of her claim and, in the absence

⁴He did not contend that a valid declaratory judgment claim would be barred by limitations.

⁵Kenneth did not argue as a ground for summary judgment that any equitable interest Bell has according to the Trust Agreement has been extinguished as a matter of law, but his limitations argument as to the constructive trust assumes that to be true.

of special exceptions, construe it liberally. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000).

Bell's pleading states in the summary section that she is seeking "a declaratory judgment that [she] *is the owner* of a one-half undivided interest" in the Real Property. [Emphasis added.] But reading the entire petition liberally, as we must, Bell clearly alleges that her interest in the Real Property derives from the Trust Agreement, which she acknowledges "enable[d] [Bert] to acquire title to the [Real Property]" and that he was to hold that title as trustee for her and his own children. Although the petition refers repeatedly to Bell's property "interest," that interest is her alleged equitable interest under the Trust Agreement to half of the Real Property's net proceeds, not a present possessory interest.⁶ Bell's request for a declaratory judgment to ascertain the nature of that equitable interest is a proper subject of a declaratory judgment claim rather than a trespass to try title claim. *See True Level Masonic Lodge #226, Inc. v. Most Worshipful Prince Hall Grand Lodge of Tex. & Jurisdictions Free & Accepted Masons*, No. 01-16-00339-CV, 2018 WL 1597460, at *3-4 (Tex. App.—Houston [1st Dist.] Apr. 3, 2018, pet. denied) (mem. op.).

This conclusion is supported by the fact that elsewhere in the petition, Bell (1) seeks a declaration that any funds Kathryn or the co-guardians of her estate received from the Real Property should be held in constructive trust for Bell and

⁶Although the trial court did not sign the final summary judgment until over ten years after Bell filed her original petition, Bell never amended her petition, and the record does not show that Kenneth filed special exceptions to the pleading.

(2) seeks damages for one-half of the oil and gas royalties from the Real Property. Additionally, although at the summary judgment hearing Bell's counsel sometimes appeared to argue that Bell was seeking to recover a present possessory interest in the Real Property rather than having her equitable interest declared, at other times he referred specifically to her equitable one-half interest in the trust res. Moreover, he never expressly waived Bell's declaratory judgment claim, and Kenneth's motion for summary judgment is based on Bell's pleaded claims. Further, the trial court must have understood that Bell was not seeking a present possessory interest because he discussed with her counsel whether she was prepared to settle her pro rata share of the property taxes and whether the Real Property would sell at a high enough price for her to recover part of the proceeds. This is consistent with how the parties tried the issues in the 431st District Court bench trial. *See Jackson v. Kisiab*, No. 02-12-00371-CV, 2013 WL 3064517, at *2 (Tex. App.—Fort Worth June 20, 2013, no pet.) (mem. op.) (explaining that in determining if even unpleaded issues had been tried by consent, court of appeals must review record for evidence of how those issues were actually tried).

Because as a matter of law Bell is entitled to bring her claim seeking clarification of her equitable status under the Trust Agreement as a declaratory judgment claim, Kenneth was not entitled to summary judgment on the only ground he raised as to that claim. We sustain Bell's first issue. We likewise sustain her second issue contending that the trial court improperly granted summary judgment if based

on the statute of frauds ground Kenneth raised at the summary judgment hearing but not in his motion because a trial court may grant summary judgment only on grounds raised in the written motion.⁷ See Tex. R. Civ. P. 166a(c); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011); see also *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010).

Constructive Trust

Bell argues in her third issue that the trial court erred by granting Kenneth's motion for summary judgment on her constructive trust request because evidence raises a fact issue on whether she is entitled to that remedy and, if she is, whether that remedy is barred by the applicable statute of limitations.

A constructive trust is an equitable, court-created remedy designed to prevent unjust enrichment. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 87 (Tex. 2015). Courts have historically applied constructive trusts to remedy or ameliorate harm arising from a wide variety of misfeasance. *Id.* (citing John N. Pomeroy, *A Treatise on Equity Jurisprudence* 97, § 1045 (5th ed. 1941), as quoted in *Pope v. Garrett*, 211 S.W.2d 559, 560 (Tex. 1948) (“It has been said that ‘The specific instances in which equity impresses a constructive trust are numberless—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts.’”). To obtain a

⁷At the hearing, the visiting trial judge appeared to be concerned with whether the Trust Agreement was a valid method for creating a property interest. *Cf. Atkins v. Carson*, 467 S.W.2d 495, 501 (Tex. App.—San Antonio 1971, writ ref'd n.r.e.) (explaining how equitable, rather than contractual, purchase money resulting trust is created).

constructive trust under Texas law, a party must establish three elements: (1) breach of a special trust or fiduciary relationship or actual or constructive fraud; (2) the wrongdoer's unjust enrichment; and (3) an identifiable res that can be traced back to the original property. *Id.*

Bell argues that Bert owed her a fiduciary duty by holding the Real Property—an identifiable res—partially in trust for her and that he breached that duty by attempting to convey her equitable interest in the Real Property to a third party without her knowledge. She also argues that Kenneth, as the Estate's executor, has further breached a duty to her by refusing to acknowledge her trust interest. She further argues that Bert and the Estate have been unjustly enriched by disclaiming her interest, which she claims entitles her to part of any income from the Real Property. This is the type of claim for which the trial court may consider imposing a constructive trust as an equitable remedy. *See id.*

Kenneth argued in his summary judgment motion that the four-year statute of limitations applies to bar Bell's constructive trust claim; Bell does not contend that a different limitations period applies. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 16.004, .051. To establish the defense of limitations as a matter of law, Kenneth had to conclusively prove when Bell's cause of action accrued and, in this case, negate the discovery rule. *KPMG Peat Marwick v. Harrison Cty. Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *see Swift Energy Operating, LLC v. Regency Field Servs. LLC*, No. 04-17-

00638-CV, 2019 WL 1547608, at *3 (Tex. App.—San Antonio Apr. 10, 2019, no pet. h.) (mem. op.).

Kenneth argued in his motion for summary judgment that limitations began to run in 2000 when Bert told Bell that he had conveyed his one-half interest in the Real Property to a third party and assured her he still held her one-half interest in trust. But that is not the wrongful act Bell premises her claim upon. Instead, she testified that she did not think the 1997 transfer affected her remaining one-half trust interest in the Real Property. Although she complains that one of Bert’s wrongful acts was to later attempt to transfer the remaining one-half interest in the Real Property in 2000, the evidence shows that she did not learn of that conveyance until mid-2006.⁸ *See York v. Boatman*, 487 S.W.3d 635, 646–47 (Tex. App.—Texarkana 2016, no pet.) (explaining that constructive trust does not exist until court imposes it for wrongful conduct; thus, limitations runs from wrongful act rather than arrangement created by the parties); *see also Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015) (noting that limitations begins to run when facts occur that authorize a person to seek a judicial remedy). Bell’s constructive trust allegations complain about the failure to pay her half of the income that the Real Property has generated; she seeks a constructive trust on those funds, not on the Real Property, because the trust she alleges on the Real Property is an express trust. *See* Tex. Prop. Code Ann. § 111.004(4).

⁸Bell served Kenneth in March 2010. To the extent there is a dispute about the meaning of “mid” 2006, it would be a fact issue to be resolved at trial.

Kenneth also contended in his motion that Bell should have discovered the 2000 conveyance before mid-2006 because it was recorded in the real property records.⁹ But Bert had held the Real Property in trust for Bell for years without paying her any income,¹⁰ and Bell knew that he had been having trouble selling the Real Property. Additionally, there is no evidence that Bell knew about potential oil and gas development around the Real Property until her law firm discovered the various conveyances related to the Real Property. The facts of this case, then, are more like fraudulent lien claims and other similar property-related claims rather than claims for underpayment of already-granted royalties on property. *See Archer v. Tregellas*, 566 S.W.3d 281, 291–92 (Tex. 2018) (explaining reasons for differing applications of discovery rule to real property-related claims and citing “well-settled principle that one who ‘already owns the land . . . is not required to search the records every morning in order to ascertain if something has happened that affects his interests or deprives him of title’” (quoting *Cox v. Clay*, 237 S.W.2d 798, 804 (Tex. Civ. App.—Amarillo 1950, writ ref’d n.r.e.)).

⁹Although Bell did not plead the discovery rule, Kenneth argued it in his motion for summary judgment, and the parties expressly litigated the issue, as reflected in the motion for summary judgment and the evidence attached to and referenced therein.

¹⁰Nothing in the record shows that Bert received any income from the conveyances that he withheld from Bell. In fact, Bert’s divorce decree shows that the trial court found that both grantees in the 1997 and 2000 conveyances held title as “agents and/or nominee transferees for the community estate.” Thus, the trial court set aside those conveyances as improper attempts to conceal community property from Kathryn, not to convey trust property away from Bell.

Because the evidence shows that Bell was entitled to pursue a constructive trust remedy and because Kenneth did not prove his entitlement to the affirmative defense of limitations as a matter of law, we hold that the trial court erred by granting summary judgment for Kenneth on Bell's request for a constructive trust. We sustain her third issue.

Conclusion

Because we have sustained Bell's three issues, we reverse the trial court's judgment for Kenneth on Bell's declaratory judgment claim and request for a constructive trust. We remand this case to the trial court for further proceedings.

/s/ Wade Birdwell

Wade Birdwell
Justice

Delivered: May 30, 2019