In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00406-CV

BOBBY TUNNELL, APPELLANT

V.

THE GARY W. COMPTON AND LORETTA COMPTON TRUST, GARY AND LORETTA COMPTON, TRUSTEES, APPELLEES

On Appeal from the 181st District Court
Randall County, Texas
Trial Court No. 68,967-B, Honorable John B. Board, Presiding

May 31, 2018

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

This is a dispute between adjoining land owners over a small tract of land. Tunnell filed suit against the Comptons asserting fee simple ownership of the disputed property. The trial court granted summary judgment in favor of the Comptons. We affirm the judgment of the trial court.

Background

On March 2, 2012, Gary and Loretta Compton purchased a 6.993-acre tract of land located at 9400 Dowell Road.[1] The property is a rectangular shaped area of land just south of Amarillo. Dowell Road runs along the east side of the property. Bobby Tunnell's home and property is situated on a 30.976-acre tract to the west of the Compton property and is landlocked. There is a 30-foot roadway and utility easement from Dowell Road through the Compton property to Tunnell's property. The ownership of this roadway is the subject of the underlying dispute between the parties.

The disputed property is approximately 0.921 acres and is located within the metes and bounds description of the Compton tract. This property is also mentioned in Tunnell's 2003 warranty deed as a "30 foot roadway and utility easement."

Problems between the parties started when the Comptons began construction of a house toward the eastern portion of their property, just north of the easement. Tunnell's attorney sent a letter to the Comptons on September 22, 2015, advising the Comptons to cease any use of the roadway. Soon thereafter, Tunnell filed a declaratory judgment action seeking a declaration that he is the owner of the property in fee simple through his 2003 deed or adverse possession.[2]

[1] The Comptons transferred the property into a family trust. Gary and Loretta Compton are the trustees of the trust.

[2] Tunnell also filed an application for temporary injunction and a claim for reimbursement for maintenance of the property. The Comptons filed counterclaims for declaratory judgment and conversion, and sought a temporary restraining order, temporary injunction, and permanent injunction.

The trial court granted the Comptons' motion for partial summary judgment as to ownership only.[3] Tunnell appeals the adverse ruling on the summary judgment and the granting of a permanent injunction that he refrain from interference with the Comptons' use of the land.

Standards of Review

Traditional Motion for Summary Judgment

We review the trial court's decision to grant summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A trial court properly grants a motion for summary judgment when the movant has established that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003). When the trial court does not specify the grounds for its summary judgment, the appellate court must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Id*. at 216.

No-Evidence Motion for Summary Judgment

In reviewing a no-evidence summary judgment, we must consider all the evidence in the light most favorable to the party against whom the summary judgment was

[3] On August 3, 2016, Tunnell non-suited his claims. After the trial court granted a permanent injunction against Tunnell on August 10, 2016, the Comptons non-suited their remaining causes of action.

rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Gonzalez v. Ramirez,* 463 S.W.3d 499, 504 (Tex. 2015); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). We will affirm a no-evidence summary judgment if the record shows one of the following: (1) there is no evidence on the challenged element, (2) the evidence offered to prove the challenged element is no more than a scintilla, (3) the evidence establishes the opposite of the challenged element, or (4) the court is barred by law or the rules of evidence from considering the only evidence offered to prove the challenged element. *Merriman v. XTO Energy, Inc*., 407 S.W.3d 244, 248 (Tex. 2013); *City of Keller*, 168 S.W.3d at 810.

Objections to Summary Judgment Evidence

Appellate courts review a trial court's ruling sustaining or overruling objections to summary judgment evidence for an abuse of discretion. *Paciwest, Inc. v. Warner Alan Props., LLC*, 266 S.W.3d 559, 567 (Tex. App.—Fort Worth 2008, pet. denied). To determine whether a trial court abused its discretion, the court must decide whether the trial court acted without reference to any guiding rules or principles; in other words, the court must decide whether the act was arbitrary or unreasonable. *Id*. Merely because a trial court may decide a matter within its discretion in a different manner than an appellate court would in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Id.*

Analysis

In his first issue, Tunnell asserts that the trial court erred in granting summary judgment because he is the fee simple owner of the property in question pursuant to his deed dated December 9, 2003.

An easement does not divest a property owner of title, but only allows another to use the property for a specific purpose. *Greenwood v. Lee*, 420 S.W.3d 106, 111 (Tex. App.—Amarillo 2012, pet. denied). An easement is a nonpossessory interest in land. *See id*. at 116-17 ("Easement" in conjunction with "right-of-way" is understood to mean a right to pass over the described land). The parcel owned by the grantor of the easement is the "servient estate," and the parcel benefitted by the easement is the "dominant estate." *Hubert v. Davis,* 170 S.W.3d 706, 710 (Tex. App.—Tyler 2005, no pet.).[4]

The 2003 deed conveys to Tunnell two separate tracts of land. The first tract is a 30.976-acre tract. The granting clause gives the specific metes and bounds description of the tract and does not limit the granting, nor is there any mention of an easement. By contrast, the second tract addressed in the deed does not begin with a specific legal description. The granting clause for the second tract provides as follows: "TOGETHER WITH 30 FOOT ROADWAY AND UTILITY EASEMENT DESCRIBED AS FOLLOWS:" and then proceeds to give a metes and bounds description of the 0.921-acre roadway and utility easement. An easement created by an express grant must be described with such certainty that a surveyor could go upon the land and locate the easement from the description. *Pick v. Bartel,* 659 S.W.2d 636, 637 (Tex. 1983).

[4] In this case, the Compton tract is the servient estate, and the Tunnell tract is the dominant estate.

The easement described in Tunnell's deed is located within the Compton tract. The parties stipulated to this fact at the hearing on the Comptons' application for temporary injunction, and this evidence was part of the summary judgment record. The Compton deed specifically provides that the Compton property is subject to all duly recorded easements. Here, the express terms of the grant in Tunnell's deed give Tunnell the unrestricted right to use the 30-foot roadway along the southern edge of the Compton property, but that does not equate to fee ownership of the easement.

The summary judgment evidence established that the disputed property is located on the 6.993-acre tract owned by the Comptons. So too does it establish that Tunnell's deed grants him a 30-foot roadway and utility easement over the disputed portion of the Comptons' property. The summary judgment record does not include evidence that creates a material fact question as to fee ownership. Thus, Tunnell's claim that he owns the property in fee, to the exclusion of the Comptons fails. Tunnell's first issue is overruled.

In his second issue, Tunnell argues that the trial court erred in striking his affidavit and in granting summary judgment because there was a fact issue on his claim of adverse possession. The Comptons' motion for summary judgment on this claim asserted traditional and no-evidence grounds.[5]

The doctrine of adverse possession is a harsh one because it involves taking real estate from a record owner without express consent or compensation. *Tran v. Macha*,

[5] When a party moves for both traditional and no-evidence summary judgment, we first consider the no-evidence motion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion, as it necessarily fails. *Merriman,* 407 S.W.3d at 248.

213 S.W.3d 913, 915 (Tex. 2006) (per curiam). "Before taking such a severe step, the law reasonably requires that the parties' intentions be very clear." *Id.*

Tunnell based his adverse possession claim on the five and ten-year statutes of limitation. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.025-.026 (West 2002).[6] One seeking to establish title to land by adverse possession has the burden of pleading and proving every fact essential to that claim. *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990) (op. on reh'g). Under the five-year statute, Tunnell must produce evidence that he has held the property in peaceable and adverse possession for five years, during which he (1) cultivates, uses, or enjoys the property; (2) pays applicable taxes on the property; and (3) claims the property under a duly registered deed. § 16.025(a). Under the ten-year statute, Tunnell must show that he (1) held the easement in peaceable and adverse possession for ten years; and (2) has cultivated, used or enjoyed the easement. § 16.026(a).

Texas law requires that adverse possession be "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." § 16.021(1) (West 2002). The possession must be actual, visible, continuous, notorious, distinct, hostile, and of such character as to indicate unmistakably an assertion of a claim of exclusive ownership by the occupant. *Rhodes*, 802 S.W.2d at 645.

In their no-evidence motion, the Comptons asserted that Tunnell cannot maintain his adverse possession claim on the five-year statute because Tunnell cannot produce

[6] Further references to provisions of the Texas Civil Practices and Remedies Code will be by reference to "section __" or "§ __."

evidence that he has paid taxes on the property at issue. *See* § 16.025(a)(2). Tunnell did not, in fact, produce any summary judgment evidence that he has paid taxes on the property. By failing to produce any evidence regarding an essential element of his claim, the trial court properly granted the Comptons' no-evidence motion for summary judgment on adverse possession under section 16.025.

The Comptons' no-evidence motion on Tunnell's ten-year adverse possession claim specifically challenged the first essential element that plaintiff held the property in peaceable and adverse possession for ten years. *See* § 16.026(a). The statute requires that the possession be "inconsistent with" and "hostile to" the claims of all others. *Tran,* 213 S.W.3d at 914. Use of another individual's land with the acquiescence of the landowner does not ripen into adverse possession unless the evidence shows that the landowner was given notice of the adverse possession claim. *Commander v. Winkler*, 67 S.W.3d 265, 269 (Tex. App.—Tyler 2001, pet. denied). In other words, possession of land by adverse claimants who began their entry upon the disputed land with the acquiescence of the record owner cannot establish adverse possession unless or until they give notice of the hostile nature of their possession. *Id*.; *see Brooks v. Jones,* 578 S.W.2d 669, 673 (Tex. 1979) ("It has long been the law in Texas that when a landowner and the claimant of an easement both use the same way, the use by the claimant is not exclusive of the owner's use and therefore will not be considered adverse."). Where the original use of the land in controversy is permissive, it is presumed that continued use is also by permission in the absence of notice to the true owner of the repudiation of such permissive use and the assertion of an adverse claim. *Commander,* 67 S.W.3d at 270; *Keels v. Keels*, 427 S.W.2d 913, 915-16 (Tex. Civ. App.—Tyler 1968, no writ). So too

must the repudiation be plain, positive, and clear-cut. *Commander,* 67 S.W.3d at 270. Express notice must be brought home to the landowner and adverse possession will run only from the time of such express notice to the landowner. *Id.*

Tunnell had permission to use the disputed tract through the express easement granted in his 2003 deed. Thus, his use of the property was permissive. Tunnell was using the disputed property consistent with his permission, as described in his deed, as a roadway easement. In response to the Comptons' motion for summary judgment, Tunnell provided an affidavit. The trial court sustained multiple objections to the affidavit and it was struck.[7] However, even if we consider Tunnell's affidavit in the light most favorable to him, it is insufficient evidence to create a fact issue regarding his claim for adverse possession. Tunnell claims, in his affidavit, that his adverse possession of the disputed property began in December 2003 when he purchased his 30.976-acre tract and received the easement. The record reflects that the Comptons did not acquire their tract until March 2012. Tunnell did not produce any evidence as to the owner of the disputed property prior to the Comptons acquiring it in March of 2012. As such, Tunnell's affidavit wholly fails to present evidence showing how he adversely possessed the property against the owners of the disputed property from December 2003 to March 2012, which is necessary to establish an adverse, hostile possession for the ten-year period. Consequently, Tunnell's affidavit is silent as to how his possession was exclusive or hostile to any owners of the disputed property for the relevant ten-year time frame.

[7] The trial court sustained the Comptons' objections to Tunnell's affidavit as (1) being irrelevant; (2) containing factual conclusions; (3) testimony from an interested witness that is not clear, positive, direct, credible, free from contradictions, and susceptible to being readily controverted; and (4) being testimony that contradicts the affiant's previous statements.

Having failed to present evidence raising an issue of material fact on a necessary element required to establish his adverse possession claim and because Tunnell's affidavit fails to raise a fact issue, we overrule Tunnell's second issue in its entirety.

Conclusion

We conclude that the trial court did not err in granting the Comptons' motion for summary judgment. The judgment of the trial court is affirmed.

Judy C. Parker
Justice