Affirmed and Opinion filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00274-CV

SUNRISE HELICOPTERS, INC., Appellant

V.

NORTHWEST AIRPORT MANAGEMENT, INC., Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 97-19953

O P I N I O N

Appellant, Sunrise Helicopters Inc. ("Sunrise"), appeals from the trial court's judgment resulting from a suit brought against it by appellee, Northwest Airport Management, Inc. ("Northwest"). Raising six issues for review, Sunrise appeals the court's order permanently enjoining its use of the airport facilities of Northwest. Sunrise also challenges those portions of the trial court's judgment ordering that it pay fees for past use of Northwest's facilities and awarding appellate attorney's fees to Northwest. For the reasons set forth below, we overrule appellant's issues and affirm the judgment of the trial

court..

Background

Northwest owns and operates the David Wayne Hooks Airport located on a 591 acre tract of land in Houston. Sunrise owns and maintains two aircraft hangars on two small tracts of land contiguous to the airport. Pursuant to a settlement agreement resulting from a prior lawsuit, "non-airport" land owners, defined in the agreement to include Sunrise, were required to sign an access and maintenance agreement with Northwest. This agreement included a requirement that Sunrise pay fees for its two tracts, provided that, at any time in a particular month, it either had aircraft occupying its hangar space or conducted "commercial aviation activity." The fees were based on the amount of hangar space contained on each of Sunrise's tracts and payable to Northwest for use of airport facilities such as taxiways, fuel stations, and water.

When Sunrise signed the access agreement in April 1993, the hangar on the smaller of its tracts was vacant. At the time of the agreement, Sunrise contended that this tract was not being used for "commercial aviation activity." Approximately one year later, Northwest's President, Jagjik Gill, learned that Sunrise had, without paying access and maintenance fees, erected pallet bays inside the small-tract hangar in furtherance of an aircraft parts business. Subsequently, Gill confronted John Peacocke, Sunrise's president, about the fees due under the access agreement. Peacocke referred to an alleged oral agreement concerning the fees in question, and rejected Gill's demand for payment of access fees on its small tract. Northwest ultimately terminated the access agreement for both tracts and filed suit against Sunrise. The court below granted an injunction prohibiting Sunrise, its licensees, and customers from trespassing on Northwest's property. In its judgment, the court also concluded that Sunrise breached the access and license agreement and awarded Northwest $7,480.08 in back fees. Sunrise now appeals.

Permanent Injunction

In its first issue for review, Sunrise argues that the trial court's judgment permanently enjoining its continued use of Northwest's airport facilities was error. Specifically, Sunrise contends that Northwest introduced no evidence proving imminent and irreparable harm, in addition to the absence of an adequate remedy at law, as a result of Sunrise's use of its facilities. Therefore, Sunrise contends, the trial court abused its discretion by issuing the injunction. We disagree.

In determining whether a trial court erred in granting injunctive relief based on facts found, a reviewing court applies an abuse of discretion standard of review. *Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps*, 999 S.W.2d 163, 167 (Tex. App.—Houston [14th Dist.] 1999, no pet.). An abuse of discretion in the grant or denial of an injunction arises only when the trial court's findings are not supported by some evidence of substantial and probative character. *Morris v. Collins*, 881 S.W.2d 138, 139 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

Before a court will grant injunctive relief, a plaintiff must prove the following: (1) the existence of a wrongful act; (2) the existence of imminent harm; (3) the existence of irreparable injury; and (4) the absence of an adequate remedy at law. *Morris*, 881 S.W.2d at 139. Neither fear nor apprehension of the possibility of injury is sufficient to support a grant of injunctive relief. *Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 248 (Tex.1983). Moreover, an injunction will not be issued to prevent injury that is purely conjectural or speculative. *Camp v. Shannon*, 162 Tex. 515, 348 S.W.2d 517, 519 (1961). However, where a person repeatedly trespasses on the property of another, the requirements for an injunction are satisfied and a grant of injunctive relief is appropriate to restrain such continued trespasses. *Bass v. Champion Intern Corp.*, 787 S.W.2d 208, 211 (Tex. App.—Beaumont 1990, no writ).

Considering the evidence introduced at trial, we conclude that the court did not abuse its discretion in permanently enjoining Sunrise from entering or otherwise using Northwest's property. In support of its order permanently enjoining Sunrise's use of Northwest's facilities, the trial court found that "[u]nless enjoined, [Sunrise] would continue to use [Northwest's] property without permission or consent." Evidence at trial showed that Sunrise's right to enter upon and use Northwest's airport facilities derived solely from the access license agreements which Sunrise admits were terminated no later than April 3, 1997. However, testimony at trial demonstrated that aircraft occupied the hangar on Sunrise's larger tract of land up to the time of trial, November 4, 1998. Testimony also demonstrated that it was physically impossible for such aircraft to occupy the hangar without using Northwest's runways and taxiways. Finally, Sunrise's president testified that he continues to use Northwest's taxiways during certain hours, and that such use was permissible based on his belief that Northwest's airport is private property.

Given this evidence, we agree with the trial court's finding that, absent an injunction, Sunrise would continue to trespass on Northwest's airport facilities. *See Railroad Comm'n of Texas v. Manziel*, 361 S.W.2d 560, 567 (Tex. 1962) (holding that trespass to real property requires a showing of an unauthorized physical entry onto the plaintiff's property by some person or thing). These repeated trespasses on Northwest's airport satisfy the requirements for issuance of a permanent injunction. *See Bass*, 787 S.W.2d at 211. Accordingly, we hold that the trial court did not abuse its discretion in enjoining Sunrise from trespassing on Northwest's airfield. Appellant's first issue is overruled.

Meaning of "Commercial Aviation Activity"

In its third issue, Sunrise argues that the trial court erred in impliedly finding that its use of the hangar on its smaller tract constituted "commercial aviation activity" as contemplated in the access agreement. Specifically, Sunrise argues that Northwest adduced either no evidence or insufficient evidence to support this finding. We disagree.

The standard of review applied to a trial court's findings is the same as that applied to a jury's verdict. *Watson v. Dingler*, 831 S.W.2d 834, 837 (Tex. App.—Houston [14th Dist.] 1992, writ denied). In reviewing the factual sufficiency of the evidence, we examine all the evidence, and will set aside a verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The evidence is "insufficient" to support a fact finding if the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the finding should be set aside and a new trial ordered. *See Jaffe Aircraft Corp. v. Carr*, 867 S.W.2d 27, 29 (Tex. 1993). To determine whether there is "no evidence" of probative force to support a jury's finding, a reviewing court considers all evidence in the light most favorable to the party in whose favor the verdict has been rendered. In addition, the appellate court indulges every reasonable inference deducible from the evidence in that party's favor. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997). We will sustain a no evidence point if: (a) there is a complete absence of evidence of a vital fact; (b) we are barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Id.* More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994)).

We begin by noting that Sunrise complains of the trial court's finding that "the license agreements are not ambiguous" regarding the term "commercial aviation activity."[1]

[1] While the court's finding does not expressly contain the term "commercial aviation activity," the main issue at trial was whether this term, contained in the access agreements, was ambiguous.

In support of this finding, the court heard testimony regarding the access agreements between Sunrise and Northwest. Here the court learned that Sunrise contracted to pay specified monthly access fees to Northwest under the occurrence of certain events. The first triggering event occurred if Sunrise used its small-tract hangar for "commercial aviation activity" on at least one day per calendar month. A second event triggering access fees occurred if Sunrise stored aircraft in the tract's hangar at least one time per month. The court also heard testimony taken from an earlier deposition wherein Sunrise's president admitted that the parts he stored and sold out of the hangar were used in "commercial aircraft activity."

Regarding the term "commercial aviation activity," Northwest's president testified that he understood the term to mean "anything that could reasonably be associated with aviation." However, Sunrise's president, when asked his definition of the term, refused to respond. Instead, Sunrise argued that its understanding of the term was defined in reference to an oral agreement made prior to signing the access agreement with Northwest. This agreement, which Northwest's president repudiated, allegedly provided that Sunrise had no obligation to pay access fees unless it actually utilized hangars for aircraft storage.

Considering this evidence in a light most favorable to Northwest, as we must, we hold that Sunrise's no evidence claim fails because the evidence adduced at the hearing supports a finding that Sunrise's sale of aircraft parts constitutes "commercial aviation activity." In light of the same evidence, we likewise hold that Sunrise's insufficient evidence claim fails because we cannot conclude that the court's finding relative to Sunrise engaging in "commercial aviation activity" was so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Appellant's third issue is overruled.

Award of Access Fees

In its fourth and fifth issues for review, Sunrise argues that the court's award of $7,480.08 in access fees to Northwest was error. Specifically, Sunrise contends that Northwest produced either no evidence or insufficient evidence of either the amount and type of square feet of hangar space, or the duration of Sunrise's commercial aviation activities in the subject hangar. In consideration of the previously stated the standards of review for both no evidence and insufficient evidence issues, we now proceed to the applicable facts.

We begin by noting that Sunrise complains of trial court findings of fact numbered five, six, and nine. Finding five is a conclusion that Northwest terminated the license agreements on Sunrise's two tracts due to its failure to pay fees. Finding six is a determination that Sunrise owes $7,480.08 in fees under the access agreement on its small tract. Finding nine is a conclusion that Northwest is entitled to prejudgment interest beginning October 30, 1996. In support of these findings Northwest first offered into evidence a copy of the revocation notice sent to Sunrise on April 3, 1997. This memorandum stated that, because of the delinquency of Sunrise's account, "the license agreements to both your properties are immediately terminated without further notice." Northwest also offered into evidence a floor plan diagram of square footage contained in Sunrise's hangar. The diagram depicted 8,682 square feet of gross hangar space, 891 square foot of unusable hangar space, and 7791 square feet of usable hangar space. Finally, Northwest submitted to the court photographs of the aircraft hangar with the pallet racks Sunrise had installed. These photos clearly show large containers stored on the racks. Northwest's president testified that he estimated Sunrise had been selling parts off these racks from approximately April 1994 through May 1996 -- a period of 26 months. When asked, on cross-examination, if this was time frame was accurate, Sunrise's president reluctantly testified that he thought it was "very close."

We find that there was factually sufficient evidence to support the court's finding as

to the amount and type of square footage contained in the hangar. Likewise, we find that this evidence was sufficient to support a finding that the duration of Sunrise's commercial aviation activities was 26 months and that Northwest terminated the license agreements for both tracts due to nonpayment of license fees. Accordingly, we overrule appellant's fourth and fifth issues.

Award of Appellate Attorney's Fees

In its sixth issue for review, Sunrise argues that the trial court's award of appellate attorney's fees to Northwest was not supported by either the pleadings or evidence in the case and was therefore an abuse of its discretion. We disagree.

In this issue, appellant complains of the court's finding of fact number seven which provides for an award of $2,500 in attorney's fees on appeal. In support of this finding, Northwest's attorney testified that his fees through trial were approximately $10,000, and "that a fair fee on appeal . . . is $2500." Texas law provides that "[t]he court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in: (1) a proceeding before the court . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1997). Section 38.005 further provides that the chapter on attorney's fees "shall be liberally construed to promote its underlying purposes." *Id* at § 38.005. The record of the trial court proceedings reflected the work involved in the case. The trial court's own proceedings together with the fact that it may take judicial notice of usual and customary fees constitute some evidence to support the award of appellate attorney's fees. *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 32 (Tex. 1990). Accordingly, we find that the court did not abuse its discretion because there was some evidence of probative force to support the its grant of appellate attorney's fees. We overrule appellant's second and sixth issues for review and affirm the judgment of the

trial court.[2]

/s/ Charles Seymore
Justice

Judgment rendered and Opinion filed March 15, 2001.
Panel consists of Senior Chief Justice Murphy[3] and Justices Hudson and Seymore.
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[2] Appellant's second issue alleges that the trial court erred in awarding damages to Northwest based on its allegedly erroneous findings in issues three through six. Because the court's findings in these issues were proper, appellant's second issue is without merit.

[3] Senior Chief Justice Paul C. Murphy sitting by assignment.