

CAUSE NO. 471-01040-2022

HENRY MISHKOFF	§	IN THE DISTRICT COURT
	§	
<i>Plaintiff,</i>	§	
	§	
vs.	§	471 ST JUDICIAL DISTRICT
	§	
SONIA BRYANT	§	
	§	
<i>Defendant.</i>	§	COLLIN COUNTY, TEXAS

**DEFENDANT’S BRIEF IN OPPOSITION
TO TEMPORARY INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Sonia Bryant (“Defendant”) files this Brief in Opposition to Plaintiff Henry Mishkoff’s (“Plaintiff”) Application for Temporary Injunction, and in support thereof would show this Honorable Court the following:

**I.
EXECUTIVE SUMMARY**

This case was filed because Mr. Mishkoff claims that he has an “implied easement” that allows him and his wife to traverse across Ms. Bryant’s driveway unimpeded by virtue of a prescriptive easement taken by adverse possession. The parties have been at odds with one another over Mr. Mishkoff’s use of Ms. Bryant’s property since at least September of 2020—when Mr. Mishkoff first wrote a letter to Ms. Bryant in response to her calling the police over the Mishkoffs’ continued trespass. This lawsuit now seeks to restrain Ms. Bryant from (unspecified) activities so that Mr. Mishkoff can perpetuate his trespass.

The decision to deny an application for a temporary injunction falls within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The Court should exercise that discretion by refusing to enter an injunction under these facts and circumstances.

The central considerations for this Court to decide at the temporary injunction hearing are whether Plaintiff has met his burden of proof of establishing that he has an implied or prescriptive easement across Ms. Bryant's driveway, and if so, whether he has proven a probable, imminent, and irreparable injury for which he has no other adequate remedy at law. He will be unable to do so, since the evidence will establish that Ms. Bryant is not preventing or impeding access to Plaintiff's property and that the use of Ms. Bryant's driveway has not been exclusive to Mr. Mishkoff—an essential element in a claim to establish an easement by prescription.

Even assuming that Plaintiff can produce competent evidence establishing an implied easement, and a probable, imminent, and irreparable injury, his failure to prosecute his application for temporary injunction for almost two years after the alleged actions occurred presumes that Defendant's actions are not causing "imminent harm" to Plaintiff as a matter of law.

II. **LEGAL STANDARD FOR OBTAINING A TEMPORARY INJUNCTION**

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). To obtain a temporary injunction, the burden is on Plaintiff to plead and prove three specific

elements: (1) a cause of action against Defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury for which it has no adequate remedy at law. *Butnaru*, 84 S.W.3d at 204; *Wilson N. Jones Mem'l Hosp. v. Huff*, 188 S.W.3d 215, 218 (Tex. App. – Dallas 2003, pet. denied). Although

The party applying for a temporary injunction has the burden of production, which is the burden of offering evidence that establishes all of the requirements for a temporary injunction. *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 897 (Tex. App.—Dallas 2006, no pet.). A trial court has broad discretion to determine whether the applicant met that burden. *Hilb, Rogal & Hamilton Co. of Texas v. Wurzman*, 861 S.W.2d 30, 33 (Tex. App.—Dallas 1993, no writ.). If an applicant does not discharge its burden, it is not entitled to injunctive relief. *Id.*

III. **ARGUMENT AND AUTHORITIES**

1. Plaintiff's inexplicable delay in seeking injunctive relief presumes that there is no apparent urgency for the Court to consider.

In their Application for Temporary Injunction, Plaintiff seeks to enjoin Defendant from (1) preventing or impeding access to the portion of Plaintiff's property that is accessible from Defendant's property; and (2) cease and desist from harassing Plaintiff and Plaintiff's spouse (a non-party).

This dispute has been ongoing since at least September of 2020, when Ms. Bryant notified the police that Mr. Mishkoff's wife was trespassing onto her property.

Mr. Mishkoff and his counsel both transmitted written demands to Ms. Bryant in the month of September, 2020.

This lawsuit was not filed until March 3, 2022 and the application for temporary injunction was not set until May 31, 2022. Plaintiff has no reason and has shown no good cause for the delay in prosecuting his claims for injunctive relief.

To be entitled to a temporary injunction, Plaintiff must show the Court that the harm resulting from Defendant's actions is imminent. *Bell v. Texas Workers Comp. Comm'n.*, 102 S.W.3d 299, 302 (Tex. App. – Austin 2003, no pet.); *Butnaru*, 84 S.W.3d at 204. Plaintiff's inexplicable delay in seeking a remedy is an important factor bearing on the need for a temporary injunction, and absent a good explanation, a substantial period of delay militates against the issuance of a temporary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief. *See, e.g. Gonannies, Inc. v. Goupair.com, Inc.*, 464 F. Supp.2d 603, 609 (N.D. Tex. 2006) (Holding that a five month delay in seeking injunctive relief rebutted any possible presumption of irreparable harm).

Plaintiff's delay in waiting from September of 2020 until May of 2022 to set a hearing on an application for temporary injunction rebuts any presumption that he currently suffer imminent, irreparable harm as a matter of law. Accordingly, Plaintiff will be incapable of meeting his burden of establishing imminent harm, and the Court should deny his Application for Temporary Injunction.

2. Plaintiff has no evidence of an irreparable injury for which he has no adequate remedy at law.

At the temporary injunction hearing, Plaintiff will have the burden of proving that if the injunction is not issued, the harm that will occur to him is irreparable. *Butnaru*, 84 S.W.3d at 204. An injury is irreparable if damages would not adequately compensate the injured party or if they cannot be measured by any certain pecuniary standard. *Argyle I.S.D. ex rel Bd. of Trustees v. Wolf*, 234 S.W.3d 229, 236 (Tex. App. – Fort Worth 2007, no pet). A trial court abuses its discretion in granting a temporary injunction unless it is clearly established by the facts that the party seeking such relief is threatened with an actual irreparable injury if the injunction is not granted. *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 925 (Tex. App. – Dallas 2006, no pet.) (quotation omitted).

Irreparable harm is, by its very nature, personal to the injured party. As such, it is incumbent upon the injured party to put on evidence of the irreparable harm that he stands to suffer. In his Application for Temporary Injunction, Plaintiff has wholly failed to plead any facts which establish that he will continue to suffer irreparable harm. Indeed, there is not even a threadbare allegation of irreparable harm in the pleading because the fact is simple—Mr. Mishkoff can easily access the side of his home without going onto Ms. Bryant’s property as he has done in the past:



The Court must deny a temporary injunction “where the party seeking the injunction has failed to show that without injunctive relief, he will suffer irreparable injury for which he has no adequate legal remedy. *Reach Group, LLC v. Angelina Group*, 173 S.W.3d 834 (Tex. App.—Houston [14th Dist.] 2005, no pet). *See also Primary Health Physicians, P.A. v. Sarver*, 390 S.W.3d 662 (Tex. App.—Dallas 2012, no pet.) (affirming a trial court’s denial of a temporary injunction in a noncompetition case where the employer failed to establish irreparable harm.); *Shoreline Gas, Inc. v. McGaughey*, 2008 WL 1747624 (Tex. App.—Corpus Christi 2008, no pet.) (holding that although the agreement was enforceable, the plaintiff was not entitled to a temporary injunction because it failed to prove a probability of irreparable injury.)

Since Plaintiffs will be unable to establish a probable, imminent injury for which they have no adequate remedy at law, the Court must deny their application for a temporary injunction.

3. Plaintiff cannot establish a cause of action and probable right to recover.

In order to meet his burden of proving a probable right of recovery, Plaintiff carries the burden of showing a “likelihood of success on the merits” on his causes of action against Defendant. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 686 (Tex. 1990). As the moving party, Plaintiff has the burden of production, which is the burden of offering some evidence that establishes a probable right to recover and a probable interim injury. *Dallas Anesthesiology Associates, P.A. v. Texas Anesthesia Group, P.A.*, 190 S.W.3d 891, 897 (Tex. App. – Dallas 2006, no pet.). A probable right of recovery is shown by alleging a cause of action and presenting evidence tending to sustain it. *Argyle I.S.D. ex rel. Bd. of Trustees*, 234 S.W.3d at 236. If Plaintiff cannot meet his burden as to any one element of their causes of action, he is not entitled to the extraordinary relief of an injunction. *Dallas Anesthesiology Associates, P.A.*, 190 S.W.3d at 897.

A. Plaintiff’s Claim for a Prescriptive Easement Fails Because His Use of Ms. Bryant’s Driveway Was Never Exclusive.

A prescriptive easement is not well-regarded in the law. *McClung v. Ayers*, 352 S.W.3d 723, 728 (Tex.App.-Texarkana 2011, no pet.); *Tiller v. Lake Alexander Properties, Ltd.*, 96 S.W.3d 617, 624 (Tex.App.—Texarkana 2002, no pet.); *Toal v. Smith*, 54 S.W.3d 431, 435 (Tex.App.—Waco 2001, pet. denied); *Wiegand v. Riojas*, 547 S.W.2d 287, 289 (Tex.Civ.App.—Austin 1977, no writ). To obtain a prescriptive easement, one must use someone else's land in a manner that is open, notorious,

continuous, exclusive, and adverse for a period of ten years or more. *Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex.1979).

Exclusivity is not met when landowner and claimant both use the property in question. *Vrazel v. Skrabanek*, 725 S.W.2d 709, 711 (Tex.1987). When a landowner and a claimant of an easement both use the same road, use by the claimant is not exclusive to the landowner's use and is not adverse. *Brooks*, 578 S.W.2d at 673. Ms. Bryant uses her driveway every day and so have the owners before her. Mr. Mishkoff has never stopped any of the prior owners from using the driveway. Joint use of a road, no matter for how long, cannot ripen into an easement by prescription. *Vrazel*, 725 S.W.2d at 711; *Othen v. Rosier*, 148 Tex. 485, 226 S.W.2d 622, 626 (1950).

Courts have analyzed the acquisition of an easement by prescription as being analogous to the acquisition of title by adverse possession. Therefore, a claim of prescription must be supported by proof of all of the elements that are involved in the statute of limitations for adverse possession. The hostile and adverse character of the use necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession. *Othen*, 226 S.W.2d at 626; *Tiller*, 96 S.W.3d at 624; *Davis v. Carriker*, 536 S.W.2d 246, 250 (Tex.App.—Amarillo 1976, writ ref'd n.r.e.).

One test to determine whether a claim is hostile as required to establish an easement by prescription is whether the adverse possessor's use, occupancy, and possession of the land is of such nature and character as to notify the true owner that the claimant is asserting a hostile claim to the land. *Tiller*, 96 S.W.3d at 624; *Mack v.*

Landry, 22 S.W.3d 524, 531 (Tex.App.-Houston [14th Dist.] 2000, no pet.). The evidence introduced at the hearing on Plaintiff's Application for Temporary Injunction will be devoid of any evidence that Mr. Mishkoff gave notice to Ms. Bryant or any of her predecessors in title that he was asserting a hostile claim to use Ms. Bryant's land before Ms. Bryant complained of his use.

The party claiming an easement by prescription must give notice that its use of property is under a claim of right. Otherwise, the use (especially if joint) is presumed to be permissive, and a permissive use can never ripen into an easement by prescription. *Sassman v. Collins*, 53 Tex.Civ.App. 71, 115 S.W. 337, 339 (1908, writ ref'd), cited with approval in *Othen*, 226 S.W.2d at 627. There must be an independent act of hostility to transform permissive use of an easement into an adverse use so as to begin the prescriptive period. *Mack*, 22 S.W.3d at 532.

Accordingly, Mr. Mishkoff will not succeed on the merits of his claim for a prescriptive or implied easement, and the Court must deny his Application for Temporary Injunction.

4. To the extent that the Court grants injunctive relief, the bond should be substantial.

TEXAS RULE OF CIVIL PROCEDURE 684 states:

"In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant. Before the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk, in the sum fixed by the judge, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of

money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.”

The purpose of the bond that is required prior to issuance of a temporary injunction is to provide protection to the enjoined party for any possible damages occurring as a result of the injunction. *Goodin v. Jolliff*, 257 S.W.3d 341, 353 (Tex. App. – Ft. Worth 2008, no pet.). The bond requirement is mandatory, and a failure to include a bond in a temporary injunction renders it void. *Qwest Communications Corp. v. AT & T Corp.*, 24 S.W.3d 334, 337 (Tex. 2000). The determination of the adequacy of the bond set by the trial court is to be made on a case-by-case basis based upon the record before the Court. *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 203 (Tex. App. – Ft. Worth 2005, no pet.).

1. If Plaintiffs’ temporary injunction is granted in the form it proposes, it will essentially be an invasion of Ms. Bryant’s property rights. The law holds the property of every person so sacred that no one can set foot upon another’s property without the property owner’s leave. Every unauthorized entry is a trespass, even if no damage is done. *See General Mills Restaurants, Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827 (Tex. App. Dallas 2000). A trespasser is liable to the property owner even when there is no proof of actual damages in any specific amount. *Id.*

Accordingly, if the Court grants Plaintiffs’ application for temporary injunction, it should set the bond at an amount totaling at least one hundred thousand dollars (\$100,000).

IV.
CONCLUSION AND PRAYER

Since Plaintiff does not have a cause of action against Defendant for a prescriptive easement; a probable right to the relief sought; or a probable, imminent, and irreparable injury for which they have no adequate remedy at law, the Court must deny his application for temporary injunction.

WHEREFORE, PREMISES CONSIDERED, Defendant request that the Court deny Plaintiff's Application for Temporary Injunction, and further award them all of their costs, attorney's fees, and such other and further relief as they may be justly entitled.

Respectfully submitted,

SCHEEF & STONE, LLP

/s/ 7. Chase Garrett

T. Chase Garrett
Texas Bar No. 24069764
chase.garrett@solidcounsel.com
2600 Network Blvd., Suite 400
Frisco, Texas 75034
(214) 472-2100 – Telephone
(214) 472-2150 – Facsimile

Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that on May 27, 2022, a true and correct copy of the foregoing was sent to all parties who have made an appearance or their attorney of record in accordance with Texas Rules of Civil Procedure.

/s/ 7. Chase Garrett