NUMBER 13-16-00136-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

HIPOLITO SORIA, **Appellant,**

v.

ROEL HERNANDEZ AND
NORMA DELIA HERNANDEZ, **Appellees.**

On appeal from the 389th District Court
of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Benavides

This is an appeal from two adverse summary judgments rendered against appellant Hipolito Soria in favor of appellees Roel Hernandez and Norma Delia Hernandez (the Hernandezes) regarding rights and title to, and interest in real property located in Hidalgo County, Texas.

By seven issues, which we construe as three, Soria asserts that the trial court erred by: (1) granting the Hernandezes' no-evidence motion for summary judgment; (2) granting the Hernandezes' traditional motion for summary judgment; and (3) awarding attorney's fees to the Hernandezes. We affirm in part and reverse and remand in part.

I. BACKGROUND

A. Historical Background

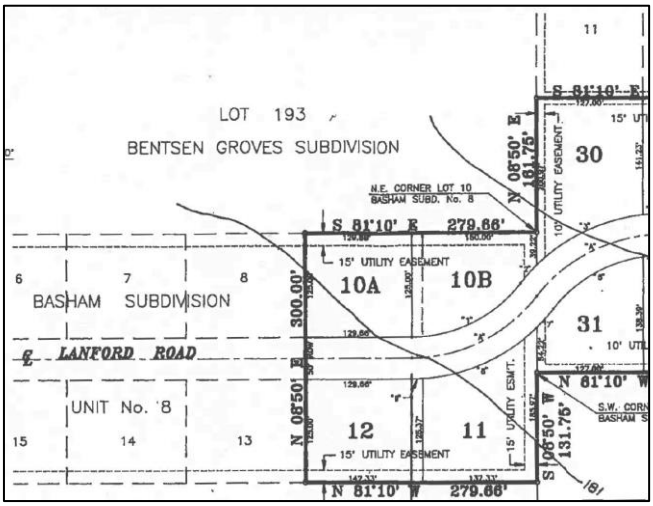
On March 21, 1988, Basham Land Co., Inc. (Basham) deeded Lots 10B and 11 of Basham Subdivision No. 8 in Hidalgo County (the Subdivision) via special warranty deed to Joaquin Luna. On November 4, 1988, Basham granted to Rodolfo Alanis Lot 10A of the Subdivision, which was located adjacent to Lot 10B and which was formerly known as Lot 9. On January 22, 1992, Basham granted Lot 9 of the Subdivision to Balbina Chavez and recorded the deed.

On June 22, 1992, Basham replatted Lots 10A, 10B, 11, and 12 of the Subdivision, with each lot owner signing their approval of the replat.[1] Alanis signed his approval as owner of Lot 10A, and Hector Luna, Joaquin's son, signed his approval as owner of Lots 10B and 11. As shown in the map, Lot 9 became Lot 10A. Further, Chavez's name was not included in the list of owners who approved the replat.

On March 18, 2006, Alanis sold Lot 10A to Soria, and the deed was recorded two days later. For unknown reasons, on June 20, 2006, Basham's deed conveying Lot 10A to Alanis was finally recorded with the Hidalgo County Clerk. On June 23, 2006, a document titled "Correction Warranty Deed" purporting to convey title to Lot 10B from Alanis to Soria was recorded with the Hidalgo County Clerk.

[1] For the reader's benefit, the relevant portion of the replatted map is embedded in the body of this memorandum opinion.

On January 17, 2007, Luna granted Lot 10B by special warranty deed to the Hernandezes, and the deed was recorded in the county records two days later.



B. Litigation Begins

On November 29, 2011, the Hernandezes obtained a writ of possession against Soria from the justice court of Hidalgo County, declaring that the Hernandezes had a right to possession of Lot 10B and ordering Soria to vacate the property.

On July 9, 2014, Soria sued Luna and the Hernandezes seeking a declaration that: (1) he is the owner of Lot 10B; (2) that Luna's special warranty deed of January 17, 2007 is "void and without [e]ffect"; (3) any liens affecting Lot 10B be declared "null and void without any [e]ffect"; (4) Luna and the Hernandezes be divested of all rights and title to, and interest in Lot 10B. In the alternative, Soria asserted that he had title to Lot 10B by way of adverse possession under section 16.026 of the Texas Civil Practice and Remedies Code. *See* TEX. PRAC. & REM. CODE ANN. § 16.026 (West, Westlaw through Ch. 49, 2017 R.S.). Lastly, Soria sought an award of reasonable and necessary attorney's fees.

Luna and the Hernandezes answered Soria's petition denying Soria's allegations and requesting that: (1) Luna be dismissed from the lawsuit because he does not assert any claim to Lot 10B; (2) Soria amend his pleading to reflect a trespass to try title claim rather than a declaratory action; and (3) Soria produce an abstract to title pursuant to Texas Rule of Civil Procedure 791. *See* TEX. R. CIV. P. 791 ("After answer filed, either party may, by notice in writing, duly served on the opposite party or his attorney of record, not less than ten days before the trial of the cause, demand an abstract in writing of the claim or title to the premises in question upon which he relies.").

1. No-Evidence Motion for Summary Judgment

On December 18, 2014, the Hernandezes filed a no-evidence motion for summary judgment, asserting that Soria never had title to Lot 10B and further did not have adverse possession of the property. More than a month after the Hernandezes filed their no-evidence motion for summary judgment, Soria amended his pleading[2] to assert causes of actions for: (1) trespass to try title; (2) declaratory relief; (3) adverse possession under the three-year, five-year, and ten-year statute of limitations; and (4) unjust enrichment. Furthermore, Soria sought an award of title and possession to the disputed property, or alternatively, "legal and/or equitable reimbursement," title possession by adverse possession; and an award of reasonable and necessary attorney's fees.

Soria subsequently responded to the Hernandezes' no-evidence motion for summary judgment by objecting to the evidence they submitted on authentication and hearsay grounds. Soria also generally denied the Hernandezes' allegations and submitted his own affidavit.

[2] The record reflects that Luna was removed as a party to this litigation and is not a party to this appeal.

The trial court subsequently granted the Hernandezes' no-evidence motion for summary judgment. It rendered judgment that the Hernandezes were the legal owners of Lot 10B and that Soria's claim of adverse possession be denied because Soria failed to meet his burden to prove title by adverse possession.

2. Traditional Motion for Summary Judgment

On July 8, 2015, the Hernandezes filed a traditional motion for summary judgment on Soria's remaining claim of unjust enrichment. In their motion, the Hernandezes asserted that Soria's unjust enrichment claim failed as a matter of law because it was barred by the statute of limitations. In their motion, the Hernandezes also requested attorney's fees in the amount of $2,500. The trial court granted the Hernandezes' motion, denied Soria's unjust enrichment claim on statute of limitations grounds, and awarded the Hernandezes attorney's fees totaling $2,500, thereby creating a final judgment. This appeal followed.

II. WAIVER FOR INADEQUATE BRIEFING

As a preliminary matter, the Hernandezes assert that Soria has waived his complaints on appeal due to inadequate briefing under Texas Rule of Appellate Procedure 38.1. *See* TEX. R. APP. P. 38.1. Rule 38.1 requires an appellant to provide the Court with a discussion of the facts and the authorities relied upon to support the point at issue. *Ratsavong v. Menevilay*, 176 S.W.3d 661, 670 (Tex. App.—El Paso 2005, pet. denied); *see also* TEX. R. APP. P. 38.1. Failure to comply with Rule 38.1 may result in a failure to preserve the issues on appeal. *See* TEX. STANDARDS FOR APP. CONDUCT, Lawyers' Duties to the Courts, Standards 3, 4, & 5 (2017) (outlining a lawyer's briefing duties to the appellate courts).

While we acknowledge and appreciate the Hernandezes' complaints, we are unpersuaded in this case that Soria failed to comply with Rule 38.1. Accordingly, we will address the merits of Soria's appeal.

III. NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

By his first, second, and third issues, which we analyze together, Soria challenges the trial court's granting of the Hernandezes' no-evidence motion for summary judgment on his trespass to try title action and claim of adverse possession.

A. Standard of Review

We review the trial court's ruling on a no-evidence motion for summary judgment de novo to determine whether the non-movant presented summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Harver v. Coats*, 491 S.W.3d 877, 881 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002)).

Texas Rule of Civil Procedure 166a(i) addresses no-evidence motions for summary judgment. Specifically, the rule states that a no-evidence motion "must state the elements as to which there is no evidence." The purpose behind this rule is to give fair notice to the non-movant of the matters that require evidence. *Cmty. Initiatives, Inc. v. Chase Bank of Tex.*, 153 S.W.3d 270, 279 (Tex. App.—El Paso 2004, no pet.). If a no-evidence motion for summary judgment is unclear as to what specific elements are challenged, the motion should be treated as a traditional motion for summary judgment where the movant has the initial burden of proof. *Michael v. Dyke*, 41 S.W.2d 746, 751-52 (Tex. App. —Corpus Christi 2001, no pet.). Nothing, however, prohibits a movant's

no-evidence motion from challenging every element, "as long as each element is distinctly and explicitly challenged." *Cmty. Initiatives, Inc*. 153 S.W.3d at 280.

Additionally, there are several means of prevailing on a no-evidence summary judgment motion. A movant may show: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

Rule 166a(i) requires that a no-evidence summary judgment be granted if the non-movant is not able to produce evidence that raises a genuine issue of material fact. *Roventini v. Ocular Sci., Inc.*, 111 S.W.3d 719, 722 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In other words, the non-movant must produce more than a scintilla of evidence on the challenged elements in order to defeat the motion. TEX. R. CIV. P. 166a; *Guevara v. Lackner*, 447 S.W.3d 566, 571 (Tex. App.—Corpus Christi 2014, no pet.). "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise of suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)

B. Discussion

Soria first argues that the Hernandezes' no-evidence motion was insufficiently specific under rule of civil procedure 166a(i) because their motion failed to state the elements for which there is no evidence. We disagree.

To prevail in a trespass-to-try-title action, a plaintiff must (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004).

In their motion, the Hernandezes asserted that Soria has produced no evidence with respect to title over Lot 10B because he: (1) could not "link the common source of the realty in question"; (2) has "not acquired title from the sovereign"; and (3) has not "been in prior possession to give rise to an adverse possession claim."

In light of this, we conclude that the no-evidence motion was sufficiently specific by clearly identifying that the Hernandezes challenged the evidence of elements—with regard to Soria's claims of trespass to try title, adverse possession, and request for declaratory relief that he owned legal or equitable title to the property. *See Doherty v. Old Place, Inc.*, 316 S.W.3d 840, 843–44 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Next, Soria argues that the trial court erred in granting the Hernandezes' no-evidence motion on these claims. Again, we disagree. Soria responded to the Hernandezes' motion by attaching a single-page affidavit signed by Soria. Relevant here, Soria stated in his affidavit that: (1) after a replat, Lot 10A became Lot 10B; (2) he has been in possession of the lot since he purchased it in 2006 until he "was evicted from [his] property"; (3) he has not "conveyed [his] land to anyone and [he] used the lot as [his] own, not hiding . . . ownership from anyone"; and (4) he demonstrated ownership of Lot 10B by (a) cutting the grass; (b) paying taxes; and (c) remodeling a trailer located on the property. Soria's affidavit also referenced the deed records.

As stated above, in a trespass to try title action, a plaintiff must (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. *See Martin*, 133 S.W.3d at 265. Based on the record, we conclude that Soria's affidavit is no more than a scintilla of evidence to establish any of these methods of prevailing on a trespass to try title action.

Stated another way, Soria put forth no evidence that established: (1) a chain of conveyances from the sovereign; (2) superior title out of a common source; (3) title by limitations; or (4) title by prior possessions with proof that possession was not abandoned. *See Martin*, 133 S.W.3d at 265. At most, Soria offered conclusory allegations in his affidavit without further proof. However, broad conclusory statements are not valid summary judgment evidence. *Doherty*, 316 S.W.3d at 844.

With regard to Soria's claim of adverse possession, we note that a claim for adverse possession under Texas requires six essential elements: (1) visible appropriation and possession of the disputed property; (2) that is open and notorious; (3) that is peaceable; (4) under a claim of right; (5) that is adverse and hostile to the claim of the owner; and (6) consistent and continuous for the duration of the statutory period. *Wells v. Johnson*, 443 S.W.3d 479, 489 (Tex. App.—Amarillo 2014, pet. denied). Additionally, under the three-year statute of limitations to recover land from a person claiming adverse possession, a person claiming adverse possession must do so under title or color of title, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.024 (West, Westlaw through Ch. 49, 2017 R.S.); under the five-year statute of limitations to recover land from a person claiming adverse possession, a person claiming adverse possession must (1) cultivate, use, or

enjoy the property, (2) pay applicable taxes on the property, and (3) claim the property under a duly registered deed, *see id.* § 16.025 (West, Westlaw through Ch. 49, 2017 R.S.); and under the ten-year statute of limitations to recover land from a person claiming adverse possession, a person claiming adverse possession must cultivate, use, or enjoy the property. *See id.* § 16.026 (West, Westlaw through Ch. 49, 2017 R.S.). Whichever adverse possession claim Soria sought to proceed under, however, he provided no evidence to defeat the Hernandezes' motion because such conclusory allegations standing alone amount to no-evidence. *See Wells*, 443 S.W.3d at 489; *Doherty*, 316 S.W.3d at 844.

Accordingly, in light of the foregoing, we conclude that the trial court did not err in granting the Hernandezes' no-evidence motion for summary judgment on Soria's trespass to try title and adverse possession claims, and any declaratory relief Soria sought pursuant to these claims. We overrule Soria's first, second, and third issues.

IV. TRADITIONAL MOTION FOR SUMMARY JUDGMENT

By his fourth and fifth issues, which we analyze together, Soria asserts that the trial court erred by granting the Hernandezes' traditional motion for summary judgment.

A. Standard of Review and Applicable Law

We review the trial court's summary judgment de novo. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003).

In order to prevail on traditional summary judgment claim, a movant must show that: (1) no genuine issue of material fact exists and (2) it is entitled to judgment as a matter of law. *BCCA Appeal Grp. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016); TEX. CIV. P. 166a(c). Relevant to this case, traditional summary judgment is proper where a

defendant conclusively establishes all elements of an affirmative defense. *Stanfield v. Neubaum,* 494 S.W.3d 90, 96 (Tex. 2016).

B. Discussion

Soria's remaining claims that were subject to the Hernandezes' traditional motion for summary judgment included his claim for unjust enrichment and declaratory relief. Soria's specific claim for declaratory relief related only to "equitable compensation for improvements and/or maintenance . . . including the payment of property taxes." This claim for declaratory relief is identical to his claim for unjust enrichment, in which Soria asserted that the Hernandezes benefitted from the monies he expended on the subject property.

A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). Claims of unjust enrichment are governed by the two-year statute of limitations. *Clark v. Dillard's, Inc.*, 460 S.W.3d 714, 719 (Tex. App.—Dallas 2015, no pet.); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West, Westlaw through Ch. 49, 2017 R.S.) (Two-Year Limitations Period). The date a cause of action accrues is normally a question of law. *Id.* To prove the accrual date as a matter of law, a party does not have to prove the exact date on which the cause of action accrued. *Id.* at 720. Instead, a party need only prove as a matter of law the latest possible date by which the cause of action accrued. *Id.*

Soria's first amended petition alleges that the Hernandezes were unjustly enriched due to Soria's misconception or misimpression that he was the title owner of Lot 10B. Thus, in order to obtain summary judgment under their statute of limitations defense, the Hernandezes had to conclusively establish that the latest possible date on which Soria made an expenditure under the misconception that he owned Lot 10B was outside the two-year statute of limitations. *See id.*

The record shows that Soria vacated Lot 10B in 2011, after the Hernandezes successfully obtained a writ of possession in the justice court. Furthermore, nothing in the record before this Court shows that Soria expended any money toward Lot 10B after he vacated the property. Accordingly, the latest year that Soria could have asserted a claim of unjust enrichment was 2013, two years after Soria vacated the property. The record undisputedly shows that Soria did not initiate the instant case until July 9, 2014. Accordingly, Soria's cause of action for unjust enrichment failed as a matter of law pursuant to the two-year statute of limitations. *See id.* at 719.

We overrule Soria's fourth and fifth issues.

V. ATTORNEY'S FEES

By his sixth and seventh issues, which we analyze together, Soria asserts that the trial court erred by awarding the Hernandezes attorney's fees of $2,500 when it granted the Hernandezes' traditional motion for summary judgment.

A. Applicable Law

Absent statutory or contractual allowance, attorney fees may not be awarded in Texas in prosecution or defense of a lawsuit. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 120 (Tex. 2009). If attorney's fees are

not plead for, then they may not be awarded. *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015).

B. Discussion

Soria first argues that the Hernandezes were not legally entitled to attorney's fees. In response, the Hernandezes argue that they were entitled to attorney's fees because their traditional motion for summary judgment was filed in response to Soria's request for declaratory relief for his unjust enrichment claim and brought under the Uniform Declaratory Judgments Act (UDJA). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–011 (West, Westlaw through Ch. 49, 2017 R.S.). We agree with the Hernandezes.

Soria sought declaratory relief under the UDJA, and under section 37.009, "in any proceeding under [the UDJA], the [trial] court may award costs and reasonable and necessary attorney's fees as are equitable and just." *Id.* § 37.009. Furthermore, the UDJA allows fee awards to either party in all cases. *MBM Fin. Corp. v. Woodlands Op. Co., L.P.*, 292 S.W.3d 660, 669 (Tex. 2009). Accordingly, the Hernandezes were legally entitled to attorney's fees related to their defense of Soria's claims brought under the UDJA.

Next, Soria argues that even if the Hernandezes were entitled to attorney's fees, the amount awarded was supported by insufficient evidence. We agree.

A factfinder should consider the following factors when considering the reasonableness of a fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.04, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A, State Bar Rules, Art. X, § 9).

We note that the record reveals that the Hernandezes prayed for $2,500 in their traditional motion for summary judgment. Absent that request, the Hernandezes did not submit any other evidence—nor was any other evidence received by the trial court—on the issue of attorney's fees. Accordingly, although we conclude that the Hernandezes are legally entitled to attorney's fees under section 37.009 of the civil practice and remedies code, we nevertheless conclude that the evidence is factually insufficient to support the trial court's award of $2,500 under the factors outlined above. *See Arthur Andersen*, 945 S.W.2d at 818.

We overrule in part and sustain in part Soria's sixth and seventh issues.

VI. CONCLUSION

We reverse the trial court's order solely on the issue of its $2,500 award of attorney's fees to the Hernandezes. We remand to the trial court to hold a hearing to re-

determine the award of attorney's fees consistent with this opinion. We affirm the remainder of the judgment.

GINA M. BENAVIDES,
Justice

Delivered and filed the
10th day of August, 2017.