Affirmed and Opinion Filed August 2, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00138-CV

IN THE INTEREST OF T.J.S., A CHILD

On Appeal from the 330th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-14-15124

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

The main question here is whether the trial court abused its discretion by dismissing appellant's bill of review for failure to prove extrinsic fraud by lack of service in the underlying divorce case in which appellant, among other things, (i) paid the filing fee, (ii) actually participated, (iii) signed a QDRO[1] that the trial court entered in the case, and (iv) signed the consent decree that formed the trial court's final judgment. We conclude that on this record the trial court did not so err. Likewise, we conclude that the trial court did not abuse its discretion by holding that notice of the final decree was properly served on appellant.

We further conclude that appellant failed to show that the trial court erred by not ruling on his motion for discovery where appellant did not present his motion to the trial court or set it for hearing.

[1] Qualified Domestic Relations Order.

Accordingly, we affirm.

I. Background

In 2005, appellant was arrested for possessing methamphetamine, and was placed on community supervision. In October 2006, the State moved to revoke his unadjudicated probation and requested final adjudication. Appellant fled and went sailing for several years. He was a fugitive from 2006-2012. But he was eventually arrested in 2012 and his probation was revoked. At the sentencing hearing, appellant admitted that he "may have been absconded for quite a while."

Appellant's wife filed a divorce petition in June 2006. But it was he who paid the filing fee, and his check includes the notation "filing fee." Nonetheless, he was not formally served with the divorce petition.

While the divorce was pending, appellant signed an agreement granting his wife permission to travel with their minor child. He also exchanged several emails with her discussing the case.

On 31 August 2006, appellant emailed with his wife that he would soon be signing the divorce papers:

> Ms. Timpa's office contacted me today about signing some paperwork. I told her you were sending it to me and I'd have it in their office the day after I recieve it. Have not recieved anything yet. I'm sure I'll be seeing only the signature page of a huge document fucking me over... Funny how they won't even talk to me, but they get right on the horn when they need something... Good thing I didn't tell them what I really thought.

Appellant signed the "Final Decree of Divorce," which has a "27 July 2006" date by his signature. The trial court signed that final decree on 7 September 2006. Appellant also signed an Agreed QDRO dated 7 September 2006.

On 20 September 2006, shortly after the trial court entered the final decree and shortly before appellant left the country for several years on a worldwide sailing trip, he wrote an email to several acquaintances acknowledging his participation in the divorce, his wife's cooperation in that case, and his consent to what he considered to be one sided terms adverse to him in the decree:

> Give Lori credit, she saw things to the end. We agreed to finish things without a big fuss. Lori and Travis were off to California. I don't think Lori intended to be difficult, however the divorce paperwork had some very unrealistic teeth. I was forced to move quickly. I can only say I was creative in dividing our estate to minimize the attorney fees and leave Lori with as much as possible. Otherwise Lori and Travis are on their own.

In 2014, after he was released from confinement, appellant received a letter from the Texas Attorney General concerning delinquent child support. Appellant responded by claiming that the divorce decree was void and refusing to pay child support.

Later in 2014, eight years after the final divorce judgment (and four years after the limitations period lapsed), appellant filed his bill of review request, arguing that he was entitled to a bill of review because he had (i) not been served with the divorce petition and (ii) no notice of the final decree.[2] Although he did not serve any discovery, he did file a "Motion for Discovery" and a summary judgment motion.

The court conducted a hearing on the summary judgment motion and denied it. But appellant did not request a hearing or a ruling on the discovery motion.

His wife moved to dismiss the bill of review, arguing that appellant failed to prove that he was entitled to relief. She also sought sanctions and a declaration that appellant is a vexatious litigant.

[2] Specifically, appellant's bill of review petition states that he "made no appearance, did not defend the case before the court or sign any documents on the date of judgment, September 7, 2006, thus plaintiff did not waive his right to counsel, right to discovery, or right to trial by jury. Per TRCP 124, without service, waiver/acceptance of process or appearance, no judgment can be rendered."

The trial court granted the motion, dismissed the bill of review, and declared appellant a vexatious litigant.

The trial court also entered findings of fact and conclusions of law supporting its judgment. Those findings and conclusions include, among other things, that:

- Petitioner [appellant] signed the consent decree presented *in camera* to the Court at both the summary judgment and *Baker* hearings in this matter[.]
- Petitioner put forth no credible evidence regarding his delay in timely bringing a Petition for Bill of Review between the entry of the judgment and the filing of his Petition[.]
- The Clerk's record contains the appropriate recitation of service of the notice of final judgment[.]
- Petitioner put forth no credible factual evidence in support of his fraud/lack of notice claim or that delay in bringing this Bill of Review is unmixed with his own negligence[.]
- Petitioner made an appearance in the underlying divorce proceeding[.]
- Petitioner did not present competent admissible evidence to support his petition for Bill of Review[.]

II. Issues

Appellant presents a single issue with two subparts arguing that (i) the trial court erred by dismissing his bill of review petition because he was not served in the underlying divorce case and he did not receive notice of the final decree under circumstances comprising extrinsic fraud

and (ii) the trial court denied him due process by not ruling on his motion for discovery.[3] We reject both issues.

III. Analysis

A. First Issue: Did the trial court abuse its discretion by dismissing the bill of review?

1. Standard of Review and Applicable Law

A bill of review is an equitable proceeding, brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for a new trial or direct appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam).

Because the residual four-year statute of limitations applies to bills of review, *Caldwell v. Barnes*, 975 S.W.3d 535, 538 (Tex. 1998) (citing TEX. CIV. PRAC. & REM. CODE § 16.051), a bill of review petition generally must be brought within four years after the trial court rendered the challenged judgment. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 275 (Tex. 2012). But the four-year limitations period may be tolled until the petitioner knew or should have known about the fraud and the judgment if the petitioner proves that the challenged judgment was obtained through extrinsic fraud. *See Valdez v. Hollenbeck*, 465 S.W.3d 217, 221 (Tex. 2015).

Extrinsic fraud is fraud that denies a litigant the opportunity to fully litigate at trial all the rights or defenses that could have been asserted, and it occurs when a litigant has been misled by the adversary by fraud or was denied knowledge of the suit. *PNS Stores, Inc.*, 379 S.W.3d at 275. Extrinsic fraud requires proof of some deception practiced by the adverse party that was collateral to the underlying action. *McIntyre v. Wilson*, 50 S.W.3d 674, 680 (Tex. App.—Dallas 2001, pet. denied). A bill of review petitioner must plead and prove the opponent's extrinsic fraud. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003).

[3] Appellant's brief appears to cite the clerk's record in the underlying divorce proceeding. But only those documents offered in the bill of review proceeding are part of our appellate record.

A bill of review is only proper where a party has exercised due diligence to pursue all legal remedies against a judgment and, at the time the bill of review is filed, there is no adequate legal remedy available because, through no fault of the petitioner, extrinsic fraud, accident, or mistake precludes presentation of a meritorious claim or defense. *King Ranch*, 118 S.W.3d at 751; *Alderson v. Alderson*, 352 S.W.3d 875, 878 (Tex. App.—Dallas 2011, no pet.).

We review a trial court's bill of review ruling for an abuse of discretion, indulging every presumption favoring the court's ruling. *Davis v. Smit*h, 227 S.W.3d 299, 302 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles. *Id.*

In applying the abuse of discretion standard, reviewing courts defer to the trial court's factual determinations; a reviewing court, however, does not engage in its own factual review but decides whether the record supports the trial court's resolution of factual matters. *Garcia-Udall v. Udall*, 141 S.W.3d 323, 333 (Tex. App.—Dallas 2004, no pet.). A reviewing court instead determines only whether the trial court properly applied the law to the facts in reaching its legal conclusion. *Id*. A trial court does not abuse its discretion when it makes its decision on conflicting evidence. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

When the inquiry on a petition for bill of review concerns a question of law, we review the decision de novo. *Presley v. McConnell-Presley*, No. 05-08-01019-CV, 2009 WL 1579185, at *2 (Tex. App.—Dallas June 8, 2009, no pet.) (mem. op.).

2. Did appellant establish extrinsic fraud by lack of service?

Appellant relies on the fact that he was not formally served with the divorce petition to establish extrinsic fraud. We are not persuaded because the there was evidence from which the trial court could reasonably find that he appeared in the case.

Texas procedural law and constitutional due process require that a defendant "be served, waive service, or voluntarily appear." *In re J.P.L.*, 359 S.W.3d 695, 707 (Tex. App.—San Antonio 2011, pet. denied); TEX. R. CIV. P. 124. The reason is to assure that the defendant knows about the proceedings and can, therefore, defend against them. *Terry v. Caldwell*, 851 S.W.2d 875, 876 (Tex. App.—Houston [14th Dist.] 1993, no writ).

But a party's voluntary appearance in a case submits it to the court's jurisdiction without needing formal service of process. *See Baker v. Monsanto*, 111 S.W.3d 158, 161 (Tex. 2003) (general appearance puts defendant before the court for all purposes). For example, a party's assent to an agreed judgment or other final order is an appearance that binds the party to the order despite defects in service. *See In re C.R.B.*, 256 S.W.3d 876, 877–78 (Tex. App.—Texarkana 2008, no pet.) (party appeared by signing final order in SAPCR as "approved and consented to in both form and substance"); *Spivey v. Holloway*, 902 S.W.2d 46, 48 (Tex. App.—Houston [1st Dist.] 1995, no pet.) (party appeared and waived service by signing divorce decree); *Terry v. Caldwell*, 851 S.W.2d 875, 876 (Tex. App.—Houston [14th Dist.] 1993, no writ) (party appeared and waived service by signing agreed modification in SAPCR suit).

Here, appellant relies on his trial court affidavit to establish extrinsic fraud. But that affidavit would only be evidence that:

- Appellant was not formally served;
- Appellant did not sign the final decree on July 7, 2006 or September 7, 2006;
- Appellant was not in Texas from July 27 to September 7, 2006; and
- As of September 2006, he did not reside at or receive mail at 7417 Delta Drive in Rowlett Texas.

That affidavit, however, does not deny actually signing the decree. Rather, he argues only that he did not sign it on the indicated date. It also does not say he was unaware of the

proceeding or the decree. Nor does he deny signing the QDRO. Rather, the trial court could have reasonably found from appellant's 31 August 2006 email that he received and signed the decree and the QDRO between 31 August and 7 September, when the trial court signed both documents.[4]

Nor does he deny signing a travel consent form, paying the filing fee, and communicating with his wife via e-mail about the proceeding.[5]

3. Did appellant establish extrinsic fraud by lack of notice regarding entry of the final decree?

Appellant also contends that there was extrinsic fraud because he received no notice that the final judgment had been entered. We disagree.

The divorce proceeding docket sheet states "Certified Copy Judgment to Respondent on 09/07/2006." Appellant offered no evidence to controvert this statement, or to otherwise establish that he had no notice of the final judgment. His sworn statement states only that he did live at or receive mail at his address as of September 2006. But that does not prove that (i) he did not receive the judgment, (ii) the clerk did not send it, or (iii) there was some deception involved. Moreover, he described the decree to his friends in an email dated two weeks after the decree was signed. Therefore, the trial court did not err in concluding that appellant failed to establish extrinsic fraud by lack of notice.

4. Did appellant establish a meritorious defense or delay unrelated to his own negligence?

The trial court also found that appellant failed to show he had a meritorious defense or that his delay in bringing the bill of review was "unmixed with his own negligence." Appellant does not challenge these findings on appeal.

[4] Given the documentary evidence and the trial court's ability to observe appellant at two different hearings, the trial court could have reasonably concluded that the 7 July 2006 date was not the actual day that appellant signed the decree.

[5] Appellant's brief makes numerous accusations and allegations, but our inquiry is confined to the facts established on the record before us.

In fact, appellant presented no evidence about why he failed to timely appeal in the divorce case or what he would have raised had he done so.[6] The record reflects, and appellant admits, that he was an out-of-the-country fugitive for the six years beginning immediately after the divorce judgment. He sought to challenge the divorce judgment only after he received a demand for delinquent child support. Thus, the record affirmatively establishes that the delay appellant's own conduct contributed to the delay.

5. Conclusion.

Based on the above, we conclude that appellant did not conclusively establish extrinsic fraud in the divorce case, a meritorious defense, or that delay unrelated to his own negligence prevented him from making a meritorious defense. Therefore, the trial court did not abuse its discretion by dismissing the action, and we overrule appellant's first issue.

B. Second Issue: Did the trial court's failure to rule on the discovery motion violate due process?

Appellant also argues that the trial court violated due process by not ruling on his motion for discovery. This alleged error, however, has not been preserved for our review.

To preserve error for appellate review, a party must show (i) a timely request, objection, or motion and (ii) a trial-court ruling or refusal to rule. The request, objection, or motion must state the grounds for the desired ruling "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context." TEX. R. APP. P. 33.1(a)(1)(A).

Filing a document, without more, ordinarily does not support an inference that the trial court is actually aware of it. *AIS Servs., LLC v. Mendez*, No. 05-07-01224-CV, 2009 WL 2622391, at *2 (Tex. App.—Dallas Aug. 27, 2009, no pet.) (mem. op.). "A court is not required

[6] The bill of review petition asserts only that "the divorce was conducted in an underhanded, predatory manner violating multiple rules . . . established case law, due process . . . and the fair trial provisions of the Sixth Amendment. . . . .

to consider a motion that is not called to its attention." *Risner v. McDonald's Corp.*, 18 S.W.3d 903, 909 (Tex. App.—Beaumont 2000, pet. denied); *accord Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 179 (Tex. App.—Waco 1987, writ denied). Thus, "[t]o complain on appeal about the denial of the motion, the movant is also required to bring the motion to the trial court's attention." *Unifund CCR Partners v. Smith*, No. 05-07-01449-CV, 2009 WL 2712385, at *2 (Tex. App.—Dallas Aug. 31, 2009, pet. dism'd) (mem. op.).

Here, appellant did not serve discovery or seek a hearing on his discovery motion. And he never requested a ruling on his motion. Having failed to bring the alleged error to the trial court's attention, he cannot now complain about the alleged error on appeal. *See* TEX. R. APP. P. 33.1(a)(1)(A). We thus resolve appellant's second issue against him.

III. Conclusion

Having resolved appellant's issues against him, we affirm the trial court's order.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

IN THE INTEREST OF T.J.S., A CHILD,
No. 05-15-00138-CV

On Appeal from the 330th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DF-14-15124.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Lori Swingle recover her costs of this appeal from appellant David Swingle.

Judgment entered August 2, 2016.