TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00745-CV

Charles N. Draper, Appellant

v.

Greg Guernsey, in his Official Capacity as Director of Planning and Development Watershed Protection Review Department; and City of Austin, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT NO. D-1-GN-13-000778, HONORABLE KARIN CRUMP, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This proceeding concerns the same land-use dispute that was the subject of two previous opinions and judgments of this Court. *See Draper v. Guernsey*, No. 03-15-00741-CV, 2016 WL 462763 (Tex. App.—Austin Feb. 3, 2016, pet. denied) (mem. op.); *Draper v. Guernsey*, No. 03-14-00265-CV, 2015 WL 868991 (Tex. App.—Austin Feb. 25, 2015, no pet.) (mem. op.). Following our ruling in the later appeal, appellees filed a traditional and no-evidence motion for summary judgment, which the trial court granted, dismissing appellant Charles N. Draper's claims for fraudulent misrepresentation, perjury, and breach of contract as well as for declaratory judgment and injunctive relief with respect to a "vested rights permit application" that he filed with appellee City of Austin. *See* Tex. Loc. Gov't Code § 245.002; *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, 383 S.W.3d 234, 245 (Tex. App.—San Antonio 2012, pet. denied) (explaining that effect of "vested rights" under chapter 245 of Local Government Code is to "freeze" land-use regulations

as they existed at time first permit application was filed through completion of particular project so that project with vested rights is not subject to intervening regulations or changes after vesting date). Draper appeals the summary judgment, and we affirm it for the following reasons.

BACKGROUND[1]

In 1985, Travis County approved a site-development permit for construction of what Draper refers to as the Patton Lane Office Building, a three-story office development, to be built on real property currently owned by Draper in Southwest Austin (the Property). Construction of the office building began shortly thereafter but was halted for an unspecified period of time due to the then-owner's financial circumstances. Draper later acquired the Property.

In 2011, Draper filed an application with the City of Austin entitled "Site Plan Fair Notice and H.B. 1704/Chapter 245 Determination" (commonly referred to as a "vested-rights application") seeking to develop the Property with an exemption from the City's current development regulations based on a plat recorded in 1872 and the 1985 Travis County permit. *See* Tex. Loc. Gov't Code § 245.002(a-1) ("Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought."). The City denied Draper's application.

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[1] The parties are familiar with the facts, procedural history, and applicable standards of review and we, accordingly, dispense with a lengthy recitation of them except as necessary to explain the basic reasons for our determination. *See* Tex. R. App. P. 47.4. The facts we do recite are taken from Draper's petition.

Appearing pro se, Draper filed this lawsuit against appellees the City of Austin and Greg Guernsey in his official capacity as Director of the City's Planning and Development Review Department[2] (collectively, the City) seeking injunctive relief and a declaration that he is entitled to vested rights under chapter 245 of the Local Government Code to develop the Property under regulations that were in effect on the date of the 1985 Travis County permit. *See* Tex. Loc. Gov't Code § 245.002. His petition also sought damages for allegations of appellees' fraudulent misrepresentation, perjury, breach of contract, "preventing the execution of civil process," and "failure to comply" with section 43.002 of the Local Government Code. *See id.* § 43.002(a)(1). On appeal, Draper contends that the trial court erred in granting the City's motion for summary judgment and raises two matters outside of the claims asserted in his pleadings and addressed in the City's motion.

DISCUSSION

In three issues, Draper asserts that: (1) the trial court's summary judgment is improper because it is "not supported by any case law, statutes, or evidence"; (2) the trial court erred in not issuing findings of fact and conclusions of law; and (3) the trial court erred in granting summary judgment because there is evidence that the City has inversely condemned the Property, for which he is entitled to compensation. *See* Tex. Const. art. 1, § 17. We will address Draper's

[2] As previously noted by this Court, Guernsey's correct job title according to the City is "Director of the Planning and Development Review Department." Draper has named Guernsey's title in his pleadings as "Director of Planning and Development Watershed Protection Review Department," which misnomer is carried through in the style of this appeal. We also note that Guernsey has been dismissed from this suit for all claims other than Draper's ultra-vires claims, as ruled by this Court in Cause No. 03-14-00265-CV. *See Draper v. Guernsey*, No. 03-14-00265-CV, 2015 WL 868991 (Tex. App.—Austin Feb. 25, 2015, no pet.) (mem. op.).

first issue by reviewing the propriety of summary judgment with respect to each claim that he raises in his pleadings and then discuss his remaining two issues.

Summary Judgment on Draper's Claims

Vested rights

Under chapter 245 of the Local Government Code, once an application for the first permit required to complete a property-development project is filed with the municipality or other agency that regulates such use of the property, the agency's regulations applicable to the project are effectively "frozen" in their then-current state, and the agency is prohibited from enforcing subsequent regulatory changes to further restrict the property's use. *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 249 (Tex. App.—Austin 2011, pet. denied) (citing Tex. Loc. Gov't Code §§ 245.001–.007); *Shumaker Enters., Inc. v. City of Austin*, 325 S.W.3d 812, 814 (Tex. App.—Austin 2010, no pet.). Draper's petition alleges that the City improperly denied his vested-rights application, which if granted would have entitled him to develop the Property in accordance with the City's regulations that were in effect at the time Travis County issued its site-development permit. The City's motion for summary judgment contended that the evidence supporting Draper's vested-rights claim was legally insufficient and that the rights conferred by chapter 245 are not so broad that "any permit application filed for the development of property with one regulatory agency [i.e., Travis County] is sufficient to exempt it from current regulations with respect to a different regulatory agency [i.e., City of Austin]." We agree with the City.

The general rule is that "the right to develop property is subject to intervening regulatory changes." *Quick v. City of Austin*, 7 S.W.3d 109, 128 (Tex. 1999) (op. on reh'g). Section

245.002(a) creates a "narrow exception to this rule" by ensuring that if, after receiving a development application or plan, a regulatory agency changes its land-use regulations, the agency cannot enforce such regulatory change to the detriment of the applicant. *Shumaker Enters.*, 325 S.W.3d at 814; *see* Tex. Loc. Gov't Code § 245.002(a), (a-1). However, an application filed with one agency does not provide "fair notice" to a different agency and is thus not sufficient to establish vested rights from the second agency's regulations. *Shumaker Enters.*, 325 S.W.3d at 815 (holding that plaintiff's application for development permit filed with Travis County prior to annexation of property by City of Austin did not entitle him to chapter 245 rights with respect to City's requirements after property was annexed because Travis County application did not provide fair notice of project to City).

Draper did not produce any summary-judgment evidence demonstrating that he filed an application with the City to develop the Property prior to the filing of his vested-rights application. Rather, he relies on the permit application filed with a different agency, Travis County, as providing the City with "fair notice." Accordingly, the holding in *Shumaker Enterprises* controls, and we hold that the trial court properly granted summary judgment on Draper's claims seeking injunctive relief and a declaration that he is entitled to vested rights to develop the Property.[3]

[3] The City supported its summary-judgment motion on Draper's vested-rights claims with other contentions, including that the development project at issue had already been "completed, abandoned, or dormant well before [Draper] submitted his request for vested rights to the City." Because we have determined that summary judgment on this issue was proper under *Shumaker Enterprises*, we need not reach the City's other arguments on the issue. *See Rogers v. Ricane Enters., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989) (noting that when district court does not indicate particular ground for granting summary judgment, appellate court must uphold judgment on appeal if it is proper on any ground asserted in motion).

Local Government Code section 43.002

Draper also attempts to support his claim for vested rights by relying on section 43.002 of the Local Government Code. *See* Tex. Loc. Gov't Code § 43.002 ("A municipality may not, after annexing an area, prohibit a person from . . . continuing to use land in the area in the manner in which the land was being used on the date the annexation proceedings were instituted if the land use was legal at that time."). He contends that the City annexed the Property in late 1985, after the Travis County permit had been issued, and that section 43.002 (the "continuing use statute") therefore prohibits the City from denying his chapter 245 request for vested rights.

Section 43.002 was not enacted until 1999, well after Draper's property was annexed by the City in 1985. *See* Act of May 30, 1999, 76th Leg., R.S., ch. 1167, § 17, 1999 Tex. Gen. Laws 4074, 4090. Statutes are presumed to be prospective in their operation unless expressly made retrospective. *See* Tex. Gov't Code § 311.022; *see also* Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."); *In re M.C.C.*, 187 S.W.3d 383, 384 (Tex. 2006) ("Statutes are only applied retroactively if the statutory language indicates that the Legislature intended that the statute be retroactive."). There is no indication in the plain language of section 43.002 that the legislature intended it to operate retroactively. *See* Tex. Loc. Gov't Code § 43.002; *see also Board of Adjustment v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002) (stating that parties conceded that section 43.002 does not apply because provision did not become effective until 1999, after 1998 annexation of property at issue). Even assuming that section 43.002's language pertaining to the "use" of land "in the manner in which [it] was being used" contemplates the particular dispute here about whether Draper's development of the Property needs to comply with current City regulations, he simply may not rely

on the statute because it was not enacted until after the Property was annexed. Accordingly, the trial court properly granted summary judgment on Draper's claim that section 43.002 entitled him to vested rights.

Ultra vires

Attempting to cast some of his allegations as "ultra-vires claims" against Guernsey, Draper contends that Guernsey took a "narrow view" of chapter 245, "refus[ed] to provide a definitive explanation for the refusal of [Draper's vested-rights] application," and failed to perform the "ministerial act" of approving Draper's vested-rights application. Essentially, Draper contends that Guernsey, in the process of reviewing and denying Draper's vested-rights application and in the capacity of director of the department responsible for such review, violated various laws and, therefore, acted ultra vires.

We conclude that Draper may not assert ultra-vires claims against Guernsey under the circumstances alleged because an official's exercise of discretion does not constitute an ultra-vires act, and unless the plaintiff has alleged that the official acted without legal authority or failed to perform a purely ministerial act, no ultra-vires claim will lie. *See Southwestern Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). Draper has presented no evidence that Guernsey was not acting in his capacity as director when he exercised his discretion to deny Draper's application, nor has Draper presented any evidence that Guernsey failed to perform a purely ministerial act or provided any authority holding that the approval of a vested-rights application is a purely ministerial act. Accordingly, we hold that the trial court properly granted summary judgment on Draper's ultra-vires claims.

Fraudulent misrepresentation

Draper's petition also makes claims against the City and Guernsey for fraudulent misrepresentation, specifically alleging that appellees' statements that his "project has changed" and that he did not give "fair notice" are actionable fraud. Fraudulent misrepresentation is an intentional tort for which the City and its employees acting in their official capacities are entitled to governmental immunity. *See LTTS Charter Sch., Inc. v. Palasota*, 362 S.W.3d 202, 209 (Tex. App.—Dallas 2012, no pet.) (fraud is intentional tort for which Texas Tort Claims Act does not waive immunity); *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 738 (Tex. App.—Austin 1994, writ denied) (noting that because "a suit against a state officer in his official capacity is a suit against the state," governmental immunity bars plaintiff's claims against state officials in their official capacities). Draper has not cited any other authority waiving the City's governmental immunity for this cause of action. Accordingly, we hold that the trial court properly granted summary judgment in favor of appellees on Draper's fraudulent-misrepresentation claim. Furthermore, to the extent that Draper's issues on appeal contend that summary judgment was improper for alleged intentional torts committed by Guernsey in his individual capacity, we overrule that issue as well because Draper did not sue Guernsey in his individual capacity and, even if he had, suits against governmental employees in their individual capacities are not permitted if the employees were acting within the scope of their employment. *See Franka v. Velasquez*, 332 S.W.3d 367, 381 (Tex. 2011).

Perjury

Draper's petition also includes a claim that an assistant city attorney, who is not a party to this lawsuit, committed perjury when she signed an affidavit in support of appellees' motion

for continuance. *See* Tex. Penal Code § 37.02 (listing elements of perjury). However, allegations of perjury are not properly before a trial court in a civil proceeding and must take place within the context of a criminal proceeding. *See Douglas v. Redmond*, No. 14-12-00259-CV, 2012 WL 5921200, at *2 (Tex. App.—Houston [14th Dist.] Nov. 27, 2012, pet. denied) (mem. op.) (holding that penal-code violations, including perjury, do not give rise to private causes of action); *LeBlanc v. Lange*, 365 S.W.3d 70, 87 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (same). Accordingly, we hold that the trial court properly granted summary judgment on Draper's perjury claim.

Breach of contract

Draper's pleadings allege a "breach of contract preventing the execution of the civil process." Specifically, he alleges that the City violated a Rule 11 agreement with him rescheduling a hearing when the City later sought a continuance of that hearing upon realizing that it essentially would constitute a trial on the merits, for which Draper had not provided the requisite notice. While Rule 11 agreements are enforceable contracts, and the trial court generally has a ministerial duty to enforce them, *see Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 (Tex. 2007), we are also cognizant that the decision to grant a motion for continuance is within the trial court's sound discretion, *see Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986), and Rule 11 agreements setting hearing dates do not implicitly foreclose the possibility of a continuance in appropriate circumstances, *see Mt. McKinley Ins. Co. v. Grupo Mexico*, No. 13-12-00347-CV, 2013 WL 1683641, at *11 n.10 (Tex. App.—Corpus Christi-Edinburg Apr. 18, 2013, no pet.) (mem. op.) ("[A]ppellants would arguably not have been in violation of the Rule 11 agreement [setting hearing date on pending motions] had it obtained a continuance from the trial court" because even though Rule 11 agreements are

contracts, "we will not construe this particular [Rule 11] agreement to implicitly foreclose the possibility of a continuance.").

The City's motion for continuance was accompanied by its attorney's affidavit, averring that: (1) Draper had provided the City only 38-days' notice for a hearing that would essentially constitute a trial on the merits, in violation of Rule of Civil Procedure 245, *see* Tex. R. Civ. P. 245; (2) no discovery had yet been completed; and (3) the continuance, the City's first, was sought not for delay but so that justice may be done. The City's motion for continuance further argued that the court had not yet ruled on the City's special exceptions, which identified several alleged deficiencies in Draper's pleadings, including the fact that he had not indicated under which level discovery would be conducted, *see* Tex. R. Civ. P. 190.1, and that because Draper had no motions on file, his hearing request could only be seeking a trial on the merits, for which the City needed more time to conduct discovery and prepare available defenses. On this record, we cannot conclude that the trial court acted without reference to any guiding rules and principles when it granted the City's motion for continuance, and accordingly, the trial court did not abuse its discretion. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Having determined that the City was entitled to judgment as a matter of law on all of Draper's claims, we overrule Draper's first issue.

Findings of fact and conclusions of law

In his second issue, Draper contends that the trial court erred in failing to issue findings of fact and conclusions of law pursuant to his Rule 297 request. *See* Tex. R. Civ. P. 297. However, findings of fact are inappropriate to summary judgments and should be ignored. *See*

Eland Energy, Inc. v. Rowden Oil & Gas, Inc., 914 S.W.2d 179, 188 n.7 (Tex. App.—San Antonio 1995, writ denied); *see also Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1994) ("[F]indings of fact and conclusions of law have no place in a summary judgment proceeding."). If summary judgment is proper, there are no facts to find and none to consider on appeal, and the legal conclusions have already been stated in the motion and response. *IKB Indus. (Nigeria) Ltd. v. Pro–Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997). Consequently, we overrule Draper's issue on this point.

Inverse condemnation

Draper lastly contends that the City's actions constitute inverse condemnation, giving rise to a takings claim, and that summary judgment was therefore improper. *See City of Midlothian v. Black*, 271 S.W.3d 791, 799 (Tex. App.—Waco 2008, no pet.) ("There is a clear and unambiguous waiver of immunity from suit for inverse-condemnation claims under article I, section 17 of the Texas Constitution also known as the 'takings clause.'"). The City responds that this appeal is the first time Draper has raised such claim and that he has waived it by not properly pleading it. *See id.* (holding that because plaintiff's petition did not properly plead elements of inverse-condemnation claim, immunity applied and claim had to be dismissed for lack of subject-matter jurisdiction). We agree.

While in an early pleading entitled "Plaintiff's Supplement Response to Defendant's Greg Guernsey and the City of Austin's Original Answer" Draper mentions that he will "supplement inverse condemnation as a cause of action" when he files an amended petition, his live "Final Amended Petition" does not mention or assert any claims for inverse condemnation. Even assuming

that his earlier "Supplement Response" could be considered an amended petition, it was fully supplanted by his later-filed Amended Petition, which did not allege any takings claim. *Cigna Ins. Co. v. TPG Store, Inc.*, 894 S.W.2d 431, 434 (Tex. App.—Austin 1995, no writ) ("When an amended petition is filed, it supplants all former petitions, which are no longer regarded as part of the pleadings."). Because Draper does not allege a takings claim in his live pleading, he may not rely on such a claim as a ground for reversing the summary judgment on appeal, and we overrule his third issue. *See City of Midlothian*, 271 S.W.3d at 799; *see also* Tex. R. App. P. 33.1; *Carrizales v. Texas Dep't of Protective & Regulatory Servs.*, 5 S.W.3d 922, 925 (Tex. App.—Austin 1999, pet. denied) (noting rule that party may not raise issue, even constitutional claim, for first time on appeal). Accordingly, we overrule Draper's third and final issue.

CONCLUSION

Because the trial court did not err in granting appellees' motion for summary judgment and failing to issue findings of fact and conclusions of law, we affirm the trial court's summary judgment in favor of appellees and its order dismissing all of Draper's claims.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

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