



NUMBER 13-17-00008-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

HECTOR NUNCIO,

Appellant,

v.

MOHAMID T. ABSI, ET AL.,

Appellees.

**On appeal from the 267th District Court
of De Witt County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Benavides
Memorandum Opinion by Chief Justice Valdez**

Pro se appellant Hector Nuncio appeals the trial court's order dismissing his suit against appellees Mohamid T. Absi, Koibe D. Ybarra, Gloria Macias, Seth R. Johnson,

Jon T. Wade, Gary Flores, Jimmy Smith, and Emil Garza.¹ By two issues, Nuncio contends that the trial court abused its discretion in dismissing his claims.² We affirm.

I. BACKGROUND

Nuncio is a Texas Department of Criminal Justice inmate at the Stevenson Unit in Cuero, Texas. Nuncio acting pro se filed suit against the officers for violations of the United States and Texas Constitutions alleging that the officers unlawfully deprived him of his property. In addition, Nuncio filed an unsworn declaration of inability to pay court costs and requested leave from the trial court to proceed *in forma pauperis*. The trial court dismissed Nuncio's claims for failure to comply with Chapter 14.³ This appeal followed.

II. APPLICABLE LAW AND STANDARD OF REVIEW

A lawsuit brought by an inmate who has filed an affidavit or unsworn declaration of inability to pay costs is governed by Chapter 14 of the Texas Civil Practice and Remedies Code. See TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a) (West, Westlaw through 2017 1st C.S.); *Donaldson v. Tex. Dep't of Crim. Justice-Corr. Inst. Div.*, 355 S.W.3d 722, 724 (Tex. App.—Tyler 2011, pet. denied). A trial court has the discretion to dismiss an inmate's lawsuit if the allegation of poverty in the indigence affidavit is false. TEX. CIV. PRAC. & REM. CODE ANN. § 14.003(a)(1) (West, Westlaw through 2017 1st C.S.); *Donaldson*, 355 S.W.3d at 724; see also *Zavala v. Salles*, No. 13-18-00104-CV, 2018 WL 3386368, at *2 (Tex. App.—Corpus Christi July 12, 2018, no pet.) (mem. op.) (concluding

¹ The appellees are officers of the Texas Department of Criminal Justice. We will refer to them collectively as the officers.

² The Office of the Attorney General filed an *amicus curiae* brief in this matter.

³ The trial court did not dismiss the claims with prejudice.

that the trial court had not abused its discretion in dismissing the appellant's claim because the evidence supported a finding that the appellant had falsely claimed to be indigent); *McGoldrick v. Velasquez*, No. 13-12-00766-CV, 2013 WL 3895315, at *1 (Tex. App.—Corpus Christi July 25, 2013, no pet.) (mem. op.) (same).

An inmate claiming to be indigent is required to file a certified copy of his inmate trust account “reflect[ing] the balance of the account at the time the claim is filed and activity in the account during the six months preceding the date on which the claim is filed.” TEX. CIV. PRAC. & REM CODE ANN. § 14.006(f) (West, Westlaw through 2017 1st C.S.). An inmate “who has no money or property is considered indigent.” *Donaldson*, 355 S.W.3d at 725; *McClain v. Terry*, 320 S.W.3d 394, 397 (Tex. App.—El Paso 2010, no pet.); see also *Zavala*, 2018 WL 3386368, at *2; *McGoldrick*, 2013 WL 3895315, at *1. “However, ‘[a]n inmate who has funds in his trust account is not indigent.’” *Donaldson*, 355 S.W.3d at 725 (quoting *McClain*, 320 S.W.3d at 397); see also *Zavala*, 2018 WL 3386368, at *2; *McGoldrick*, 2013 WL 3895315, at *1.

A trial court's dismissal of a claim pursuant to Chapter 14 is reviewed for an abuse of discretion. *Scott v. Menchaca*, 185 S.W.3d 543, 545 (Tex. App.—Corpus Christi 2006, no pet.); see also *Zavala*, 2018 WL 3386368, at *2; *McGoldrick*, 2013 WL 3895315, at *1. A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). “The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.” *Id.* at 242.

III. DISCUSSION

By his first and second issues, Nuncio contends that the trial court abused its discretion by dismissing his claims. On appeal, the Office of the Attorney General (OAG) argues, among other things, that the trial court properly dismissed Nuncio's claims because he made a false statement of indigency.⁴

In two similar cases, we concluded that the evidence supported the trial court's determination that the inmate's allegation of poverty was false. In *McGoldrick*, the evidence showed that (1) the inmate received \$50.00 per month as gifts from relatives and friends, (2) deposits in the amounts of \$50.00 to \$153.00 were made to his inmate trust account within a six-month period, (3) the inmate's average balance for that six-month period was \$36.18, and (4) the total deposits to his inmate trust account were \$453.42. 2013 WL 3895315, at *1. In *Zavala*, the evidence showed that the inmate's account had deposits of \$607.80 over the last six months, a six-month average balance of \$40.76, a six-month average deposit of \$101.30, and a final balance of \$56.44 at the time the suit was filed. 2018 WL 3386368, at *2. We concluded that the "since [the inmate] had funds in his trust account, the trial court did not abuse its discretion in dismissing [the inmate's] lawsuit on the basis that his indigence affidavit contained a false statement of poverty." *Id.*

In his reply brief, Nuncio argues that the case law referenced by the OAG does not support its assertion that an inmate who has funds in his account is not indigent. See *McClain*, 320 S.W.3d at 397 ("A prisoner at a Texas Department of Criminal Justice who has no money or property is considered indigent.") (citing *Allred v. Lowry*, 597 S.W.2d

⁴ The trial court did not state its reason for dismissing Nuncio's claims. Thus, we will affirm the decision if any theory supports dismissal. See *Walker v. Gonzales Cty. Sheriff's Dep't*, 35 S.W.3d 157, 162 (Tex. App.—Corpus Christi 2000, pet. denied).

353, 355 (Tex. 1980) (setting out that the only evidence presented showed that the inmate had no way of paying the court costs)). However, as previously explained, this Court has determined that a trial court does not abuse its discretion in dismissing an inmate's suit if the evidence supports a finding that the inmate has funds in his trust account. *McClain*, 320 S.W.3d at 397 (“[A]n inmate who has funds in his trust account is not indigent.”); see also *Zavala*, 2018 WL 3386368, at *2 (citing and quoting *McClain*, 320 S.W.3d at 397); *McGoldrick*, 2013 WL 3895315, at *1 (same).

Here, Nuncio's six-month account statement shows total deposits of \$555.00, and average balance of \$53.40, an average deposit of \$162.50, and a final balance of \$47.97. Accordingly, because Nuncio had funds in his trust account, the trial court had sufficient evidence to support its ruling that Nuncio made a false allegation of poverty. See *Donaldson*, 355 S.W.3d at 725 (finding no abuse of discretion when trial court dismissed the inmate's claim for false allegation of poverty where average monthly balance was \$63.42 and deposits in six-month period totaled \$1,020.00); *McClain*, 320 S.W.3d at 397; see also *Zavala*, 2018 WL 3386368, at *2; *McGoldrick*, 2013 WL 3895315, at *1. Because the trial court properly dismissed Nuncio's claims on this basis, we overrule his first and second issues.

IV. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
16th day of August, 2018.