In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00197-CV

IN RE DEBORAH JANE HOLDER

Original Proceeding

MEMORANDUM OPINION

Deborah Jane Holder seeks mandamus relief in a post-divorce enforcement proceeding. The real party in interest, John Paul Duncan, filed a response. The relator contends: (1) the judgment in the underlying enforcement proceeding is not subject to execution because it is not yet final; (2) the real party in interest failed to follow the applicable procedural rules regarding service of the writ of execution on the judgment debtor; (3) the trial court abused its discretion by setting aside Holder's supersedeas bond; and (4) the trial court abused its discretion by holding Holder in contempt. We deny the relief requested by Holder in her petition.

Holder and Duncan divorced in April 2008. Under the agreed decree, Holder was to take possession of a house and remove it from separate property owned by Duncan. The decree also awarded Duncan certain personal property listed in the decree. The

decree provided that "[e]ach party will execute any and all titles and other documents facilitating the transfer of debts and/or assets."

After the decree became final, both Holder and Duncan petitioned in the original divorce action for enforcement of the decree. *See* TEX. FAM. CODE ANN. § 9.001 (Vernon 2006). Holder also filed a separate suit for conversion against John Paul Duncan and Mary Alice Roth Duncan. The parties reached a Rule 11 agreement that allowed Holder and her agents to access the property for the purpose of removing the house. *See* TEX. R. CIV. P. 11. The Rule 11 agreement was executed in the conversion suit, Cause No. 49,546.

The trial court heard the enforcement action, filed in Cause No. 45,116, on October 26, 2009. The trial court did not call Cause No. 49,546. At the commencement of the hearing, Holder's counsel informed the trial court that they were working under the Rule 11 agreement to move the house. The trial court heard evidence on Duncan's petition for enforcement. At the conclusion of the hearing, the trial court awarded Duncan $20,000 plus attorney's fees in the amount of $1,500. *See* TEX. FAM. CODE ANN. § 9.010 (Vernon 2006). The trial court signed a judgment on November 2, 2009. On November 5, 2009, Holder filed a motion for new trial on Duncan's petition for enforcement "because the finding is against the great weight and preponderance of the evidence and is manifestly unjust." The trial court denied the motion for new trial by written order on December 14, 2009. On December 15, 2009, the trial court signed an amended final judgment that granted Duncan's petition for enforcement and awarded

Duncan judgment in the amount of $20,000 plus attorney's fees of $1,500 payable to Duncan's counsel. The amended judgment added a ruling that the judgment was in lieu of personal property listed in Duncan's live pleading. The amended judgment ordered post-judgment interest and recited that "this is intended to be a final appealable judgment which disposes of all claims and causes of action in this case."

On January 22, 2010, Holder filed a motion to dissolve writ of execution. That same day, the district clerk executed a Writ of Supersedeas that recited that a writ of execution had issued on the judgment in Cause No. 45,116 on that day, recited that a supersedeas bond had been executed by a person not named in the writ, and ordered the constable to desist from further execution on the judgment in Cause No. 45,116.[1]

On March 15, 2010, the trial court conducted a hearing on Duncan's motion to set aside the supersedeas bond. At the commencement of the hearing, counsel for Duncan informed the trial court that "I think we both put the wrong cause numbers on some of the orders, the old divorce case." The parties agreed to consolidate Cause No. 45,116 and Cause No. 49,546.[2] Holder argued that her claims should have been heard at the same time as Duncan's. On March 15, 2010, the trial court signed an order setting aside the supersedeas bond.

[1] The mandamus record does not contain a document in which Holder and her sureties agree to pay the judgment in the event she is unsuccessful in Cause No. 45,116.

[2] The mandamus record does not include a written order of consolidation. It appears the trial court may have declined to sign an order of consolidation once it determined that the judgment in Cause No. 45,116 was final.

In her first issue, Holder contends that the amended final judgment signed on December 15, 2009, is not a final judgment because it failed to dispose of all of the issues before the trial court. There are two ways that an order can be determined to be a final judgment: (1) if the order actually disposes of all parties and claims; or (2) if the order contains unequivocal language of finality. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). In this case, Holder argues the judgment is interlocutory because the record of the evidentiary hearing shows that the trial court did not hear evidence on Holder's petition for enforcement, and the order signed by the trial court on December 15, 2009, mentioned only Duncan's petition for enforcement. In other words, Holder contends the order is not final because it failed to actually dispose of all parties and claims. *See id.* ("[W]hen there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party[.]"). However, the amended final judgment signed on December 15, 2009, is final because the order contains "some other clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* A recital that "'This judgment finally disposes of all parties and all claims and is appealable', [leaves] no doubt about the court's intention." *Id.* at 206.

> [When] the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more parties did not intend for the judgment to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed.

Id.

The amended final judgment signed on December 15, 2009, recited that "this is intended to be a final appealable judgment which disposes of all claims and causes of action in this case." Pursuant to *Lehmann,* this language unequivocally disposed of both Holder's petition for enforcement and Duncan's counter-petition for enforcement in Cause No. 45,116. *See id.*

The filing of a petition for enforcement in a divorce case proceeds as in civil cases generally. *See* TEX. FAM. CODE ANN. § 9.001(c). The trial court signed a final judgment on November 2, 2009. *See Lehmann,* 39 S.W.3d at 206. The filing of Holder's motion for new trial within thirty days extended the trial court's plenary power over the enforcement action for thirty days after the trial court overruled the motion. *See* TEX. R. CIV. P. 329b(e). The trial court signed a new judgment within the period of its plenary power. *See* TEX. R. CIV. P. 329b(h). The trial court's plenary power over its judgment in Cause No. 45,116 extended for another thirty days. *See* TEX. R. CIV. P. 329b(d). Thus, the trial court's plenary power over the judgment expired January 14, 2010. Holder does not contend that she perfected an appeal of the enforcement action in Cause No. 45,116 on or before March 15, 2010.[3] Thus, Cause No. 45,116 was final on the date that the

[3] If a party makes a *bona fide* attempt to perfect an appeal but files the wrong document, the party must be provided an opportunity to substitute the correct document. *Linwood v. NCNB Texas,* 885 S.W.2d 102, 103 (Tex. 1994) (party perfected appeal by filing notice of appeal when rules required appeal bond); *Gregorian v. Ewell*, 106 S.W.3d 257, 258-59 (Tex. App.--Fort Worth 2003, no pet.) (filing cash deposit in lieu of supersedeas exhibits *bona fide* attempt to appeal, making subsequent notice of appeal timely); *but see In the Interest of K.A.F.,* 160 S.W.3d 923, 928 (Tex. 2005) (filing a motion for new trial is not a *bona fide* attempt to appeal). Because the issue is not raised

parties agreed to consolidate Cause No. 49,546 with Cause No. 45,116 and the trial court set aside Holder's supersedeas bond in Cause No. 45,116. Because the trial court lacked plenary power to affect the finality of the judgment in Cause No. 45,116, the parties' attempt to consolidate the two cases was ineffective.[4] *See* TEX. R. CIV. P. 174 (trial court may consolidate actions that are pending before the court). We overrule issue one.

Holder's second issue complains that the writ of execution was not properly levied because Holder was not provided with an opportunity to point out the property to be levied. *See* TEX. R. CIV. P. 637. The mandamus record does not show that the constable seized any property belonging to Holder. *See* TEX. R. CIV. P. 639 ("Levy upon personal property is made by taking possession thereof, when the defendant in execution is entitled to the possession."); TEX. R. CIV. P. 654 ("The levying officer shall make due return of the execution, in writing and signed by him officially, stating concisely what such officer has done in pursuance of the requirements of the writ and of the law."); TEX. R. CIV. P. 656 ("The clerk of each court shall keep an execution docket in which he shall enter a statement of all executions as they are issued by him, specifying . . . the date of issuing the execution, to whom delivered, and the return of the officer thereon, with the date of such return."). Although the writ of execution is not found in the mandamus record, the

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in this mandamus proceeding, we express no opinion on whether Holder timely made a *bona fide* attempt to appeal.

[4] Implicit in our holding that the trial court lacked plenary power to consolidate Cause No. 45,116 with Cause No. 49,546 is the conclusion that the trial court retains plenary power over Cause No. 49,546. Because no order of the trial court in Cause No. 49,546 is presently before us on mandamus review, we express no opinion regarding Cause No. 49,546 and any issues of estoppel or mootness that might affect that case.

writ of execution necessarily expired by its own terms and would have to be re-issued for a levy to occur. *See* TEX. R. CIV. P. 629 ("It shall require the officer to return it within thirty, sixty, or ninety days, as directed by the plaintiff or his attorney."). Because the mandamus record does not establish a wrongful levy of execution, we overrule issue two.

In her third issue, Holder argues that she properly superseded the judgment and the trial court erred in setting aside the supersedeas bond. *See* TEX. R. APP. P. 24.1. At the hearing conducted on March 15, 2010, Duncan argued that Holder could not supersede the judgment because she had failed to perfect an appeal from the judgment on the petition for enforcement of the divorce decree. Holder argued that she was superseding the judgment "pending the finality of the initial case." Holder asked the trial court to "hold the execution in abeyance at this point" and set a hearing on Holder's claims. Holder did not represent to the trial court that she had perfected an appeal, attempted to perfect an appeal, or presently desired to perfect an appeal. Rule 24 does not place a time limit on superseding a judgment. *See id.* The rule does require that the bond surety be

> subject to liability for all damages and costs that may be awarded against the debtor--up to the amount of the bond, deposit, or security--if: (1) the debtor does not perfect an appeal or the debtor's appeal is dismissed, and the debtor does not perform the trial court's judgment; [or] (2) the debtor does not perform an adverse judgment final on appeal[.]

TEX. R. APP. P. 24.1(d)(1), (2). In other words, without an appeal, Holder and her sureties would be immediately liable on the supersedeas bond. On this mandamus record, Holder has not established that the trial court clearly abused its discretion. We overrule issue three.

Holder's fourth issue contends the divorce decree did not unambiguously require her to deliver to Duncan property in Holder's possession but awarded to Duncan in the divorce decree. Holder claims the trial court clearly abused its discretion by holding her in contempt. Her argument is not supported by the record, which shows the trial court enforced the divorce decree by awarding Duncan a money judgment pursuant to section 9.010 of the Family Code and did not enforce the divorce decree through contempt pursuant to Section 9.012 of the Texas Family Code. *Compare* TEX. FAM. CODE ANN. § 9.010, *with* TEX. FAM. CODE ANN. § 9.012 (Vernon 2006). We overrule issue four.

The relator has not established a clear abuse of discretion by the trial court for which the relator has no adequate remedy at law. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). Accordingly, we deny the petition for writ of mandamus.

PETITION DENIED.

PER CURIAM

Submitted on May 17, 2010
Opinion Delivered June 24, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.