Reversed and Remanded and Opinion filed March 9, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00940-CV

LEONARD JAMES KELLEY, Appellant

V.

CITY OF HITCHCOCK, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 96-CV-0429

O P I N I O N

Summary judgment was granted against Leonard James Kelley in a property dispute with the City of Hitchcock. On appeal, Kelley contends that due to unresolved fact issues the trial court erred in granting summary judgment. We agree.

Herbert and Vanesta Johnson owned nearly 100 acres of land in Galveston County. In 1958, they sold a portion of their land to Galveston County Water Control and Improvement District No. 7. To permit access to the tract, the Johnsons also granted the District an easement across their unimproved pasture land. The dominant tract subsequently passed from the District to the City of Hitchcock, which operates

a sewage treatment facility on the property. The servient tract eventually passed by succession to Mr. Kelley, who uses it for farming and grazing cattle.

For many years, the easement was enclosed by gates on both ends of the roadway. The City had access to the plant, and cattle were able to roam the tract freely. Eventually, the City replaced one of the gates with a cattle guard. This increased the ease of access to the plant while still retaining the cattle.

Sometime in 1994, the City posted a sign naming the easement "Price Road," and removed the cattle guard. Kelley's cattle escaped, and on May 5, 1995, Kelley attempted to replace the cattle guard. He was arrested for obstructing a public way, and taken before a justice of the peace who, according to Kelley's original petition, fined him and admonished him not to return to his land.

Kelley claims the easement is a private easement for ingress and egress only, and thus the City cannot unreasonably interfere with his right to use the land. The City claims the easement is a public right of way, that it has been so since 1958, and that Kelley cannot lawfully restrict access to it in any way.

On May 2, 1996, Kelley filed suit seeking a declaratory judgment as to the status of his rights in the land and an injunction to prevent the City from interfering with his use and enjoyment of his land, specifically to prevent his arrest should he return. In the alternative, he included two claims for unlawful taking. First, that by preventing his use of the land for farming and grazing cattle, the City had unlawfully taken the entire tract. Second, that by transforming a private easement into a public road, the City had unlawfully taken the difference in value between the two. Finally, Kelley sought damages to compensate him for lost income because he cannot work his land for fear of arrest.

The City moved for a "no evidence" summary judgment. The trial court granted the motion and ruled that Kelley take nothing.

The City's Motion

Three of the grounds set out in the City's "no evidence" motion for summary judgment are, in fact, affirmative defenses: (1) the statute of limitations for a claim of damage to property had expired; (2) the City enjoys sovereign immunity for intentional acts; and (3) the statute of limitations for a taking had run.[1] *See KPMG Peat Marwick v. Harrison County Housing Finance Corp.*, 988 S.W.2d 746, 748 (Tex. 1999); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The Rules of Civil Procedure state that "a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense *on which an adverse party would have the burden of proof at trial*." TEX. R. CIV. P. 166a (i) (emphasis added). Kelley, the party adverse to the City, does not bear the burden of proving the City's affirmative defenses. An affirmative defense can never be a proper basis for a no-evidence summary judgment, and the judgment may not be supported on these grounds. TEX. R. CIV. P. 166a(i).

Neither can we construe the City's motion as anything other than a "no evidence" motion for summary judgment. The motion was titled "Rule 166a(i) Motion," and it tracked the statutory language of 166a(i). The Judge's order expressly granted relief under Rule 166a(i) and, in their response to Kelley's motion for a new trial, the City said that its "motion made it clear that it was a Rule 166a(i) motion, the City moving for summary judgement on the ground that there was no evidence of one or more of the essential elements of a claim."

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[1] As an aside, we note that Kelley did not bring forward either a tort claim or a claim for damage to property. While the City alleged a two-year limit for takings claims, courts in Texas agree the cause of action for inverse condemnation is barred only after the expiration of the ten-year period of limitations to acquire land by adverse possession. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986); *Brazos River Auth. v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99, 110 (1961); *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625, 631(Tex. App.–Houston [14th Dist.] 1997, pet. denied), cert. denied, 525 U.S. 1070, 119 S.Ct. 802, 142 L.Ed.2d 663 (1999).

Public Dedication as a Matter of Law

In its motion for summary judgment, the City also alleged that Kelley has no evidence showing he possesses any legal interest in the property at issue. Although not required by Rule 166(a)(i), the City attached the Johnson's original deed granting the easement to their motion. Clearly, there cannot be a taking if Kelley does not own the land in dispute.[2]

When responding to a "no evidence" summary judgment, it is the non-movant's burden to bring forth evidence that raises a fact issue on the challenged elements. *See Heiser v. Eckerd Corp.*, 983 S.W.2d 313, 316 (Tex. App.–Fort Worth 1998, no pet.); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.–Austin 1998, no pet.). The non-movant "is not required to marshal its proof," but need only point out the evidence produced which establishes that a question of fact exists. *Bomar v. Walls Regional Hosp.*, 983 S.W.2d 834, 840 (Tex. App.–Waco 1998, no pet.). A "no evidence" summary judgment is properly granted only if the non-movant cannot present more than a scintilla of probative evidence. *See Fiesta Mart, Inc.*, 979 S.W.2d at 70-71. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 714 (Tex.1997) (internal citations omitted).

Kelley offered no separate evidence, but instead pointed to the deed and argued that it can be reasonably interpreted as granting only an easement for ingress and egress. *See Fiesta Mart, Inc.*, 979 S.W.2d at 70 (evidence attached by movant in a no-evidence summary judgment motion is nonetheless "summary judgment evidence before the court"). The deed was executed at the same time the neighboring tract was sold to the water district. Its relevant provision states "that we. . .do hereby GRANT AND DEDICATE an easement for roadway purposes in, on and over [the tract now owned by Kelley]." The grant does not define boundaries for the easement. The City argues that, as a matter of law, the deed can only be interpreted as an express dedication of a public road. It contends that any easement to a public

[2] It is not an element of Mr. Kelley's second claim of unlawful taking, that by preventing his use of the land for farming and grazing cattle, the City had unlawfully taken the entire tract.

entity is necessarily a public road and that the Johnson's use of the terms "dedicate" and "roadway" is enough, in and of itself, to make the easement a public road.

The City claims that any easement granted to a public entity is, of necessity, a public road. The scope of an easement, however, is not determined by the status of the parties. The scope of an express easement is determined by the face of the deed unless cause exists for going outside the four corners of the granting instrument or the document is ambiguous. *See Adams v. Norsworthy Ranch, Ltd.*, 975 S.W.2d 424, 428 (Tex. App.–Austin 1998, no pet.); *Wall v. Lower Colorado River Authority*, 536 S.W.2d 688, 691 (Tex. App.–Austin 1976, writ ref'd n.r.e.). One example of a private easement being granted to a public entity is *Texas Parks and Wildlife Department v. Callaway*, 971 S.W.2d 145 (Tex. App.–Austin 1998, no pet.). Callaway owned property on which the Texas Parks and Wildlife Department had an easement for a waterway pass. The terms of the easement stated that the pass would be closed to all water traffic except Department personnel. The Department eventually decided to open the pass to the public. Callaway sued, alleging that opening the pass violated the easement and constituted a taking by inverse condemnation. The court held Callaway's suit was a lawful cause of action.

The City cites two cases, neither of which support its position. The case of *City of Uvalde v. Stovall*, 279 S.W. 889 (Tex. Civ.App.–San Antonio 1925, writ ref'd) involved a vehicle that crashed into an open excavation. When sued, the city denied liability claiming the road was not a public road because it had never "accepted" the roadway. The case does not discuss how or in what manner the street was dedicated. In fact, the case seems to suggest that the road was acquired by condemnation. *Id.*

The city's second case, *Viscardi v. Pajestka*, 576 S.W.2d 16 (Tex. 1978), involved a dispute about the status of an alleyway. In that case, a bank deeded portions of a block to separate individuals. One of the deeds included a dedication of an alley between the two lots. The jury concluded the bank intended its dedication of the alley to be a public dedication; thus, the alley could be used by both landowners. The supreme court affirmed the jury's finding, but its decision was based upon evidence of the grantor's intent, not a legal maxim requiring all such dedications to be public. The court found the use

of the phrases "has dedicated" and "does dedicate" to be only some evidence of intent. The Court also relied on extraneous evidence such as subsequent deeds and the inaction of individual owners.

Here, the Johnson's use of the terms "dedicate" and "roadway" is some evidence that the easement was intended to be public. However, the absence of any defined right-of-way in the deed and the subsequent actions of the parties in restricting access with gates is some evidence the parties intended a private easement. The question of whether or not a dedication to public use has occurred is invariably a question of fact. *See Viscardi v. Pajestka*, 576 S.W.2d 16, 19 (Tex.1978); *Gutierrez v. County of Zapata*, 951 S.W.2d 831, 837(Tex. App.–San Antonio 1997). Mere use of the term "dedicate" is not dispositive. *See Viscardi*, 576 S.W.2d at19; *see also Russell v. City of Bryan*, 919 S.W.2d 698, 703(Tex. App.–Houston [14th Dist.] 1996, writ denied)(mere use of the term "dedication" does not indicate what is being conveyed); *cf. City of Newport v. Sisson*, 51 R.I. 481, 155 A. 576 (1931) (finding that "the use of the word, 'dedicate,' is not decisive of the character of the conveyance when considered with the other terms of the conveyance."); *Joyce v. Brothers Realty Co.*, 127 So.2d 756, 760 (La. Ct. App. 1961) (holding that dedications to public use are not governed by the strict rules).

We find the deed may reasonably be interpreted to grant a private easement. Thus, Kelley has presented some evidence of ownership of the property at issue. Accordingly, under the record presented here, summary judgment was not appropriate.

The judgment of the trial court is reversed and the cause is remanded for further proceedings consistent with this opinion.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed March 9, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).