Affirmed and Opinion filed October 4, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00672-CV

BONITA O. ODUTAYO, AGBOLADE O. ODUTAYO, and MEGA CHILD CARE, INC., Appellants

V.

JFA OIL COMPANY d/b/a REGENCY CAR WASH, Appellee

On Appeal from the 295TH District Court
Harris County, Texas
Trial Court Cause No. 97-56516

O P I N I O N

In this nuisance and trespass case, Mega Child Care, Inc., Bonita O. Odutayo, and Agbolade O. Odutayo (collectively, "Mega") appeal a summary judgment in favor of JFA Oil Co. d/b/a Regency Car Wash ("JFA") on the ground that a fact issue exists as to whether Mega filed suit within the statute of limitations for its nuisance and trespass causes of action. We affirm.

Background

Since Mega began operating a child care facility in September of 1995, Mega's adjacent neighbor, JFA, has allegedly been draining wastewater from its car wash operation onto Mega's property. On May 16, 1996, Mega complained to the local health department, and that department issued a citation to JFA the following day. However, JFA allegedly did not stop draining wastewater onto Mega's property. Consequently, Mega filed suit against JFA on November 14, 1997, asserting claims for nuisance and trespass. JFA thereafter filed a motion for summary judgment, arguing that Mega's claims were barred by the two-year statute of limitations.[1] The trial court granted JFA a take-nothing summary judgment.

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 the moving party is entitled to judgment as a matter of law on those issues expressly set out in the motion or response. TEX. R. CIV. P. 166a(c). A party moving for summary judgment on limitations grounds must prove when the cause of action accrued. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). If a movant's motion and summary judgment proof facially establish his right to judgment as a matter of law, then the burden shifts to the non-movant to raise any fact issues precluding summary judgment. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). In reviewing a summary judgment, we take as true all evidence favorable to the non-movant and make all reasonable inferences in the non-movant's favor. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

---

[1] Actions for nuisance and trespass are governed by a two-year statute of limitations. *See Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 126 (Tex. App.—Houston [14th Dist.] 1997, no writ) (nuisance); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2001) (trespass); *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (trespass).

Limitations

Mega's two points of error contend that the trial court erred in granting JFA's motion for summary judgment because its trespass and nuisance claims did not begin to accrue when Mega first noticed the wastewater problem in September of 1995, but only when the wastewater became a "substantial invasion" on May 17, 1996, the date the health department issued JFA a citation.

When a cause of action accrues is a question of law for the court. *See Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 126 (Tex. App.—Houston [14th Dist.] 1997, no writ). The time at which the two-year period begins to accrue depends upon whether the nuisance or trespass is temporary or permanent in character. *Loyd*, 956 S.W.2d at 126 (nuisance); *Waddy*, 834 S.W.2d at 102 (trespass). An action for permanent injuries to land accrues upon discovery of the injury. *See Loyd*, 956 S.W.2d at 127 (nuisance); *Waddy*, 834 S.W.2d at 102 (trespass). Thus, nuisance and trespass causes of action begin to accrue upon discovery of the first actionable injury, rather than when the extent of the damages to the land are fully ascertainable. *See Bayouth*, 671 S.W.2d at 868. In contrast, an action for temporary injuries to land may encompass whatever injuries were sustained during the two years prior to filing of the plaintiff's suit. *See Yancy v. Tyler*, 836 S.W.2d 337, 340-41 (Tex. App.—Tyler 1992, writ denied).

In this case, it is undisputed for purposes of the summary judgment that Mega began operating its child care facility in September of 1995, and that any draining of JFA's wastewater onto Mega's property has been occurring since then. Mega's alleged injuries include diminution in its property value because of foundation problems, deterioration in its parking lot, "corrosion of certain utilities," and lost income due to loss of business reputation.[2] However, Mega does not challenge the summary judgment on the basis of any

---

[2] In particular, Mega complains that JFA swept and redirected wastewater containing automobile cleaning and detailing chemicals onto its property everyday. As a result, Mega alleges that the wastewater formed stagnant pools of unsanitary water, thereby serving as a breeding ground for mosquitos. Further, the stagnant water allegedly emitted foul odors which caused Mega's personnel

fact issue regarding whether the activity or injury was temporary versus permanent, but only as to when the invasion became substantial, *i.e.*, presumably in terms of its magnitude. Even if the substantiality of the invasion is relevant for limitations purposes, Mega does not explain how the invasion became any more substantial upon the health department's issuance of the citation. If anything, its pleadings assert that the alleged problem was the same before and after the citation. Morever, to the extent that issuance of the citation was of any legal significance to the accrual of the limitations period, such significance could seemingly have been determined as a matter of law in that the facts pertaining to issuance of the citation are not disputed. Because Mega's brief does not, therefore, demonstrate a fact issue precluding JFA's summary judgment, Mega's points of error are overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 4, 2001.

Panel consists of Justices Yates, Edelman, and Wittig.

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

---

and customers nausea and vomiting. Moreover, the stagnant water allegedly prevented Mega's customers from parking in designated parking areas and using Mega's front entrance.