

Affirmed and Opinion filed March 25, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00429-CV

DENNIS C. DeACETIS, Appellant

V.

**MARIANNE WHITLEY, MICHAEL DeACETIS, JAMES M. GARY, KIMBERLY
C. GARY, and MARTHA C. FONKE, Appellees**

**On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 46490**

MEMORANDUM OPINION

In this real estate dispute involving title to a residence, appellant, Dennis C. DeAcetis (Dennis), appeals a final judgment consolidating four summary judgments granted in favor of appellees, Marianne Whitley, former wife of Dennis (Marianne), Michael DeAcetis, son of Dennis and Marianne (Michael), James M. Gary, Kimberly C. Gary, purchasers of the residence from Marianne (the Garys), and Martha Fonke, purchaser of the residence from the Garys (Martha). In five issues, appellant asserts the trial court erred in granting summary judgments to each of the appellees and in denying

his motion to continue the summary judgment hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following relevant facts are uncontroverted:

1. On April 18, 2002, Marianne filed for divorce from Dennis. After a trial, on April 24, 2003, the 300th District Court of Brazoria County, Texas, rendered a Final Decree of Divorce awarding Marianne “ownership of 129 Aster Lane, Lake Jackson, Texas”. The Divorce Decree was signed on May 29, 2003.
2. At the time of the divorce, neither Marianne nor Dennis owned record title to 129 Aster Lane. However, the following facts support the conclusion that they owned beneficial title. Record title was held by SMP Family Leasing Incorporated (fka SMP Leasing Incorporated). The sole asset of SMP Family Leasing Incorporated was the subject residence, 129 Aster Lane, acquired in 1997, and the sole shareholders and officers were the two sons of Dennis and Marianne, Michael and Peter DeAcetis. The purchase and maintenance of 129 Aster was paid for totally from the community property funds of Dennis and Marianne; however, on paper, Dennis and Marianne were tenants under a lease with SMP Family Leasing Incorporated. Marianne and Dennis lived at the residence as their home.
3. After rendition of the divorce on April 24, 2003, but before the decree of divorce was signed on May 29, 2003, son Peter, as president of SMP Family Leasing Incorporated, allegedly entered into an oral agreement with Dennis on April 28, 2003, to convey record title to 129 Aster Lane to Dennis. Said alleged oral agreement was never reduced to a signed writing, and the next day, on April 29, 2003, Peter resigned as president, director, and registered agent of SMP Family Leasing Incorporated.
4. After the divorce decree was signed, Dennis refused to vacate the residence at 129 Aster Lane.

5. On July 17, 2003, a warranty deed was signed conveying fee title to 129 Aster Lane from SMP Family Leasing Incorporated to Marianne. The deed was signed by son Michael, as officer of the corporation.
6. Dennis continued to refuse to vacate the residence at 129 Aster Lane.
7. Marianne filed proceedings to enforce the divorce decree. On December 17, 2003, the 300th District Court of Brazoria County (the divorce court) signed an “Order of Enforcement by Contempt and Suspension of Contempt”, stating in part:

“The Court finds that Respondent (Dennis) is guilty of separate violations of the order signed on April 24, 2003 that appears in the minutes of this Court, and states in relevant part as follows:

IT IS ORDERED AND DECREED that the wife, MARIANNE DeACETIS is awarded the following as her sole and separate property, and the husband is divested of all right, title, interest, and claim in and to that property:

-
1. 129 Aster Lane, Lake Jackson, Texas 77566 [including keys]

.....

The Court further finds that Petitioner (Marianne) was awarded the residence located at 129 Aster Lane, Lake Jackson, Texas and that Respondent has failed to turn that property over to Petitioner.

.....

IT IS ORDERED that Respondent, Dennis Charles DeAcetis, shall vacate the residence located at 129 Aster Lane no later than 5:00 p.m. on January 15, 2004 and by that time turn over all keys, including garage door openers and utility deposits, to Petitioner.”

8. Dennis continued to refuse to vacate the residence.
9. Marianne filed a forcible detainer suit. The JP and County Courts ruled in Marianne’s favor and ordered Dennis to vacate the residence.
10. Dennis still refused to vacate the residence.
11. The 300th District Court (the Divorce Court) held Dennis in contempt for failing to comply with its Enforcement Order and committed him to jail.

12. On December 14, 2004, almost eight months after the Divorce was granted, the parties entered into a Rule 11 Agreement regarding the suspension of Dennis's jail commitment, and the 300th District Court signed an Order Suspending Commitment that states, in part:

“IT IS THEREFORE ORDERED that Dennis...shall be released from the Brazoria County jail until Monday, December 20, 2004, 9:00 a.m. during which time he shall perform the following:

.....

c. Respondent [shall] vacate the premises at 129 Aster Lane....

.....

f. Respondent will execute all documents necessary to clear title on the residence located at 129 Aster Lane, Lake Jackson, Texas....”

13. Dennis vacated the residence after being released from jail.

14. Dennis did not appeal any of the rulings of the 300th District Court of Brazoria County, the Divorce Court.

15. In March 2005, Marianne conveyed title to 129 Aster Lane by Warranty Deed to appellees James and Kimberly Gary (the Garys).

16. In February 2006, the Garys conveyed 129 Aster Lane to appellee Martha Fonke.

17. In December 2005, Dennis filed suit against his son Peter.

18. In August 2006, Dennis amended the petition to add as defendants Marianne, the Garys, Martha Fonke, and his son Michael (among others), seeking a declaratory judgment as to ownership of 129 Aster Lane and alleging causes of action based on trespass to try title, fraud, conversion, and conspiracy.

19. The trial court granted summary judgments in favor of all appellees (the claims against son Peter are not before us on appeal).

DISCUSSION

I. Did the trial court err in granting summary judgments in favor of all appellees?

A. Standard of Review

We review the granting of summary judgment *de novo*. *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 500 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). We may affirm a summary judgment only on grounds specifically stated in the motion. *Id.* Where the trial court’s order granting summary judgment does not specify on what grounds it was granted, it must be affirmed if any of the grounds asserted are meritorious. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

In a no-evidence motion for summary judgment, the movant must specifically state the elements as to which there is no evidence. *Walker v. Thomasson Lumber Co.*, 203 S.W.3d 470, 473–474 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The trial court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact. Tex. R. Civ. P. 166a(i). However, the respondent is “not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements.” *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (quoting Tex. R. Civ. P. 166a cmt.)).

Under the traditional summary judgment standard of review, a movant has the burden to show at the trial level that there are no genuine issues of material fact, and he is entitled to judgment as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the non-movant is taken as true and we make all reasonable inference in his favor. *Id.* We review the trial court’s summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A movant is entitled to summary judgment only if he conclusively proves all essential elements of his claim. *Johnston v. Crook*, 93 S.W.3d 263, 273 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

B. Analysis

1. Traditional Summary Judgment Motion

Marianne filed a traditional motion for summary judgment based on the doctrine of res judicata. Res judicata is an affirmative defense. Tex. R. Civ. P. 94. The party claiming the defense must prove: (1) the claims asserted in this case arise out of the same subject matter of the previous suit, (2) the claims asserted in this suit were litigated or could have been litigated through the exercise of due diligence in the previous suit, (3) there is a final judgment in the prior lawsuit. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex. 1992). We take the transactional approach to res judicata. *Id.* Under that approach, the subject matter of a suit is based on the factual matter that make up the gist of the complaint. *Id.* at 630. Any claim that arises out of those facts should be litigated in the same lawsuit. *Id.*

Marianne contends the divorce decree, and subsequent orders, entered by the 300th District Court dealt with the division of the property of the marital estate. Specifically, Marianne has provided evidence that she was awarded ownership of 129 Aster Lane. Res judicata applies to the property division in a final divorce decree, just as it does to any other final judgment, barring subsequent collateral attack even if the divorce decree improperly divided the property. *Baxter v. Ruddle*, 794 S.W.2d 761, 762 (Tex. 1990). Division of the property of the marital estate was the subject matter of Marianne and appellant's divorce proceeding. *See* Tex. Fam. Code Ann. § 7.001 (Vernon 2006). Thus, (1) appellant's claims to 129 Aster arise out of the same subject matter as his divorce proceeding, (2) appellant either did or could have asserted claims to 129 Aster during the divorce proceeding, and (3) there is a final judgment in appellant's divorce proceeding. *See Barr*, 837 S.W.2d at 631. All claims alleged against Marianne, including claims of fraud, conspiracy, and conversion, are related to the determination of ownership of 129 Aster and consequently are barred by res judicata. Therefore, the trial court did not err in granting Marianne's motion for summary judgment.

Accordingly, appellant's first issue is overruled.

2. No-Evidence Summary Judgment Motions

The trial court granted the remaining summary judgment motions on no-evidence grounds¹. Appellant did not file a response to any of the no-evidence motions. Absent such a response, the trial court properly granted the no-evidence motions. *See* Tex. R. Civ. P. 166a(i).²

Accordingly, appellant's issues two, three, and four are overruled.

II. Did the trial court err in denying appellant's motion for continuance?

A. Standard of Review

When reviewing a trial court's order denying a motion for continuance, we consider whether the trial court committed a clear abuse of discretion on a case by case basis. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.* We consider the following nonexclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: (1) the length of time the case has been on file, (2) the materiality and purpose of the discovery sought, and (3) whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *Id.*

Generally, it is not an abuse of discretion to deny a motion for continuance if a party has received the 21-days' notice required by Rule 166a(c). *Clemons v. State Farm Fire & Cas. Co.*, 879 S.W.2d 385, 394 (Tex. App.—Houston [14th Dist.] 1994, no writ). A party seeking more time to oppose a summary judgment must file an affidavit describing the evidence sought, explaining its materiality, and showing the due diligence

¹ Martha was granted summary judgment on both no-evidence and traditional grounds; we review the propriety of granting her full summary judgment on no-evidence grounds.

² Appellant filed only one summary judgment response, dealing with "Res Judicata And/Or Collateral Attack." In this document, appellant acknowledged that he was not filing a response to any of the no-evidence motions because of his motion for continuance.

used to obtain the evidence. Tex. R. Civ. P. 166a(g). The affidavit must show why the continuance is necessary; conclusory allegations are not sufficient. *Carter v. MacFadyen*, 93 S.W.3d 307, 310 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

B. Analysis

In his verified motion for continuance, appellant asked the court for leave to continue discovery “for at least 90 days.” Appellant argued additional time was needed to obtain deposition testimony, transcripts, and affidavits. Appellant complained the appellees continually resisted discovery through objections and by a general failure to cooperate with his requests. Specifically, appellant claimed he needed to depose Marianne to discover evidence establishing fraud and conspiracy in the real estate transaction. Additionally, he sought to depose Michael and the Garys to ascertain evidence of collusion and establish a “non-biased platform” for his claims. Finally, he requested that the appellees be compelled to provide abstracts of title to 129 Aster in order to show a significant missing link in the chain of title.

1. Discovery Narrative

Appellant originally filed this case on September 30, 2005 against a single defendant, Peter DeAcetis. Appellant filed an amended petition adding Michael, Marianne, the Garys, and Martha on August 23, 2006. On October 13, 2006 he filed his first discovery motion, a request for an abstract of title from all defendants. Martha complied by filing her abstract on October 25, 2006. Martha’s abstract demonstrated an unbroken chain of title from the sale of 129 Aster to SMP Family Leasing Incorporated until the conveyance of 129 Aster to her. The Garys filed an objection to the request arguing they were not in possession of the premises and did not claim any title to the property. Between May 7, 2007 and June 5, 2007, all appellees filed motions for summary judgment. On June 19, 2007, appellant filed a motion to compel defendants to respond to discovery requests. In his motion, appellant alleged he had filed numerous discovery requests over a seven month period. He claimed appellees had filed “misappropriated, blanket objections” and further refused to answer the bulk of the

requests. Additionally, he complained Marianne had failed to appear at a scheduled deposition because of a motion to quash filed by the Garys.

The trial court held a hearing on the summary judgment motions, appellant's motion to compel, and appellant's motion for continuance. The trial court decided to take the matter under advisement. Three months after taking the matter under advisement, the trial court granted Michael's motion for summary judgment and within the next two months granted the remaining three appellees' motions in their favor. The court did not enter an order expressly denying appellant's motion for continuance nor his motion to compel. Appellant then filed a motion to reconsider and withdraw summary judgments, a motion to re-open discovery, and a motion for ruling on continuance. The court held a hearing on the motions and entered an order denying appellant's motion to reconsider, motion to withdraw summary judgments, and motion to re-open discovery. Effectively, appellant's motion for continuance was denied. *See Carter*, 93 S.W.3d at 310.

2. On Appeal

Approximately nine months passed between the time appellant brought the appellees into the case and when they filed their summary judgment motions. Appellant did not file a motion to compel or motion for continuance until June 19, 2007, one week before the summary judgment hearing was scheduled. The trial court could have reasonably concluded that appellant should have diligently brought motions to compel, instead of waiting until one week before the summary judgment hearing. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 800–01 (Tex. 2002). It is well established that the failure of a litigant to diligently utilize the rules of civil procedure for discovery purposes will not authorize the granting of a continuance. *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988). Further, in order to respond to the no-evidence motions for summary judgment, appellant only needed to point out evidence that raised a fact issue, which could have included his own affidavit testimony as to the claims he had made, which were all based on allegations purportedly within his own personal knowledge. In this case, the trial court could have reasonably concluded that the

discovery sought was not material to appellant's ability to respond to the no-evidence motions for summary judgment, and thus a continuance of the summary judgment hearing was not merited. Under these circumstances we cannot say the trial court's denial was an abuse of discretion. For the same reasons, the trial court did not abuse its discretion in denying appellant's motions to reconsider and to reopen evidence.

Accordingly, appellant's fifth issue is overruled.

CONCLUSION

We affirm the trial court's judgment.

/s/ Margaret Garner Mirabal
Senior Justice

Panel consists of Justices Boyce and Sullivan and Senior Justice Mirabal.³

³ Senior Justice Margaret Garner Mirabal sitting by assignment.