Opinion filed May 11, 2017

In The

Eleventh Court of Appeals

No. 11-15-00103-CV

ROBERT OCHOA, Appellant

V.

JANIE CHRISTINE OCHOA, Appellee

On Appeal from the 1st Multicounty Court at Law
Nolan County, Texas
Trial Court Cause No. CC-6479

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

On November 23, 2011, Appellant filed for divorce from Appellee. The trial court initially entered a no-answer "default" decree of divorce on January 24, 2012. Appellee subsequently sought to set aside the initial decree by timely filing a motion for new trial. Among other things, Appellee asserted that service of citation was defective and that the evidence supporting the initial decree was insufficient. The trial court granted Appellee's motion for new trial on February 14, 2012.

After numerous hearings, including two hearings seeking the recusal of the trial court judge, the trial court entered a final decree of divorce on February 20, 2015. Appellant brings four issues on appeal. In his first three issues, Appellant asserts that it was improper for the trial court to grant the motion for new trial on February 14, 2012, which set aside the initial default decree of divorce. In his fourth issue, Appellant asserts that the trial court abused its discretion in denying his motions to recuse the Honorable David Hall. We affirm.

Appellant's first three issues challenge the trial court's order granting Appellee's motion for new trial. In presenting these issues, Appellant contends that the trial court did not have a valid basis for setting aside the initial default divorce decree. Appellee contends that the trial court's act of granting the motion for new trial is not reviewable on appeal because the motion was granted during the period in which the trial court retained plenary power. We agree.

An order granting a motion for new trial rendered within the trial court's plenary power is not reviewable on appeal. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005); *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984). As noted by the Texas Supreme Court in *Cummins*, "An order granting a new trial within that period is not subject to review either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court." 682 S.W.2d at 236 (quoting *Burroughs v. Leslie*, 620 S.W.2d 643, 644 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.)). Appellee timely filed the motion for new trial, and the trial court granted it during its period of plenary power. TEX. R. CIV. P. 329b(a), (d). Accordingly, we overrule Appellant's first three issues because they are not reviewable on appeal.

In his fourth issue, Appellant challenges the denial of his motions to recuse Judge Hall. We review the denial of a motion to recuse under an abuse of discretion standard. TEX. R. CIV. P. 18a(j)(1)(A). A trial court abuses its discretion by acting

arbitrarily, unreasonably, or without consideration of guiding principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

Appellant asserted in his initial motion to recuse that Judge Hall's impartiality might reasonably be questioned. Appellant asserted that Judge Hall had taken a personal interest in the outcome of the case and had engaged in inappropriate ex parte communications with a receiver appointed by the court. Appellant based his second motion for recusal on the same allegation.

The trial court appointed Russell Riggan as a receiver in the case on September 14, 2012. On October 7, 2013, the trial court received an e-mail from Riggan stating in part, "Here is correspondence that I received from Jeff Rank who is representing Robert Ochoa. *They continue to harass me about the distributions being made on your order*. I also tried to place a follow up call last week in reference to the distribution of the remaining $19,951.73" (emphasis added). That same day, the trial court entered a final disbursement order with the above-quoted e-mail attached to it. However, the italicized portion of the e-mail was omitted in the attachment.

Following Appellee's filing of her second motion for new trial on September 27, 2013, Appellant filed his first motion to recuse Judge Hall on October 23, 2013, alleging that Judge Hall had engaged in ex parte communications with Riggan and had initiated collections for Appellee. The first recusal motion was heard by the Honorable Billy John Edwards on October 31, 2013. At the conclusion of an extensive hearing, Judge Edwards denied the motion, finding that there were no improper ex parte communications concerning the merits of the case.

After the trial court granted Appellee's second motion for new trial, Appellant subsequently filed his second motion to recuse Judge Hall on December 10, 2013. The second recusal was heard by the Honorable Judge Charles Chapman on January 9, 2014. At the conclusion of a brief hearing, Judge Chapman denied the

second motion for recusal, finding that there was no reasonable question as to the impartiality of Judge Hall.

"A party seeking recusal must satisfy a 'high threshold' before a judge must be recused." *Ex parte Ellis*, 275 S.W.3d 109, 116 (Tex. App.—Austin 2008, no pet.) (quoting *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring)). Rule 18b requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned. TEX. R. CIV. P. 18b(b)(1). In determining whether a judge's impartiality might be reasonably questioned so as to require recusal, the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial. *Burkett v. State*, 196 S.W.3d 892, 896 (Tex. App.—Texarkana 2006, no pet.) (citing *Kirby v. Chapman*, 917 S.W.2d 902, 908 (Tex. App.—Fort Worth 1996, no pet.)); *see Rogers v. Bradley*, 909 S.W.2d 872, 881 (Tex. 1995) (Enoch, J., responding to Gammage, J.'s declaration of recusal). We evaluate the merits of a motion to recuse from "a disinterested observer's point of view." *Ellis*, 275 S.W.3d at 116 (quoting *Rogers*, 909 S.W.2d at 882 (Enoch, J., responding to Gammage, J.'s declaration of recusal).

Members of the judiciary are prohibited from engaging in ex parte communications "concerning the merits of a pending or impending judicial proceeding." TEX. CODE JUD. CONDUCT, Canon 3(B)(8), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 2013); *see Randolph v. Texaco Expl. & Prod., Inc.*, 319 S.W.3d 831, 836 (Tex. App.—El Paso 2010, pet. denied). The parties and the trial court questioned Riggan extensively at the hearing on the first motion to recuse Judge Hall. Riggan testified that he received "countless calls from all parties involved" in serving as the receiver in the case and that he contacted Judge Hall to obtain clarification on how he should proceed. Riggan also testified that he

did not feel like Judge Hall had "pressured" him into doing something that he thought was wrong. Near the end of the hearing, Judge Edwards stated that he had reviewed the e-mails between Riggan and Judge Hall and that he "didn't see any that talked about the merits of the case itself." At the conclusion of the hearing, Judge Edwards "specifically" found that "there were no ex parte communications concerning the merits of this case or impending judicial proceedings that were inappropriate in any way. And since there were none, the public should not perceive it as such."

Although there were e-mail communications between Judge Hall and Riggan, Judge Edwards found that the e-mails did not concern the merits of the case. The record from the hearing supports his finding because the e-mails merely consisted of requests for instruction or information from Riggan and responses from Judge Hall. As Judge Edwards recognized in the first recusal hearing, Judge Hall did not discuss in the e-mails what the court orders meant and did not discuss which party the court might believe. Additionally, the specific facts of the case were not discussed in the e-mails. Therefore, the communications between Judge Hall and Riggan were not prohibited ex parte communications.

We also conclude that Judge Edwards did not abuse his discretion by determining that the public would not reasonably question Judge Hall's impartiality. Under the applicable standard, we presume that a reasonable member of the public knows all of the facts of the case. *See Burkett*, 196 S.W.3d at 896. Accordingly, Judge Edwards used the correct standard to determine that Judge Hall's impartiality would not reasonably be questioned.

The hearing on Appellant's second motion to recuse Judge Hall was much shorter. No witnesses testified at the hearing. Judge Chapman asked Appellant's counsel to focus on events that occurred after Judge Edwards's ruling on the first motion to recuse. In response, Appellant's counsel advised Judge Chapman that

Judge Hall had granted Appellee's second motion for new trial. As noted by Judge Chapman, a trial judge's rulings alone almost never constitute a valid basis for recusal based on bias or partiality. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam) (citing *Liteky*, 510 U.S. at 555).

Appellant additionally asserts that Judge Hall altered the e-mail from Riggan in order to conceal Riggan's bias toward Appellant. We disagree that this alleged act indicated partiality by Judge Hall. The omitted sentence was not relevant to the disbursement order. Furthermore, after the detailed examination of the communications between Riggan and Judge Hall, we conclude that no member of the public would reasonably question Judge Hall's partiality based upon the omitted sentence.

Finally, Appellant argues that Judge Hall engaged in collection activities for Appellee because he issued the disbursement order that awarded Appellee a substantial amount after two posttrial motions had been filed. As noted previously, a trial judge's rulings alone almost never constitute a valid basis for recusal based on bias or partiality. *Francis*, 46 S.W.3d at 240. Judicial rulings "do not necessitate recusal 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Id.* (quoting *Liteky*, 510 U.S. at 555). Judge Hall's rulings do not demonstrate either favoritism or antagonism to have required his recusal.

We conclude that Judge Hall's communications with Riggan and his disbursement of funds would not cause a reasonable member of the public, knowing all the facts of the judge's conduct, to have a reasonable doubt that Judge Hall was actually impartial. Accordingly, the denial of Appellant's motions to recuse Judge Hall did not constitute an abuse of discretion. Appellant's fourth issue is overruled.

We affirm the judgment of the trial court.

JOHN M. BAILEY

JUSTICE

May 11, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.