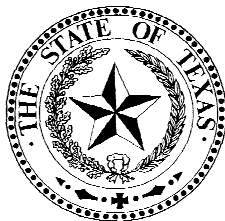


Affirmed in Part, Reversed and Remanded in Part, and Opinion filed March 14, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00441-CV

**TRAIL ENTERPRISES, INC. d/b/a
WILSON OIL COMPANY, Appellant**

V.

THE CITY OF HOUSTON, Appellee

**On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 99-54945**

OPINION

In this inverse condemnation case, Trail Enterprises, Inc. d/b/a Wilson Oil Company (“Wilson”) appeals a summary judgment granted in favor of The City of Houston (the “City”) on the grounds that the summary judgment evidence: (1) conclusively establishes that the City inversely condemned Wilson’s mineral estate; (2) fails to conclusively establish the City’s affirmative defenses of res judicata and collateral estoppel; or, alternatively, (3) creates a fact issue as to whether inverse condemnation occurred. We affirm in part and reverse and remand in part.

Background

Wilson is a mineral lessee of land (the “leased acreage”) located next to and below Lake Houston in an area that was annexed into the City in 1996. Prior to that annexation, City ordinance 67-2544 (“67-2544”) prohibited drilling for minerals in certain portions of the City’s extraterritorial jurisdiction, including the “control area” around Lake Houston, in order to protect the Lake’s water supply from contamination. This control area included most, if not all, of the leased acreage.

In 1995, Wilson filed a lawsuit against the City, asserting, among other things, that the drilling prohibition in 67-2544 resulted in an inverse condemnation¹ of Wilson’s mineral leasehold. This court affirmed a summary judgment in the City’s favor, holding that Wilson’s inverse condemnation claim was barred by the statute of limitations. *See Trail Enters., Inc. v. City of Houston*, 957 S.W.2d 625, 633 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (“*Trail I*”).

As a result of the 1996 annexation, the leased acreage was no longer subject to 67-2544 or any other prohibition on drilling. However, in 1997, City ordinance 97-1394 (“97-1394”) was adopted, essentially imposing the same drilling prohibition on the leased acreage as had been imposed by 67-2544. Wilson thereafter filed the present action against the City, asserting, among other things, that the drilling prohibition in 97-1394 constituted an inverse condemnation of its mineral lease. The City and Wilson filed cross motions for summary judgment, and the trial court entered a summary judgment in the City’s favor which Wilson now appeals.

Standard of Review

A summary judgment may be granted if the motion and summary judgment evidence show that, except as to the amount of damages, there is no genuine issue of material fact and

¹ As contrasted from ordinary condemnation, *inverse* condemnation is a cause of action asserted by a property owner to be compensated by the government for a taking of property for public use without a condemnation proceeding or paying adequate compensation. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992).

the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). Where, as here, both parties have filed competing motions for summary judgment and the trial court has granted one motion and denied the other, the reviewing court should review the summary judgment evidence presented by both sides and determine all questions presented. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). The reviewing court should then render such judgment as the trial court should have rendered. *Id.* Where, as in this case, the summary judgment order does not specify the grounds upon which summary judgment was granted, the reviewing court will affirm the judgment if any of the theories advanced in the motion is meritorious. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

Res Judicata

Wilson's first two issues argue that the trial court erred in granting the City's motion for summary judgment and denying its motion because the summary judgment evidence: (1) conclusively established that the City inversely condemned Wilson's mineral estate; (2) failed to establish the City's affirmative defenses of res judicata or collateral estoppel; and (3) failed to establish that a regulatory taking did not occur.²

The City's motion for summary judgment asserted that Wilson's inverse condemnation claim was: (1) barred by res judicata and/or collateral estoppel in that in *Trail I*, (a) this court held that 67-2544 was a valid exercise of police power; and (b) the issue whether Wilson could, in fact, drill on its lease despite the drilling prohibition under 67-2544 was litigated (but not decided); and (2) defeated by the City's summary judgment evidence that there are locations within the leased acreage that do not fall within the drilling prohibition such that the City established the lack of a regulatory taking as a matter of law.³

² Wilson's brief does not challenge the summary judgment as against any of its claims besides inverse condemnation.

³ The City's motion for summary judgment also asserted that Wilson's federal taking claim was not ripe because Wilson had not exhausted its state remedy. However, the motion does not explain what

Res judicata, or claim preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated on the merits, as well as related matters that, with the use of diligence, should have been litigated in the prior suit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992).⁴ Similarly, when asserted against a party in the second action who was also a party in the first action, the doctrine of collateral estoppel bars in the second action the relitigation of any fact issues that were: (1) fully and fairly litigated in the first action; (2) essential to the judgment in that action; and (3) identical to issues in the second action. *State and County Mut. Fire Ins. Co. v. Miller*, 52 S.W.3d 693, 696-97 (Tex. 2001).

A compensable regulatory taking of property occurs when a governmental agency imposes restrictions that: (1) do not substantially advance legitimate state interests; or (2) either (a) deny property owners all economically viable use of their property, or (b) unreasonably interfere with property owners' rights to use and enjoy their property. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933, 935 (Tex. 1998). A restriction denies the property owner all economically viable use of the property or totally destroys its value if the restriction renders the property valueless. *Id.* at 935. Determining whether all economically

further action Wilson had failed to take and references no supporting evidence other than a federal district court opinion issued in connection with *Trail 1*. Nor does the City rely on a ripeness contention in its appellate brief. We are thus without an adequate basis to affirm the summary judgment on ripeness grounds.

In addition, the City argues on appeal that Wilson judicially admitted in a summary judgment reply that the portion of the leased acreage beneath Lake Houston can be economically developed by means of directional drilling. However, because this contention was not asserted as a ground in the City's summary judgment motion or responses, it is not a ground upon which the summary judgment can properly be affirmed. See *City of Midland v. O'Bryant*, 18 S.W.3d 209, 218 (Tex. 2000); *Perry v. S.N.*, 973 S.W.2d 301, 303 (Tex. 1998). The City also did not assert in its motion for summary judgment that the holding in *Trail 1*, that its inverse condemnation claim was barred by limitations, was res judicata of, or collaterally estopped, Wilson's inverse condemnation claim in this case. Accordingly, we do not address that issue either.

⁴ However, a judgment in one suit will not operate as res judicata in a subsequent suit on the same question between the same parties if there has been a change in the material facts, statutory law, or decisional law between the first judgment and the second suit. *Marino v. State Farm Fire & Cas. Ins. Co.*, 787 S.W.2d 948, 949-50 (Tex. 1990).

viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action. *Id.* In contrast, determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires a consideration of the economic impact of the regulation and the extent to which the regulation interferes with distinct "investment-backed expectations." *Id.*⁵

In *Trail 1*, this court held, with regard to Wilson's due process and equal protection claims (as contrasted from its inverse condemnation claim) that 67-2544 was a valid exercise of the City's police power as a matter of law. *See Trail 1*, 957 S.W.2d at 625. We agree with the City that this determination applies equally to 97-1394 and thereby collaterally estops Wilson from relitigating whether 97-1394 substantially advances legitimate state interests as a ground for its inverse condemnation claim in this case. However, we also agree with Wilson that this determination has no res judicata or collateral estoppel effect on the other grounds for claiming inverse condemnation, *i.e.*, whether 97-1394 denies Wilson all economically viable use of its property or unreasonably interferes with Wilson's rights to use and enjoy its property.

The City's motion for summary judgment also asserted that "[t]he 'takings' issue, specifically including whether Wilson could drill anywhere on the . . . lease was fully adjudicated in *Trail 1*, both by [the trial] court's prior ruling on the 1995 Motions for Summary Judgment—and the evidence considered therein—and by the appellate court holdings applicable to the 'takings' claim." Wilson challenges this contention on the ground that in *Trail 1*, its inverse condemnation claim was determined on the limitations ground, which is not applicable in this case. We agree. To whatever extent Wilson's right to drill

⁵ In this context, the economic impact of a regulation merely compares the value that has been taken from the property with the value that remains in the property. *Mayhew*, 964 S.W.2d at 935-36. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Id.* at 936. With regard to the investment-backed expectation of the landowner, the existing and permitted uses of the property constitute the "primary expectation" of the landowner that is affected by a regulation. *Id.*

on the leased acreage was litigated in the *Trail 1* summary judgment, it was not the issue on which the inverse condemnation claim was ultimately disposed, and the City has not shown that it was otherwise essential to the judgment in that action for collateral estoppel purposes.⁶

With regard to whether there are locations within the leased acreage where drilling could lawfully be conducted despite 97-1394, the parties offered conflicting affidavits from their experts. The City's expert concluded that "it would be physically possible to locate a drilling rig and production operations within the 985-acre lease" without violating the City's ordinance because "there are several areas within the lease which are not located within 1,000 feet of a drain, stream, or tributary of Lake Houston as defined by Ordinance 97-1394" Conversely, Wilson's expert concluded that the City's ordinance "would prohibit the drilling of any oil or gas well anywhere on the 985-acre lease." These conflicting affidavits create a fact issue as to whether there are locations within the leased acreage which are not subject to the drilling prohibition.⁷ Moreover, none of the summary judgment evidence addresses the extent to which drilling from any location(s), whether within or outside the leased acreage, would allow a sufficient quantity of minerals to be extracted in an economically feasible manner that Wilson could realize an economic benefit from the entirety of its lease despite the drilling prohibition.⁸ Therefore, the summary judgment evidence does not conclusively establish whether the drilling prohibition denies Wilson all economically viable use of its property or unreasonably interferes with Wilson's rights to use and enjoy its property.

⁶ Nor did the City's motion for summary judgment contend or establish that Wilson's drilling rights, to the extent restored by the annexation, could not have been inversely condemned a second time by 97-1394, so as to preclude a second action for inverse condemnation.

⁷ Depending on the circumstances on which the experts rely, which are not addressed in the affidavits, this issue could also include questions of law.

⁸ Because the expert affidavits create a fact issue on the extent to which the leased acreage falls outside the drilling prohibition, and are also insufficient to establish the economic viability of drilling from outside the leased acreage, we need not address Wilson's challenge to the qualifications of the City's expert, and thus the admissibility of his conclusions, regarding directional drilling.

Accordingly, the summary judgment of the trial court is: (1) reversed and remanded only as to Wilson's claim for inverse condemnation based on denial of all economically viable use of its mineral interest and unreasonable interference with its rights to use and enjoy that interest; (2) affirmed as to Wilson's claim for inverse condemnation based on not substantially advancing legitimate state interests; and (3) affirmed as to Wilson's other claims besides inverse condemnation.

/s/ Richard H. Edelman
 Justice

Judgment rendered and Opinion filed March 14, 2002.

Panel consists of Justices Yates, Edelman, and Guzman.

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