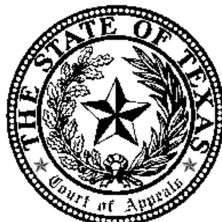
Affirmed and Memorandum Opinion filed April 13, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-01002-CV

DEANNA SAMPSON, Appellant

V.

CARLOS JOSE AYALA, Appellee

On Appeal from the 328th District Court
Fort Bend County, Texas
Trial Court Cause No. 07-CV-159905

MEMORANDUM OPINION

This appeal arises out of a suit for modification of a parent-child relationship, in which a mother and father each sought to modify terms of possession and visitation. After mediation on some of the issues, the parties entered into an agreement with the intent to file it with the court pursuant to Rule 11 of the Texas Rules of Civil Procedure. On the day before trial, the father sought to revoke his consent to some terms of the agreement. The mother filed the agreement with the court on the day of trial. At trial, the mother argued that the agreement was valid and enforceable; however, the trial court ruled that the father's consent to the agreement had been withdrawn. On appeal, the mother asserts the trial court erred in the following ways: (1) by failing to uphold and

enforce the agreement and in finding no valid Rule 11 agreement existed because it was not filed prior to the partial revocation, and (2) by denying the mother's motion for a continuance. We affirm.

I. Factual and Procedural Background

Appellant Deanna Sampson and appellee Carlos Jose Ayala are the parents of K.N.A.F., a minor female child.[1] Under the terms of the trial court's original order in a suit affecting the parent-child relationship, Sampson was appointed sole managing conservator of the child and Ayala was appointed possessory conservator.

Ayala, a resident of Wilbarger County, Texas, filed a petition to modify the parent-child relationship seeking joint managing conservatorship of the child and to modify terms of his visitation with the child. Specifically, Ayala asked the trial court to render an order that Sampson, a resident of Fort Bend County, Texas, meet him in Ennis, Texas, in order to drop off or pick up the child for Ayala's periods of possession. Sampson filed a counter-petition to modify the parent-child relationship seeking, among other things, an order for Ayala to pick up the child from and return the child to Sampson's home for Ayala's visitation with the child.

The parties participated in mediation and reached a partial mediated settlement agreement on some of the issues. The remaining issues ultimately were set for trial on July 15, 2008. The parties, in May 2008, entered into a written agreement ("Agreement") with the following terms:

> (1) Both parties will give 30 days' notice before any international travel and will offer a detailed schedule of travel plans and destination.
> (2) Ayala can pick up and drop off the child in Conroe, Texas, on the weekends he has visitation with the child. Alternatively, the parties can agree to pick up and drop off the child at the home of the child's maternal grandparents in Richland Springs, Texas.
> (3) Arrearage payments will continue as scheduled until paid in full.

[1] To protect the privacy of the child, we identify her by her initials. *See* Tex. Fam. Code Ann. § 109.002(d) (Vernon 2009).

(4) Ayala will receive two weeks in June and two weeks in July with the child, subject to change based on the parties' agreement.

The parties intended to file the Agreement in accordance with Rule 11 of the Texas Rules of Civil Procedure.

On July 14, 2008, the day before trial, Ayala sought to revoke his consent to several provisions of the Agreement in a document sent by facsimile to Sampson's trial counsel. Although the facsimile is not part of the record before this court, a transcript of the proceeding that occurred on the following day reflects some of the parties' arguments pertaining to Ayala's withdrawal of his consent to provisions 2, 3, and 4 of the Agreement.

On July 15, 2008, the trial date, Sampson filed the Agreement with the court. The record reflects that the trial court called the case to trial. At the proceeding, Sampson objected to going forward with trial, claiming that she did not receive 45 days' notice of the trial setting. Sampson argued that she was precluded from preparing for trial because she did not receive notice of Ayala's withdrawal of consent from the Agreement until the day of or the day before trial. According to Sampson, the Agreement was valid and enforceable because she filed it before she sought to enforce it. The trial court made the following comment:

> [TRIAL COURT]: The—before we went on the [r]ecord, I heard argument from both of y'all with respect to that Rule 11 agreement. It seems to me to be very clear, that Rule 11 agreement was withdrawn. Rule 11 agreement is only an agreement and any party can withdraw their agreement prior to trial. I noted that that agreement was withdrawn. It was very clear to me prior to trial that that agreement was withdrawn. The Rule 11 agreement is withdrawn. Now, relative to—let's move on to stipulations.

Sampson asked for a ruling on her objection that she did not receive notice of Ayala's rescission, which she claimed precluded her from preparing for trial. Sampson denied that the Agreement was withdrawn and asked for a finding as to "what was clear before

we got on the [r]ecord as to whether or not it was clear that this was withdrawn." In response, the trial court noted the following:

> [TRIAL COURT]: And I understand that you don't agree with it being withdrawn. However, it was very clear to me that [Ayala's trial counsel] was withdrawing their agreement to the Rule 11 letter and I so fine [sic] as such. Because prior to trial, the Rule 11 agreement was withdrawn, there is no Rule 11 agreement. Now, with respect to stipulations . . . .

Sampson's counsel objected again, asserting that she was unprepared to proceed with trial and claimed that she had a hearing in another county that afternoon. The trial court noted that on that morning, the parties had announced that they were ready to proceed. The trial court offered a brief recess for Sampson's counsel to make alternative arrangements for that hearing.

Sampson did not file a written motion for continuance, but re-urged her complaint that she had no notice because Ayala withdrew his consent to the second and third provisions of the Agreement. The trial court did not rule on the objection. Sampson agreed to stipulate to the first provision of the Agreement. As to whether the parties agreed to stipulate to the terms of the fourth provision, Sampson argued that, at the time of the hearing, Ayala had possession of the child under the terms of the Agreement. Sampson asked the trial court, "How is [Ayala's trial counsel] able to rescind the agreement but then she is able to rescind only select provisions of the agreement?" The trial court responded:

> [TRIAL COURT]: Rule 11 agreement is withdrawn. Now, what I am going to allow you folks to do, you have a mediated settlement agreement that is enforceable. If you folks want to enter any further stipulations that may or may not have been part of that Rule 11 agreement, y'all are welcome to do that. Y'all are welcome to do that but it won't be pursuant to a Rule 11 agreement.

It appears from the record that a trial was conducted, although that proceeding is not included in the record on appeal. The trial court entered an order on modification of the parent-child relationship. Under the terms of the trial court's order, the parties shared

joint managing conservatorship of the child and the parties were to meet in Ennis, Texas, to pick up and drop off the child for visitation with Ayala.

Sampson filed a motion for new trial, asking the trial court to reconsider its ruling on the Agreement. According to Sampson's motion, the trial court should have enforced the Agreement because Ayala's partial withdrawal of consent was not effective as a partial rescission. At the hearing on the motion, the trial court noted that the Agreement was withdrawn on July 14th, there was no valid Rule 11 agreement on file when the parties went to trial on July 15th, and no notice of hearing was filed to reconstitute the agreement. The trial court did not grant a new trial. Sampson now claims on appeal that the trial court should have upheld and enforced the Agreement as a Rule 11 agreement.

II. ISSUES AND ANALYSIS

A. Enforcement of the Agreement in the Trial Court

As a threshold matter, we note that we are unable to determine whether reversible error occurred because we do not have the entire record. The only portions of the record before this court are the clerk's record, a thirteen-page "Excerpt of Objections and Stipulations" made before trial and a transcript of the hearing on Sampson's motion for new trial. Sampson has not followed the steps set forth in the Texas Rules of Appellate Procedure for an appeal based on a partial reporter's record. *See* TEX. R. APP. P. 34.6(c). The record does not reflect that Sampson requested a partial reporter's record nor does the record show that Sampson submitted a statement of points or issues to be presented on appeal, as required by Rule 34.6(c)(1). *See id.* Because Sampson failed to comply with Rule 34.6(c), and because our appellate record does not contain a complete record of the trial, we must presume that the omitted portions are relevant to the disposition of this appeal and that they support the denial of Sampson's motion for new trial. *See Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002). When, as in this case, a party completely fails to submit a statement of points of issues, Rule 34.6 requires this court to affirm the trial court's judgment. *Id.*

Even if Sampson had complied with Rule 34.6(c), this court still would find no merit in Sampson's first two issues. In the first, Sampson asserts that the trial court reversibly erred in finding that no valid Rule 11 agreement existed. In the second, Sampson asserts the trial court reversibly erred in permitting Ayala to withdraw his consent, wholly or partially, to the Agreement. According to Sampson, Rule 11 and *Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995), support her contention that a Rule 11 agreement must be filed prior to its enforcement in order for it to be upheld and that withdrawal of a party's consent to a Rule 11 agreement does not render the settlement unenforceable.

A trial court's decision regarding enforcement of a Rule 11 agreement is reviewed for abuse of discretion. *See Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 659 (Tex. 1996); *Staley v. Herblin*, 188 S.W.3d 334, 336 (Tex. App.—Dallas 2006, pet. denied). A trial judge has no discretion in determining what the law is or in applying the law to the facts of a case. *Staley*, 188 S.W.3d at 336. The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Abuse of discretion is shown when a trial judge fails to analyze or apply the law correctly. *Staley*, 188 S.W.3d at 336.

Rule 11 of the Texas Rules of Civil Procedure, entitled "Agreements to be in Writing," provides as follows:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

TEX. R. CIV. P. 11. An agreement satisfies the requirements of Rule 11 if it is (1) in writing, (2) signed, and (3) "filed with the papers as part of the record." TEX. R. CIV. P. 11; *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). Rule 11 does not prescribe when the written agreement must be filed. *Padilla*, 907 S.W.2d at 461. The purpose of

the filing requirement is to put the agreement before the trial court so that the trial court may judge its import and act upon it. *See id.* Therefore, the purpose of filing is satisfied as long as "the agreement is filed before it is sought to be enforced." *Id.* (determining that filing an agreement along with motion for summary judgment satisfied requirement of filing). If an agreement is filed before the trial court renders its judgment and before the judgment becomes final, the agreement will comply with Rule 11. *In re Guthrie*, 45 S.W.3d 719, 728 (Tex. App.—Dallas 2001, pet. denied) (enforcing Rule 11 agreement even though it was not filed until trial, because it was filed before the trial court rendered judgment and may be enforced as to "any suit pending").

The parties do not dispute that a written and signed agreement existed, nor do the parties dispute that Sampson attempted to file the Agreement on the day of trial. *See* TEX. R. CIV. P. 11 (requiring enforcement of a written and signed agreement that is filed as part of the record). However, the parties dispute whether the trial court could enforce the Agreement given the undisputed fact that Ayala withdrew his consent, in whole or in part, before the Agreement was filed.

A trial court cannot render a valid agreed judgment absent a party's consent at the time it is rendered; however, after proper notice and hearing, a trial court is not precluded from enforcing a settlement agreement that complies with Rule 11 even though one party no longer consents to the terms of the settlement. *See Padilla*, 907 S.W.2d at 461; *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 309 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *see also Staley*, 188 S.W.3d at 336. In such a case, a party may seek to enforce the agreement under contract law. *Mantas*, 925 S.W.2d at 658; *Padilla*, 907 S.W.2d at 461; *Staley*, 188 S.W.3d at 336. A claim to enforce a disputed settlement agreement may be raised through an amended pleading or counterclaim asserting breach of contract. *Padilla*, 907 S.W.2d at 462; *Staley*, 188 S.W.3d at 336.

These actions, however, must be based on proper pleading and proof. *See Mantas*, 925 S.W.2d at 658; *Padilla*, 907 S.W.2d at 462 (involving a party's counterclaim seeking

enforcement of the parties' agreement and the parties' motions for summary judgment on that claim in which the summary-judgment evidence established an enforceable settlement agreement as a matter of law); *see also Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983) ("The validity of the settlement agreement, however, may not be determined without proper pleadings and full resolution of the surrounding facts and circumstances."). To allow enforcement of a disputed settlement agreement simply on a party's motion and hearing deprives a party of the right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a fact finder. *Staley*, 188 S.W.3d at 336–37. After proper pleading and proof, a contract may be enforced and a party may obtain a judgment thereon under the Texas Rules of Civil Procedure through summary-judgment proceedings, if no fact issue exists, and by non-jury trial or jury trial, if a fact issue exists. *See Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.—Houston [14th Dist.] 1996, no pet.); *see also* TEX. R. CIV. P. 166a, 262–270, 295. A trial court may render judgment on a settlement agreement when one of the parties contests his consent to be bound only by following one of these procedural vehicles. *Davis*, 917 S.W.2d at 416–17 (involving judgment rendered on mediated settlement agreement).

In *Padilla*, the Supreme Court of Texas determined that even though one party had withdrawn consent to a Rule 11 agreement before it was filed, the agreement was still enforceable because the other party filed a counterclaim seeking enforcement of the parties' agreement and both parties moved for summary judgment on that claim. *See Padilla*, 907 S.W.2d at 462. According to the *Padilla* court, because the summary-judgment evidence established an enforceable settlement agreement as a matter of law, the trial court should have enforced the agreement. *See id.*

It is undisputed that Ayala revoked his consent to some or all provisions of the Agreement prior to trial and prior to the trial court's judgment. Although Sampson complains that the trial court abused its discretion in allowing Ayala to withdraw his

consent to the Agreement, a party can withdraw consent to a Rule 11 agreement at any time before rendition of judgment. *See Quintero*, 654 S.W.2d at 444; *ExxonMobil Corp.*, 174 S.W.3d at 309. Sampson points to *Padilla* and asserts that the Agreement should have been enforced despite Ayala's withdrawal of his consent because the Agreement was filed before the start of trial. We construe Sampson's argument as attempting to equate the trial on the parties' petitions for modification of the parent-child relationship with seeking enforcement of the Agreement; however, Sampson provides no authority to support this notion. *See Davis*, 917 S.W.2d at 417 (concluding that a proceeding on the parties' motions to render or not render judgment on a Rule 11 agreement, which was repudiated by one party before rendition of judgment, was "not an action to enforce a settlement agreement . . . based on proper pleading and proof" under *Padilla*). Sampson does not point to any place in the record showing that she pleaded and offered proof in support of enforcement of the Agreement; likewise, our own independent review of the record reveals no pleadings in this regard. *See Padilla*, 907 S.W.2d at 462 (concluding trial court should have enforced the Rule 11 agreement because the parties filed a counterclaim and motions for summary judgment pertaining to the enforcement of the agreement); *Davis*, 917 S.W.2d at 417 (concluding a hearing on parties' motions for judgment based on a Rule 11 agreement was not an action to enforce the settlement agreement); *see also Quintero*, 654 S.W.2d at 444 (involving settlement agreement providing for release of claims; however only pleading before the trial court was a joint motion to dismiss upon which the trial court rendered dismissal).

The record reflects the Agreement was filed with the trial court after Ayala revoked his consent; however, Sampson did not seek to enforce the Agreement by amended pleading or an independent suit. *See Davis*, 917 S.W.2d at 417. Sampson did not file an amended pleading or counterclaim asserting a breach-of-contract claim. *See Padilla*, 907 S.W.2d at 462 (providing that enforcement of a settlement agreement in which a party has revoked consent can be enforced through amended pleadings or a counterclaim asserting a breach-of-contract action). Ayala was entitled to be confronted

by appropriate pleadings, assert defenses, conduct discovery, and submit contested issues of fact to the trier of fact. *See Staley*, 188 S.W.3d at 337. The trial court could enforce the Agreement only as a written contract subject to proper pleadings and proof. *See Mantas*, 925 S.W.2d at 658; *Staley*, 188 S.W.3d at 337. Because Sampson did not file the requisite pleadings and proof, Sampson's reliance on *Padilla* is not supported. *See Padilla*, 907 S.W.2d at 462 (determining that counterclaim and summary-judgment evidence established existence of Rule 11 agreement as a matter of law that should have been enforced).

Sampson contends she did not have an opportunity to file a motion to enforce the Agreement and cites Rule 21 of the Texas Rules of Civil Procedure as requiring three days' notice to other parties of any hearing for an application to the court for an order.[2] *See* TEX. R. CIV. P. 21. Rule 21, entitled "Filing and Serving Pleadings and Motions," provides in relevant part

> An application to the court for an order and notice of any hearing thereon, *not presented during a hearing or trial*, shall be served upon all other parties not less than three days before the time specified for the hearing unless otherwise provided by these rules or shortened by the court.

Id. (emphasis added). Notably, Rule 21 specifically excepts pleadings and motions "presented during a hearing or trial" from the requirement of three days' notice. *Id.*; *see Owens v. Neely*, 866 S.W.2d 716, 720 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Sampson has provided no other authority in support of her contention.

[2] Sampson also argues that because the parties were set for entry of judgment, and not for trial, and because the trial court ordered the parties to trial, Sampson was prevented from receiving forty-five days' notice of trial, which in turn, prevented her from having the opportunity to file a motion to enforce. Although Sampson points to correspondence between the parties to support her assertion that the proceeding on July 15, 2008, was intended to be an entry of judgment instead of a trial, those documents are not part of the record, and, therefore, may not be considered. Nothing in the record before this court suggests that the proceeding was not a trial setting. Furthermore, we address Sampson's arguments regarding notice of trial in her third issue below.

Based on the forgoing, even if Sampson had complied with Rule 34.6(c), we still would conclude the trial court did not err in failing to enforce the Agreement under Rule 11. *See Davis*, 917 S.W.2d at 417. We overrule Sampson's first and second issues.

B. Requests for Resetting in the Trial Court

In a third issue, Sampson asserts that the trial court erred in denying her opportunity to prepare for trial by refusing to reset the trial. According to Sampson, the trial court abused its discretion in failing to grant Sampson a reset and an opportunity to enforce the Agreement by forcing her to trial. Sampson points to mandatory language in Texas Rule of Civil Procedure 245, entitled "Assignment of Cases of Trial," requiring forty-five days' notice of a trial setting, and claims that failure to give reasonable notice of a trial setting is a violation of due process rights. Sampson's request for a reset was tantamount to a request for a continuance. We review a trial court's denial of a motion for continuance under an abuse-of-discretion standard. *See Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685 (Tex. 2002).

Rule 245 provides in relevant part,

> The Court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties.

TEX. R. CIV. P. 245. A party is entitled to forty-five days' notice only with the first trial setting. *Id.* When the setting in question is not the first setting, parties are entitled to reasonable notice under Rule 245. *Id.*; *see Osborn v. Osborn*, 961 S.W.2d 408, 411 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). A court examines the facts of the individual case in determining what constitutes reasonable notice for a subsequent setting under Rule 245. *See O'Connell v. O'Connell*, 843 S.W.2d 212, 215 (Tex. App.—Texarkana 1992, no writ).

The record before this court reflects that the July 15, 2008 setting was not the first trial setting. According to the record, at one time trial was set for June 3, 2008. On May 30, 2008, Ayala sought a continuance, alleging that a recent death in the family prevented him from completing family matters in time to attend trial. The trial court granted Ayala's motion for continuance on June 3, 2008, and reset the trial for July 15, 2008. Nothing in the record shows that Sampson objected to this trial setting or filed a written motion for continuance. Although she points to documents supporting her contention that the proceeding was intended to be an entry of judgment, the documents to which Sampson refers are not part of the record before this court. Because the trial court already had granted a continuance and reset the trial to July 15, 2008, only reasonable notice or agreement by the parties was required. *See* TEX. R. CIV. P. 245; *see also O'Connell*, 843 S.W.2d at 216–17 (concluding that eight days' actual notice was reasonable when case had been set and reset for trial three times and a fourth trial setting was probable). Furthermore, we note that Sampson's request for a continuance was not made in writing as required by Texas Rule of Civil Procedure 251. *See* TEX. R. CIV. P. 251 (providing that a party moving for continuance must show sufficient cause supported by affidavit, consent of the parties, or by operation of law). On this basis alone, the trial court would not have abused its discretion in denying the continuance. *See id.*; *Dempsey v. Dempsey*, 227 S.W.3d 771, 776 & n.1(Tex. App.—El Paso 2005, no pet.) (providing that a trial court does not abuse its discretion in denying a party's oral motion for continuance that failed to comply with Rule 251 and that a party's oral request for continuance, which is not in writing, does not preserve error). Under these circumstances, the trial court did not abuse its discretion in failing to grant Sampson's request for a reset of the trial date. We therefore overrule Sampson's third issue.

C. Rulings on Pending Motions

On the day this case was set for oral argument before this court, Sampson filed a motion seeking abatement of the appellate proceedings so that Sampson would have an

opportunity to amend the pleadings to assert a breach-of-contract claim. In Sampson's motion, she asserts that she had no opportunity to seek enforcement of the Agreement and relies on the premise that she would have been required to provide three days' notice of a hearing. This argument is the same argument Sampson presents on appeal regarding Rule 21, which we have rejected.[3] Sampson also refers to the fact that she was denied a continuance at trial, which she claims deprived her of an opportunity to enforce the Agreement, because "there was no need to seek enforcement until less than 24 hours of the day of trial." In her motion, Sampson relies on the case of *Mantas v. Fifth Circuit Court of Appeals* for two propositions: (1) when a dispute arises while the underlying action is on appeal, the party seeking enforcement of an agreement must file a separate breach-of-contract action, and (2) abatement is proper in the interest of judicial economy to avoid ruling on a moot case. *See* 925 S.W.2d at 658, 659. However, Sampson's reliance on *Mantas* is misplaced because it is factually distinguishable from the case at hand in two ways. First, the disputed settlement agreement in *Mantas* arose on appeal after the appellate court ordered mediation and not in the trial court as in the case at hand. *See id.* at 658. Second, the party seeking enforcement of the agreement in *Mantas* already had filed a separate breach-of-contract action that was pending as a separate action in the trial court. *See id.* On this basis and for the same reasons stated above in overruling Sampson's three issues on appeal, we overrule Sampson's motion to abate.

We, likewise, consider Ayala's motion for sanctions, in which Ayala seeks sanctions under Texas Rule of Appellate Procedure 45, entitled "Damages for Frivolous Appeals in Civil Cases." Ayala asks this court to award damages against Sampson for filing the motion to abate on the day of oral argument. Under Rule 45, an appellate court first must determine that an appeal is "frivolous" before it can consider awarding "just damages" to a prevailing party. TEX. R. APP. P. 45. Sampson's filing of the motion to abate does not make this appeal frivolous. We conclude this is not a frivolous appeal and

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[3] *See* Part II, A, *supra.*

that Ayala is entitled to no relief under Rule 45. Accordingly, we deny Ayala's request for sanctions.

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.