Affirmed and Memorandum Opinion filed July 15, 2010

In The

Fourteenth Court of Appeals

NO. 14-08-00698-CV

DONALD L. YOUNG, DORIS YOUNG, CURTIS HOLCOMB, AND DONNA HOLCOMB, Appellants

V.

GALVESTON BLEAK HOUSE REALTY, INC., Appellee

On Appeal from the County Court at Law No. 1
Galveston County, Texas
Trial Court Cause No. 57,404

M E M O R A N D U M O P I N I O N

This suit arises from a dispute as to ownership of several parcels of real property. The trial court granted appellee's motion for partial summary judgment regarding Lot 26 and severed that portion of the judgment from the remaining claims. In four issues, appellants complain that the trial court erred in granting summary judgment and severance and in granting their attorney's motion to withdraw. We affirm.

I. BACKGROUND

This case involves title to property in Galveston County, Lot 26, Block 4, West Kemah, Section 1, recorded in Volume 254-A, Page 52 ("Lot 26"). Galveston Bleak House Realty, Inc., ("Bleak House")[1] filed the underlying suit against appellants, Donald and Doris Young and Curtis and Donna Holcomb, to clear title to Lot 26. Suit was also filed against Two Story Enterprises, Inc. ("TSE"), a company alleged to be wholly owned by either Curtis or Donna Holcomb.

Bleak House obtained Lot 26 on March 6, 2007, in a foreclosure sale wherein Chris Di Ferrante, as substitute trustee for TSE, the mortgagor of Lot 26, conveyed title to Bleak House. On June 12, 2007, Donna, on behalf of TSE, filed notice of lis pendens on Lot 26 alleging pending litigation in Galveston County and federal bankruptcy court. Thereafter, Bleak House filed suit to clear title to Lot 26. Donna filed a counterclaim alleging that Donald entered into an agreement with Donna, TSE, and others to borrow against his homestead, which included Lot 26. Donna claimed that Di Ferrante filed suit against Donald, Donna, TSE, and others alleging the loan arrangement amounted to a fraudulent transfer of Lot 26. The Youngs and the Holcombs filed several notices of lis pendens on Lot 26, culminating with a final notice filed March 3, 2008, alleging pending litigation in cause numbers 52,700, 52,700-A, 52,700-B in Galveston County, 14-07-00969-CV and 14-07-995-CV in the Fourteenth Court of Appeals, and 06-8044 in the United States District Court for the Southern District of Texas Houston Division.

On May 27, 2008, appellee filed a motion for summary judgment concerning Lot 26 alleging that none of the lawsuits listed in the lis pendens were sufficient to maintain notices against Lot 26. Appellee alleged that the only issue of title in either cause number 52,700 or 06-8044 had been decided against appellants in a final summary judgment in cause number 52,700. The judgment in that cause number was based on Donna's counterclaim that Di Ferrante's lien on Lot 26 was a sham sale of a homestead.

[1] Bleak House is a real estate agency wholly owned by Chris Di Ferrante.

The same claim was alleged and rejected in bankruptcy court. According to the motion for summary judgment, cause number 52,700-A was severed from 52,700 and only involved Di Ferrante's claims against TSE and Donna Holcomb on the note and Donna's guaranty of the note that was part of the sham transaction. Final judgment in that cause was rendered on July 13, 2006. Final judgment in cause number 52,700-B was rendered August 16, 2007. Cause number 14-07-00995-CV was dismissed in this court for failure to pay the filing fee. Cause number 14-07-00969-CV was dismissed in this court for want of jurisdiction.

Appellee moved for summary judgment seeking a declaration that no defendant had an interest or ownership in Lot 26 and each of the lis pendens filed against the property were invalid as a matter of law. Appellee further moved to sever the issue of ownership of Lot 26 from the other lots in appellants' lawsuits. Appellee served the motion on appellants by mailing it certified mail, return receipt requested to appellants and their attorney. Appellants failed to file a response to appellee's motion.

On May 21, 2008, appellants' attorney filed a motion to withdraw as counsel in which he asserted he was unable to effectively communicate with appellants and a breach of the attorney-client relationship had occurred. On June 9, 2008, the trial court granted the attorney's motion and permitted him to withdraw. On June 19, 2008, appellants filed a motion for continuance of the hearing on appellee's motion for summary judgment on the grounds that they were without counsel. On that same day, appellee filed a third-amended motion for partial summary judgment on several tracts of land other than Lot 26. On June 23, 2008, the trial court granted summary judgment as to Lot 26 and granted appellee's motion to sever. Appellants appeal from that order.[2]

[2] We note that Curtis Holcomb did not file a brief with this Court.

II. SUMMARY JUDGMENT

In their first two issues, appellants argue the trial court erred in granting summary judgment because the judgment is not supported by legally and factually sufficient evidence. Appellants further argue that they were never served with the motion for summary judgment, and that Doris Young was under bankruptcy jurisdiction at the time the motion was filed.

A. Service of the Summary-Judgment Motion

Proper notice to the nonmovant of the summary-judgment hearing is a prerequisite to summary judgment. *Tanksley v. CitiCapital Commercial Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied). Lack of notice to the non-movant of the hearing on a motion for summary judgment violates the non-movant's due process rights. *Id.* A certificate of service by a party or attorney of record, a return of an officer, or the affidavit of any person showing service of a motion for summary judgment is prima facie evidence of service. *Cliff v. Huggins*, 724 S.W.2d 778, 779–80 (Tex. 1987).

The motion for summary judgment in this case contains on its last page, a certificate of service, reflecting the following:

> I hereby certify that on this the 27th day of May 2008, true and correct copies of the foregoing instrument were forwarded via facsimile and/or certified mail, return receipt requested, to all counsel of record, and that the original of same has been filed with the County Clerk of Galveston County, Texas
>
> Donna Holcomb and Curtis Holcomb, pro se
> 4021 Oak Lane
> Houston, Texas 77518
>
> Donald and Doris Young
> 45 W. 5th
> Kemah, Texas 77565

Mr. Wade Williams
LEWIS & WILLIAMS
2200 Market, Suite 750
Galveston, Texas 77550

Appellants presented no evidence to rebut the presumption of notice. Therefore, we presume appellants and their attorney had notice of the motion for summary judgment. *See Cliff*, 724 S.W.2d at 780. Appellants appear to complain about an amended motion for summary judgment they allege was filed on the date of the hearing. The amended motion, however, was filed with regard to a different parcel of land, not Lot 26.

B. Bankruptcy

Doris Young contends transfer of the property on March 6, 2007, was void because the sale was held in violation of the automatic bankruptcy stay. The filing of a petition in bankruptcy operates to stay actions and proceedings against the debtor. 11 U.S.C.A. § 362(a) (West 2010). The actions stayed include foreclosure sales such as the sale that took place in this case. 11 U.S.C.A. § 362(a)(4). In general, acts taken in violation of the automatic stay are void and without legal effect. *Kalb v. Feuerstein*, 308 U.S. 433, 438–39 (1940). There is no evidence in the record, however, that Doris was in bankruptcy at the time the property was sold. Therefore, there is no evidence that the sale was consummated in violation of the stay.

C. Traditional Motion for Summary Judgment

Bleak House filed both a traditional motion for summary judgment and a no-evidence motion. In its traditional motion, Bleak House alleged there were no genuine issues of material fact on the validity of the lis pendens filed by each of the defendants as they were invalid as a matter of law. In its no-evidence motion, Bleak House alleged there was no evidence that appellants had any legal or beneficial interest in Lot 26 or any right to claim a lien or encumbrance upon it. Appellants filed no response. The trial court granted summary judgment, determining that appellants "do not own any legal or

beneficial interest in Lot 26" and that the lis pendens notices are invalid. The trial court further denied the counterclaims filed by Donna and Curtis Holcomb.

The movant for summary judgment has the burden of showing there is no genuine issue of material fact and it is entitled to summary judgment as a matter of law. Tex. R. Civ. P. 166a(c). Reviewing a summary judgment, we take evidence favorable to the nonmovant as true, and indulge every inference and resolve every doubt in the nonmovant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). A plaintiff moving for summary judgment on its own cause of action must conclusively prove each element of the cause of action. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). The movant must establish his entitlement to summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The non-movant must expressly present to the trial court any ground that would defeat the movant's right to summary judgment by filing a written answer or response to the motion, and if he fails to do so, he may not later assign any new ground as error on appeal. *Id*. at 678–79. However, on appeal there is no requirement that a non-movant respond to the motion in order to claim that the grounds expressly presented to the trial court are insufficient as a matter of law to support the judgment. *Id*. at 678. Accordingly, appellants may challenge legal sufficiency of the evidence to support the summary judgment. *Id.*

A traditional summary judgment is proper when the plaintiff conclusively proves each element of his cause of action. *MMP, Ltd.*, 710 S.W.2d at 60. Pertinent to the severed action herein, Bleak House bore the burden of conclusively proving (1) that appellants owned no legal or beneficial interest in Lot 26 or any lien or encumbrance on Lot 26 and that Bleak House was the sole owner of Lot 26, and (2) that the lis pendens notices should be canceled.

Attached to Bleak House's motion for summary judgment is a deed of trust dated March 6, 2007, transferring Lot 26 to Di Ferrante and Bleak House. Also attached are

three notices of lis pendens filed by appellants. In the first notice, signed October 3, 2006, Donald and Doris Young assert that Lot 26 is subject to pending lawsuits in cause numbers 52,700 and 52,700-A. In another notice, appellants assert the property is subject to pending lawsuits in cause number 52,700-A and 52,700-B in Galveston County County Court, 14-07-00969-CV and 14-07-00995-CV in this court, and 06-08044 in bankruptcy court. In the third notice, appellants claim the property is subject to pending lawsuits in cause number 52,700 in Galveston County Court, 06CV1248 in Galveston County District Court, and 06-08044 in the bankruptcy court.

The lis pendens statute gives litigants a method to constructively notify anyone taking an interest in real property that litigation is pending against the property. *In re Collins*, 172 S.W.3d 287, 292 (Tex. App.—Fort Worth 2005, orig. proceeding). A notice of lis pendens may be filed during the pendency of an action involving (1) title to real property, (2) the establishment of an interest in real property, or (3) the enforcement of an encumbrance against real property. Tex. Prop. Code Ann. § 12.007(a) (Vernon Supp. 2009). If a notice of lis pendens satisfies the requirements of section 12.007, the trial court many not cancel it except as provided in section 12.008. *See* Tex. Prop. Code Ann. § 12.008 (Vernon 2004); *In re Collins*, 172 S.W.3d at 293. In this case, the trial court did not cancel the lis pendens in accordance with section 12.008; therefore, we must determine whether the lis pendens complies with section 12.007.

Section 12.007(b) of the Texas Property Code provides:

> The party filing a lis pendens or the party's agent or attorney shall sign the lis pendens, which must state:
>
> (1) the style and number, if any, of the proceeding;
>
> (2) the court in which the proceeding is pending;
>
> (3) the names of the parties;
>
> (4) the kind of proceeding; and
>
> (5) a description of the property affected.

Tex. Prop. Code Ann. § 12.007(b) (Vernon Supp. 2009).

To meet the requirements of section 12.007, the action involving real property must be pending. *Id.* Here, any issue as to title to the real property had been finally determined in each of the causes of action alleged in the notices of lis pendens. Because none of the causes of action were still pending at the time Bleak House filed its motion for summary judgment, the trial court did not err in canceling the lis pendens.

The summary-judgment evidence before the trial court showed that Bleak House owned the property, that appellants had no interest in the property, and that none of the causes of action listed in the notices of lis pendens were pending. We conclude the evidence was legally sufficient to support the summary judgment.

D. No-Evidence Motion for Summary Judgment

Bleak House moved for a no-evidence summary judgment, arguing, "There is no evidence that the Youngs have any legal or beneficial interest in Lot 26, or any right to claim a lien or encumbrance upon it." After adequate time for discovery, a party without presenting summary-judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i). Absent a timely response, a trial court must grant a no-evidence motion for summary judgment that meets the requirements of Rule 166a(i). *Id.*; *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 746 (Tex. App.—Houston [1st Dist.] 2008, no pet.). If a non-movant wishes to assert that, based on the evidence in the record, a fact issue exists to defeat a no-evidence motion for summary judgment, he must timely file a response to the motion raising this issue before the trial court. *Landers*, 257 S.W.3d at 746.

In this case, Bleak House filed suit against the Youngs and bore the burden of proof for declaration that the Youngs had no legal or beneficial interest in Lot 26. The Holcombs filed counterclaims alleging a fraudulent transfer of the property, but the Youngs did not file any counterclaims. Because Bleak House bore the burden of proof,

its no-evidence motion does not fit within the parameters of rule 166a(i). However, the error in granting a no-evidence summary judgment is rendered harmless because the trial court did not err in granting Bleak House's traditional summary judgment. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000) ("[Court of appeals] must affirm summary judgment if any . . . grounds are meritorious."). We overrule appellants' first two issues.

III. SEVERANCE

In their third issue, appellants contend the trial court erroneously granted a severance of the summary judgment on Lot 26 from other issues that were pending between the parties in the trial court. After reviewing the record, we find no indication that appellants objected to severance in the trial court, thus preserving his complaint for appellate review. Because appellants failed to preserve error with regard to severance, we overrule their third issue. *See* Tex. R. App. P. 33.1; *Shank, Irwin, Conant & Williamson v. Durant, Mankoff, Davis, Wolens & Francis*, 748 S.W.2d 494, 501 (Tex. App.—Dallas 1988, no writ).

IV. MOTION FOR CONTINUANCE

In their fourth issue, appellants contend the trial court erred in denying their motion for continuance. On June 19, 2008, the Youngs filed a motion for continuance alleging they were not prepared for the summary judgment hearing because their attorney had been permitted to withdraw "just days before this hearing." Prerequisite to presenting a complaint for appellate review, the record must show the complaint was made to the trial court by a timely request, objection, or motion, and the trial court (1) ruled on the request, objection, or motion, either expressly or impliedly, or (2) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal. Tex. R. App. P. 33.1(a). Here, the record does not show the trial court ruled on appellants' motion for continuance. Therefore, appellants have failed to preserve error on this issue. *Washington v. Tyler Indep. Sch. Dist.*, 932 S.W.2d 686, 690 (Tex. App.—Tyler 1996, no writ) (party's failure to obtain written ruling on motion for continuance of

summary-judgment hearing waived any error). We overrule appellants' fourth issue.

V. APPELLEE'S MOTION FOR SANCTIONS

Appellee alleges appellants filed a frivolous appeal and requests this court to assess sanctions pursuant to Texas Rule of Appellate Procedure 45. Appellee alleges that appellants have improperly extended the lis pendens on the property that the trial court canceled by filing this appeal.

If we determine that an appeal is frivolous, we may award damages to the prevailing party. *See* Tex. R. App. P. 45. Although imposition of sanctions is within our discretion, we may do so only in circumstances that are truly egregious. *Angelou v. African Overseas Union*, 33 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.). In determining whether sanctions should be imposed, we weigh the following factors: (1) failure to present a complete record; (2) raising issues for the first time on appeal, even though preservation of error was required in the trial court; (3) failure to file a response to a request for appellate sanctions; and (4) filing an inadequate brief. *Tate v. E.I. Du Pont de Nemours & Co.*, 954 S.W.2d 872, 875 (Tex. App.—Houston [14th Dist.] 1997, no pet.). This court has determined that in order to assess sanctions, we must find the appeal to be both objectively frivolous and subjectively brought in bad faith or for the purpose of delay. *See Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60, 66 (Tex. App.—Houston [14th Dist.] 1998, no pet.). In determining the propriety of sanctions, this court views the record from the appellants' point of view at the time the appeal was filed, and we may not consider any matter that is not in the record, briefs, or other papers filed in this court. *Id.*

In this case, appellants failed to present a complete record, filed inadequate briefs, and raised issues for the first time on appeal. Further, they filed no response to appellee's motion for sanctions. It does not appear from the record, however, that appellants subjectively filed the appeal in bad faith. Accordingly, appellee's motion for sanctions is overruled.

The judgment of the trial court is affirmed.

/s/ Charles W. Seymore
Justice

Panel consists of Justices Yates, Seymore, and Brown.