Concurring opinion issued November 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00587-CV

TU NGUYEN, Appellant

V.

BANK OF AMERICA, N.A., Appellee

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2014-64308

CONCURRING OPINION

I concur solely in the judgment, purely as an application of summary-judgment procedure. The legal arguments presented by appellant Tu Nguyen, a self-represented litigant, do not justify reversal of the equitable relief granted by the trial court, vacating a "judicial finding" that had been granted, erroneously,

pursuant to Government Code Section 51.903. Because I disagree with the court's analysis, I write separately in an attempt to clarify the unusual procedural circumstances of this appeal.

I.

For our purposes, the story of this dispute began with Nguyen's application for judicial review of the bank's mortgage lien. Nguyen invoked a statutory procedure for an ex parte judicial review of his allegation that a fraudulent lien had been filed against his real property. *See* TEX. GOV'T CODE § 51.903. The statute does not require any form of advance notice to the holder of the purported lien, *id.* § 51.903(c), and in this case the bank received no notice of Nguyen's motion.

Representing himself, Nguyen filed a document entitled "Amended Motion for Judicial Review of Documentation or Instrument Purporting to Create a Lien or Claim." The first paragraph of this filing stated that the motion was filed "pursuant to Texas Statutes – Section 51.903." The motion then proceeded to mirror substantially a statutory "suggested form" of motion. *Id.* § 51.903(a). Nguyen's motion supplemented the statutory form by inserting additional text between sections IV and V of the form. There, Nguyen inserted three sections entitled "Factual Background," "The Law," and "Application of the Texas Government Code Ann. § 51.903 and Authorities." In the "Law" section, Nguyen quoted large sections of Section 51.903, including the following sentences and language

emphasized with boldface and italics: "The ***court's finding may be made solely on a review of the documentation or instrument attached to the motion*** and ***without hearing any testimonial evidence***. The court's review ***may be made ex parte without delay or notice of any kind***." (Emphasis in original, quoting TEX. GOV'T CODE § 51.903(c).) The "Application" section referenced attached documentation to support allegations that the bank was "NOT the original owner" of the deed of trust, "NOT the current owner," and "NO LONGER the loan servicer."

The attached documents, however, were not the challenged lien documentation contemplated by the statutory form motion. Nguyen slightly, but meaningfully, deviated from section II of the suggested form, which states:

> On (date), in the exercise of the county clerk's official duties as County Clerk of (county name) County, Texas, *the county clerk received and filed and recorded the documentation or instrument attached hereto* and containing (number) pages. Said documentation or instrument purports to have created a lien on real or personal property or an interest in real or personal property against one (name of purported debtor).

TEX. GOV'T CODE § 51.903(a) (emphasis supplied). Nguyen instead referenced by file number the challenged "documentation or instrument" that was "received and filed" by the county clerk, and he deleted the reference to that same documentation being "attached hereto." This is a material alteration because section III, which Nguyen quoted verbatim from the statutory form, alleged that the attached "documentation or instrument . . . is fraudulent." Rather than attaching the

documents filed with the county clerk, as contemplated by section II of the form motion, Nguyen attached other documents upon which he attempted to rely to suggest the bank's lien was fraudulent.

Consistent with the statutory form, the motion stated: "Movant does not request the court to make a finding as to any underlying claim of the parties involved and acknowledges that this motion does not seek to invalidate a legitimate lien." *Id*. The motion's prayer for relief was precisely the same prayer suggested by the statutory form: "Movant requests the court to review the attached documentation or instrument and enter an order determining whether it should be accorded lien status, together with such other orders as the court deems appropriate." *Id*.

The trial court granted Nguyen's requested relief in the precise form specified by the statute he repeatedly invoked. *See id*. § 51.903(g). In particular, consistent with Nguyen's motion and the statute, the trial court's "Judicial Finding of Fact and Conclusion of Law" stated: "This court makes no finding as to any underlying claims of the parties involved, and expressly limits its finding of fact and conclusion of law to the review of a ministerial act." *Id*. The form and substance of the judicial finding distinguishes the facts of this case from *Becker v. Tropic Isles Ass'n*, No. 13-08-00559-CV, 2010 WL 877569 (Tex. App.—Corpus Christi Mar. 11, 2010, pet. denied) (mem. op.). In *Becker*, the Corpus Christi court

observed that the trial court did more than determine whether the documents attached to the Section 51.903 motion were fraudulent; the trial court declared that the lienholder "did not exist" and ruled that a contract had expired. 2010 WL 877569, at *3. On that basis the court concluded the trial court went beyond making a Section 51.903 judicial finding and instead entered a declaratory judgment. *See id.*

II.

The bank filed an original petition for bill of review, seeking to vacate the judicial finding. Cross-motions for summary judgment were filed, and the trial court entered final summary judgment in favor of the bank, decreeing that the previously issued judicial finding was "voided and vacated."

This is Nguyen's appeal from the summary judgment granted in the bill of review proceeding.

"A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal." *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998). Ordinarily, a person must exercise due diligence to avail himself of all adequate legal remedies "against a former judgment" before filing a bill of review. *Id.* Thus, to show sufficient cause for a bill of review, a plaintiff ordinarily must plead and prove not

only that it has a meritorious defense, but that it was prevented from presenting the defense. *See Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004).

The procedural anomaly of this case is that there was no "judgment" impairing the bank's interest in the property, and ordinary legal remedies were available to relieve the bank of the effect of the judicial finding entered by the trial court. Unlike a default-judgment scenario, the "judicial finding" was still subject to challenge. The bank was not prevented from presenting its defense. It still could have foreclosed on the property after Nguyen defaulted on the loan. Or the bank could have sought a declaration of its rights with respect to the property. *See* TEX. CIV. PRAC. & REM. CODE § 37.003. Legal remedies were available, and therefore the equitable remedy of a bill of review was unnecessary and unwarranted.

III.

The court's application of the bill of review framework rests on the mistaken premise that–like the *Becker* case–Nguyen's motion only could be construed as a petition for declaratory judgment, and the trial court's order effectively was a judgment on the merits, rendered without notice to the bank. I disagree with this view of the proceedings.

When dealing with filings by a self-represented litigant like Nguyen, a court must conduct its review with "liberality and patience." *Aguilar v. Stone*, 68 S.W.3d 1, 1 (Tex. App.—Houston [1st Dist.] 1997, no writ); *Johnson v. McAdams*, 781

S.W.2d 451, 452 (Tex. App.—Houston [1st Dist.] 1989, no writ). As outlined above, Nguyen expressly invoked the Section 51.903 procedure, and the trial court applied the Section 51.903 procedure.

Rather than considering the totality of the circumstances relating to the motion and judicial finding, the court isolates fragments of Nguyen's filing which present allegations that are inconsistent with the Section 51.903 procedure he invoked. But if the experienced trial court judge had construed Nguyen's motion as presenting a declaratory judgment petition disguised as a Section 51.903 motion, he surely would have required service of process, and the resulting process ultimately would have resulted in some form of judgment. He didn't do that. Instead, as evidenced by the judicial finding contemplated by Section 51.903 and entered by the trial court, the judge appropriately followed the procedure expressly invoked by Nguyen.

The court invokes *State Bar v. Heard* for the proposition that we "look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it." 603 S.W.2d 829, 833 (Tex. 1980). Looking to the substance of Nguyen's plea for relief in this case, which was a verbatim recitation of the prayer suggested by the Section 51.903 form motion, should lead to the conclusion that the filing was a Section 51.903 motion, not a petition for declaratory judgment.

The court also suggests the similarity of this appeal to *Nguyen v. Bank of America, N.A.*, in which the Fourteenth Court of Appeals affirmed a bill of review granted in a similar dispute between these same parties. No. 14-15-00290-CV, 2016 WL 2343893 (Tex. App.—Houston [14th Dist.] May 3, 2016, no pet.). I am not persuaded by that opinion, which focused solely on the "substantive evidentiary" claims included in the motion to characterize the judicial finding as a declaratory judgment, without addressing the fact that the judicial finding at issue did not purport to grant relief beyond the scope of Section 51.903. *See* 2016 WL 2343893, at *4. The Fourteenth Court found *Becker* analogous without addressing the key difference of that case, that the trial court had purported to decide issues beyond the scope of Section 51.903. The distinction is critical, and I do not agree that we should mirror the Fourteenth Court's reasoning. *See generally* Bryan A. Garner et al., *The Law of Judicial Precedent* 169-70 (2016) (explaining some reasons why courts might take "the road less traveled" and "decline to follow the decision of another court").

Simply put, I would not contort the substance of Nguyen's Section 51.903 motion to force this case into the inapplicable bill of review framework.

IV.

Because this was not an appropriate case for the equitable bill of review remedy, it is incorrect to say that summary judgment was correctly granted in this

case. And there is no reason to say that. It's enough to say that Nguyen failed to present a legally correct argument, either in the trial court or on appeal. *See* TEX. R. CIV. P. 166a(c); TEX. R. APP. P. 38.1(i). Accordingly, I respectfully concur only in the judgment of affirmance.

Michael Massengale
Justice

Panel consists of Justices Bland, Massengale, and Lloyd.

Justice Massengale, concurring in the judgment.