COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MICHAEL C. SMART, Appellant, v. PRIME MORTGAGE & ESCROW, LLC, MICHAEL J. ZIMPRICH, PLLC, RAMSEY M. ESPER, NATALIA RUBIO and BEVERLY MITRISIN, Appellees.	§	No. 08-21-00138-CV
	§	Appeal from the
	§	County Court at Law No. 3
	§	of El Paso County, Texas
	§	(TC#2021DCV1347)

O P I N I O N[1]

Appellant Michael C. Smart, appearing pro se at trial and on appeal, filed a lawsuit alleging a variety of claims, against multiple defendants, arising from a threatened foreclosure. The foreclosure was cancelled prior to default and before Appellant's lawsuit was filed. Grouped together, Appellees filed two separate Rule 91a[2] motions to dismiss. The first group includes

[1] In a companion case, Appellant also filed an original proceeding in this Court, which we docketed as *In re: Michael C. Smart,* No. 08-21-00228-CV. In the companion case, Appellant seeks a writ of injunction. By separate opinion issued on the same date as this direct appeal, we deny Smart's petition for writ of injunction.

[2] TEX. R. CIV. P. 91a (dismissal of baseless causes of action).

Appellees Prime Mortgage & Escrow, LLC (Prime Escrow[3]), Ramsey Esper, and Natalia Rubio (collectively, the Prime Escrow Appellees). The second group includes Appellees Michael Zimprich, PLLC, and Beverly Mitrisin (collectively, Zimprich Appellees). Additionally, the Zimprich Appellees also filed a motion to reconsider their dismissal motion after part of it was denied. After granting both motions to dismiss, the trial court dismissed all claims with prejudice. Although Appellant originally asserted multiple causes of action, this appeal only concerns his claim of discrimination based on race in violation of federal law. Presenting three issues, Appellant contends the trial court erred in dismissing—as baseless claims—his federal causes of action. For the reasons that follow, we affirm.

I. BACKGROUND

On April 23, 2021, Appellant filed a petition against Appellees asserting multiple claims involving events surrounding the servicing of a loan secured by his property. Because Appellant only appeals the dismissal of his claims alleging that Appellees committed violations of 42 U.S.C. §§ 1981 and 1982,[4] we focus on allegations and pleadings involving those claims. Additionally, Appellant does not challenge the evidentiary support for the trial court's award of attorney's fees.

Appellant claimed Appellees violated federal law by their intention to discriminate against him based on his race. His amended petition alleged, "[a]s a black borrower and client of [Prime

[3] Appellant's pleadings list "Prime Mortgage & Escrow, LLC" as one of the defendants. However, the record reveals there is no apparent entity with said name. The mortgage servicer for Appellant's loan was listed as "Prime Escrow, LLC" and is the entity that corresponds with Appellant. One correspondence from Prime Escrow states "Prime Mortgage" is another entity that is not servicing Appellant's account, but that Prime Escrow is the entity servicing his account.

[4] Section 1981 of Title 42 provides equal rights under the law and states, "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981. Section 1982 of Title 42 concerns property rights of citizens and states, "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

Escrow][,] [he] was one month behind on the plaintiff mortgage loan payment" when Appellees issued a notice of default and a notice of foreclosure. He further claims that other borrowers, "who were white and 7 to 10 months behind" on their payments, did not receive similar notices. As a factual basis, he claims that while making a payment at the Prime Escrow office, he saw a list of borrowers who were behind on payments. Other than himself, he claims that all other listed names were white people. Appellant concedes that he was behind on certain payments owed. Prior to the foreclosure process commencing, and before Appellant filed suit, Appellant brought his account current, and the foreclosure process was cancelled.

Appellant's petition asserted claims against multiple parties to include Appellee Prime Escrow, and its managers, Appellees Esper and Rubio, along with claims against Appellee Zimprich, the primary debt collector, and Appellee Mitrisin, a substitute trustee who retrieved the deed of trust from Zimprich. Appellant alleged all Appellees took the actions they did in threatening foreclosure of his property due to his race in violation of 42 U.S.C. §§ 1981 and 1982.

Two separate Rule 91a motions to dismiss were filed by appellees. First, the Zimprich Appellees moved to dismiss by asserting: (1) there was no foreclosure pending, (2) there were no facts alleged that Appellant was denied any rights granted by sections 1981 or 1982, (3) they were unaware of Appellant's race until the lawsuit was filed as they had not met or spoken with him, and (4) Appellee Mitrisin only recorded a substitute trustee document in accordance with the Texas Property Code. Second, the Prime Escrow Appellees filed a motion to dismiss asserting: (1) that Appellant's factual allegation asserting he saw a list of deficient borrowers on a counter and immediately knew their race by their names alone was not plausible , (2) that his factual allegations were conclusory and speculative, (3) that Appellant's allegations failed to plausibly allege that he was deprived of any contract rights under the promissory note and deed of trust, or that his rights

to inherit, purchase, lease, sell, hold, or convey property were deprived, (4) that no allegations were made that Appellant was not afforded the same right to make and enforce contracts, (5) that Appellee Prime Escrow was not a lender and did not have direct contact with Appellant, and (6) that Appellees Esper and Rubio could not be held individually liable because no reasonable person would believe they were acting in their individual capacities.

On July 20, 2021, the trial court held a hearing on the dismissal motion of the Zimprich Appellees. At the hearing, they reurged the arguments made by their motion, generally asserting Appellant's claims were baseless. Responding, Appellant argued he was not afforded the same opportunities as other borrowers. He urged, "I'm one month behind and he got all your white folks, that's right, white folk, that are ten to twelve months behind on their mortgage, and you come after me?" Appellant asserted that, unlike the treatment he received, other borrowers did not receive default notices. Summarizing, he claimed that the Zimprich Appellees had not provided any evidence to show they did not discriminate against him. When the hearing concluded, the trial court granted in part the Zimprich Appellees motion to dismiss as to all claims except for those brought under 42 U.S.C. §§ 1981 and 1982, finding Appellant had a right to proceed on those claims.

Days later, the trial court held a hearing on the separate motion to dismiss of the Prime Escrow Appellees. After Appellees urged their multiple bases for requesting dismissal of claims, Appellant responded. He asserted he was an African American client of Prime Escrow who was treated differently from other clients due to his race. Although he acknowledged having fallen a month behind on his mortgage, he urged that he was treated differently from other clients of a different race who had fallen even more months behind on their mortgages. He was asked to clarify how he knew the race of the other clients. He responded, "That was two years ago. That's why I

need discovery, to find out this information." Additionally, Appellant asserted that all the other names on the list were "Hispanic names" and he was the "only black African American on the list." As the hearing concluded, the trial court asked each side to prepare proposed orders. Also, the court indicated it would permit post-argument submission of affidavits and counter-affidavits, respectively, as to an award of attorney's fees. The Zimprich Appellees soon filed a motion for reconsideration of the denial in part of their motion to dismiss.

By written order dated August 4, 2021, the trial court rendered an order dismissing all claims brought against the Prime Escrow Appellees in their entirety and with prejudice. A few days later and by separate order, the trial court granted the motion for reconsideration of the Zimprich Appellees, dismissing with prejudice the claims brought against those parties under 42 U.S.C. §§ 1981 and 1982. Contained in both orders, the trial court also awarded attorney's fees as follows: first, as to the Prime Escrow Appellees, an award of $8,763.80; second, as to the Zimprich Appellees, an award of $4,942.35.

This appeal followed.

II. ISSUES ON APPEAL

Appellant presents three issues on appeal. We construe Appellant's brief as generally contending the trial court failed to ensure he was afforded the right to present his claim of federal discrimination and to be heard. First, he contends it was error for the trial court to "[prevent] [Appellant] from properly presenting [his] case" when it dismissed the federal claims brought pursuant to 42 U.S.C. §§ 1981 and 1982, without providing "the required 'valid excuse' for dismissal of federal rights." Second, he argues the trial court abused its discretion in rendering a judgment granting attorney's fees when it reversed the previously denied Rule 91a motion to dismiss. Third, he contends the trial court caused the rendition of an improper judgment by

"discriminating against federal rights" and "ignoring the pleading that the violation of federal rights" had occurred during the pandemic.

III. DISCUSSION

A. Standard of Review and Applicable Law

1. Standards for pro se litigants

To start, we first recognize that Appellant is acting pro se on appeal and we must construe his brief liberally, and with patience. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *see also Johnson v. McAdams*, 781 S.W.2d 451, 452 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) ("The Supreme Court directs us to seek the substance of a pro se complaint by reviewing pro se applications with liberality and patience."). But even so, the law is well-settled that a party proceeding pro se must comply with all applicable procedural rules. *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.). And procedural requirements include proper presentation of a case on appeal as is similarly required in the trial court. *Id.* In short, we are not permitted to make allowances simply because a pro se litigant is not an attorney. *Jonson v. Duong*, 642 S.W.3d 189, 193 (Tex. App.—El Paso 2021, no pet.). Otherwise, such litigant would be given an unfair advantage over those parties represented by counsel. *Id*. Additionally, the Supreme Court of Texas noted that, "[h]aving two sets of rules—a strict set for attorneys and a lenient set for pro se parties—might encourage litigants to discard their valuable right to the advice and assistance of counsel." *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005).

2. Briefing rules on appeal

The right to appellate review in Texas extends only to complaints made in accordance with our rules of appellate procedure, which require an appellant to clearly articulate the issues we will be asked to decide, to make cogent and specific arguments in support of its position, to cite authorities, and to specify the pages in the record where each alleged error can be found. TEX. R.

APP. P. 38.1; *Lee v. Abbott*, No. 05-18-01185-CV, 2019 WL 1970521, at *1 (Tex. App.—Dallas May 3, 2019, no pet.) (mem. op.); *Bolling v. Farmers Branch Indep. Sch. Dist.*, 315 S.W.3d 895, 895 (Tex. App.—Dallas 2010, no pet.) (rules require appellants to "state concisely the complaint they may have, provide understandable, succinct, and clear argument for why their complaint has merit in fact and in law, and cite and apply law that is applicable to the complaint being made along with record references that are appropriate"). Specifically, Rule 38.1 of the Texas Rules of Appellate Procedure expressly requires appellant's brief to contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). It is not sufficient to satisfy this requirement "by merely uttering brief conclusory statements unsupported by legal citations . . . ." *Jonson*, 642 S.W.3d at 193. Appellate courts have "no duty—or even right—to perform an independent review of the record and applicable law to determine whether there was error." *Martinez v. Ward*, 303 S.W.3d 326, 328 (Tex. App.—El Paso 2009, no pet.) (quoting *Valadez*, 238 S.W.3d at 845). "The failure to cite legal authority or provide substantive analysis of the legal issue presented results in waiver of the complaint." *Valadez*, 238 S.W.3d at 845.

3. Rule 91a motion to dismiss

A trial court's Rule 91a ruling is reviewed de novo. *In re Farmers Texas Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding) ("[W]hether a defendant is entitled to dismissal under the facts alleged is a legal question."). Rule 91a states "[a] cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." TEX. R. CIV. P. 91a.1. "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* The trial court "may not consider evidence but must decide the motion based solely on the pleading of the cause of action, together with any [permitted] pleading exhibits." *In re Farmers*, 621 S.W.3d at 266 (quoting

TEX. R. CIV. P. 91a.6).

Under our standard of review, we "construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact." *Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Vasquez v. Legend Nat. Gas III, LP*, 492 S.W.3d 448, 451 (Tex. App.—San Antonio 2016, pet. denied) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

B. Analysis

1. Was the trial court required to provide a "valid excuse" after dismissing Appellant's claims?

Under his first issue, Appellant asserts that courts have a "duty to enforce federal law" and "may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse.'" Appellant cites *Howlett v. Rose*, 496 U.S. 356 (1990), arguing it requires the trial court to provide a reason for its dismissal ruling. Without a reason given, he argues that it leaves him "guessing on appeal the reason for the dismissal and denial of federal rights." He adds that the trial court "acknowledged federal rights under 42 U.S.C. § 1981 and 1982, [have] a basis of law," when it initially denied the motion of appellee Zimprich and Mitrisin. Given such ruling, he thus argues the trial court acted without a "valid excuse for denying federal rights," when it reconsidered the motion and dismissed his claims. Responding, Appellees contend that Appellant misconstrues the holding of *Howlett*.

In *Howlett*, the United States Supreme Court held that "state law immunity" is not a "valid excuse" for purposes of a state court declining to exercise jurisdiction over a 42 U.S.C. § 1983 claim. *Id.* at 370. Rather, *Howlett* found that a state law immunity defense presents a question of

federal law, and any attempt to assert such immunity would violate federal law. *Id.* at 375. Contrary to Appellant's argument, we do not read *Howlett* as requiring a "valid excuse" for dismissal of a § 1983 cause of action. *See id.* at 376.

Here, the trial court did not dismiss Appellant's suit based on a refusal to exercise jurisdiction over federal claims. Rather, the court granted dismissal based on Rule 91a of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 91a. Other than *Howlett*, Appellant cites no other authority in support of his argument that a trial court is required to articulate a specific explanation for granting a Rule 91a motion. *Cf. In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 213 (Tex. 2009) (requiring a sufficient explanation, more than "in the interest of justice," when granting a new trial and setting aside a jury verdict); *see also* TEX. R. CIV. P. 91a (allowing the trial court to grant a motion to dismiss if the claim has no basis in law or fact). Furthermore, a trial court's ruling can be upheld even when it does not specify the grounds it relied on when granting the Rule 91a motion. *See Emmanuel v. Izoukumor*, 611 S.W.3d 453, 458 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (stating that a trial court's order granting a Rule 91a dismissal can be upheld even when the trial court does not specify the grounds it relied on when the appealing party does not challenge every ground).

We overrule Appellant's first issue.

2. Did the trial court err in reconsidering and granting the Zimprich Appellees' Rule 91a motion?

In his second issue, Appellant argues as follows:

> When the [trial court]. . . denied [Zimprich and Mitrisin's] Rule 91a motion, involving 42 U.S.C. § 1981 and 1982. The [trial court] informed parties that [Appellant] was entitled to discovery and scheduling order being placed [ ]. [Appellant] met the requirement for Rule 91a, that lawsuit was not a baseless cause of action, especially when the [trial court] informed parties that [Appellant] was entitled to discovery and scheduling order. The court reversing decision so [Zimprich and Mitrisin] could recover as prevailing parties under 91a.7 is an abuse of discretion.

Responding, Appellees first assert Appellant waived his complaint due to his brief not complying with Rule 38.1(i) of the Texas Rules of Appellate Procedure. Second, if waiver does not apply, Appellees alternatively assert the trial court acted within its lawful authority in reconsidering its earlier ruling.

Although we construe pro se briefs liberally, and with patience, we cannot "perform an independent review of the record and applicable law to determine whether there was error." *Martinez*, 303 S.W.3d at 328; *Castleberry v. New Hampshire Ins. Co.*, 367 S.W.3d 505, 506 n.1 (Tex. App.—Texarkana 2012, pet. denied) ("We review and evaluate pro se pleadings with liberality and patience, but otherwise apply the same standards applicable to pleadings drafted by lawyers."). Here, Appellant simply makes a conclusory argument that the trial court abused its discretion in granting the Zimprich Appellees' motion to dismiss after granting their motion to reconsider. Because Appellant fails to direct us to any authority demonstrating the trial court lacked authority to reconsider a previous ruling, Appellant's brief does not comply with Rule 38.1(i) of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 38.1(i). As such, Appellant waives his complaint on appeal. *Id*.

Even without such waiver, we would necessarily reject Appellant's argument. The Supreme Court of Texas has long recognized that a trial court retains continuing control over interlocutory orders and has the power to set those orders aside any time before a final judgment is rendered. *In re Panchakarla*, 602 S.W.3d 536, 539-40 (Tex. 2020) (quoting *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993)).

We overrule Appellant's second issue.

3. Was dismissal of Appellant's federal claims proper under Rule 91a?

Appellant's third issue asserts the trial court "discriminated against federal law" and

"ignored the pleading in [the] complaint establishing the violation of federal rights." He contends the trial court "grant[ed] [the] Rule 91a motion based on list of names [Appellant] [had] seen at the defendant's office prior to [the] pandemic, and not what [Appellant] pleaded in complaint and gave [rise] to [the] lawsuit." We liberally construe Appellant's third issue as asserting the trial court erred in granting the rule 91a motion to dismiss by relying on argument he made at the hearing set on the motion, not based on the claim he set forth in his pleading.

Responding, Appellees argue Appellant's brief is deficient because it neither cites to the record nor provides authority, other than to restate the statutes under which he brought his suit. Appellees also argue that, if not waived, the trial court did not err in dismissing the suit for two reasons: (1) because Appellant's claims were not factually plausible, and (2) because Appellant failed to challenge independent grounds for the trial court's ruling.

We agree that Appellant's brief fails to develop a clear argument and does not cite to supporting authority. TEX. R. APP. P. 38.1(i). We also agree that Appellant failed to challenge independent grounds for the ruling.

When, as here, the trial court does not specify the grounds on which it relied in granting the motion to dismiss, the appealing party must challenge every ground on which the trial court could have granted the motion. *Emmanuel*, 611 S.W.3d at 458 (stating that a trial court's order granting a Rule 91a dismissal can be upheld—even when the trial court does not specify the grounds it relied on—when the appealing party does not challenge every ground asserted by the motion). Because Appellant has not challenged every ground upon which the trial court could have relied when granting the motion to dismiss, we must affirm the trial decision. *See id*.

Appellees asserted that Appellant's claims were baseless in law and fact for multiple reasons. Appellees first point out that Appellant was in fact behind on payments, which he cured

before default, and his foreclosure never occurred. Appellees assert it is not plausible to believe that any of the Appellees had the authority to make the decision to foreclose on the property. Appellant did not sue the lender or noteholder, but rather sued the mortgage servicer, its employees, the trustee, and substitute trustee. Appellant's petition does not assert any allegation that any Appellees had this authority. Additionally, Appellees assert Appellant's pleaded allegations were not plausible because "no reasonable person would believe that it is possible to tell from a person's name on a list whether that person is a black person or a white person."

Other reasons Appellees moved for dismissal of Appellant's suit were as follows: (1) the Zimprich Appellees never met or spoke with Appellant and were not aware of his race prior to the lawsuit, (2) Appellees Esper and Rubio asserted there was no allegation that they took any action against Appellant in their individual capacity, (3) Appellant failed to assert any allegation that any Appellees failed to afford the rights to make and enforce contracts, to sue, be parties, give evidence, and other rights provided by section 1981, and (4) Appellant failed to assert any allegation that any Appellees prohibited or interfered with his rights to inherit, purchase, lease, sell, hold, and convey real and personal property as provided by section 1982.

We conclude that Appellant failed to assert a challenge to each ground the trial court could have based its dismissal on. For this reason, we must uphold the trial court's conclusion.

We overrule Appellant's third issue.

IV. CONCLUSION

We affirm.

GINA M. PALAFOX, Justice

July 21, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.