Affirmed and Opinion Filed May 31, 2017

In The
Court of Appeals
`Fifth District of Texas at Dallas

No. 05-15-01068-CV

MY THREE SONS, LTD., MY THREE SONS MANAGEMENT, LLC, PRESTONWOOD OB/GYN ASSOCIATES, P.A., CHRISTOPHER RIEGEL, M.D., P.A., AND CHRISTOPHER RIEGEL, Appellants

V.

MIDWAY/PARKER MEDICAL CENTER, L.P., KINSMAN VENTURES, LLC, MANHATTAN CONSTRUCTION COMPANY, TD INDUSTRIES, INC., SOUTHSTAR FIRE PROTECTION COMPANY, CMA MANAGEMENT COMPANY, AND MIDWAY MEDICAL CENTER OWNERS ASSOCIATION, INC., Appellees

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On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-00398-2013

MEMORANDUM OPINION ON REHEARING

Before Justices Francis, Fillmore, and Stoddart
Opinion by Justice Francis

We deny appellants' motion for rehearing. On the Court's own motion, we withdraw our opinion of March 9, 2017 and vacate the judgment of that date. This is now the opinion of the Court.

Christopher Riegel and various entities affiliated with him—My Three Sons, Ltd., My Three Sons Management, LLC, Prestonwood OB/GYN Associates, P.A., Christopher Riegel, M.D., P.A.—appeal the trial court's dismissal of their lawsuit against appellees for failing to comply with an order compelling arbitration of the dispute. In five issues, appellants complain the trial court erred in compelling arbitration, dismissing the case, failing to reinstate the case or

grant appellants' motion for new trial, and failing to make findings of fact and conclusions of law with respect to the motion to reinstate. For reasons set out below, we conclude all issues are without merit and affirm the trial court's order of dismissal.

Riegel is an obstetrician/gynecologist in Plano. In June 2005, he purchased, through an affiliated entity, a medical office condominium from Midway/Parker Medical Center, L.P. Riegel claims that after moving in, brown sewer water infested with E. Coli leaked from above into the medical office, and on one occasion, dripped onto a patient. He also asserts that on at least two other occasions, the water pipes froze and burst, causing flood damage to the office.

On January 30, 2013, appellants sued appellees Midway/Parker Medical Center, L.P., Kinsman Ventures, LLC, Manhattan Construction Company, TD Industries, Inc., Southstar Fire Protection Company, CMA Management Company, and Midway Medical Center Owners Association, Inc., alleging one or more of them were responsible for water pipes bursting and the resulting flooding and/or contamination of the medical office. Appellants alleged that faulty design, installation, construction, maintenance, remediation, clean-up, and/or insulation of the plumbing and fire protections systems in the building and other acts or omissions of appellees "caused the formation, infestation, transmission, migration, and proliferation of mold, bacteria, and other environmental or biological hazardous material and/or conditions . . . inside the building and the Property, including, but not limited to, 'brown water' containing fecal bacteria." Appellants brought claims for negligence, premises liability, breach of contract/breach of warranty, breach of implied warranties, breach of covenant of quiet possession and enjoyment, trespass, nuisance, Deceptive Trade Practices Act violations, fraud, and negligent misrepresentation. Appellants also sought attorney's fees and punitive damages.

Two months later, appellee Manhattan Construction, the general contractor on the medical building construction project, filed a motion to stay litigation and compel arbitration.

The motion argued appellants should be compelled to arbitrate their claims against Manhattan because appellants alleged third-party beneficiary status under the contract on which they were suing Manhattan, and the contract contained an arbitration clause. Appellants did not file a response to the motion. On July 11, 2013, the trial court signed an order granting the motion and ordering appellants "be compelled to arbitrate their claims against Manhattan in accordance with the terms of the subject Contract." The order also abated the case until the conclusion of the arbitration proceedings.

Nineteen months later, on February 9, 2015, appellee Southstar filed a motion to dismiss for failure to initiate arbitration. The motion asserted appellants had "ignored" the trial court's order compelling arbitration and had caused "unjustifiable delay and injustice" to Southstar and the other defendants. The motion asserted the trial court had an inherent right to dismiss the suit for failure to prosecute with diligence. Over the next month, each of the appellees joined Southstar's motion. In late March, a hearing was set for May 18.

A week before the hearing, appellants filed an objection to the dismissal, asserting Riegel had been "devoting an inordinate amount of his time dealing with his own health issues, raising his three sons after his wife inexplicably left him and his sons, and being the sole caretaker of his father who has advanced Parkinson's," and appellants' counsel "did not want to interject any more stress" on Riegel in 2014 because of these issues. Appellants further asserted they did not intend to "abandon" their claims. Three days before the hearing, appellants separately filed Riegel's affidavit in support of their objections to the motion to dismiss. Appellants also filed a notice of filing a request for mediation with the American Arbitration Association[1] and a notice of filing a demand with AAA.

[1] The arbitration clause required the parties to try to resolve disputes by mediation prior to arbitration.

At the dismissal hearing, the trial court sustained appellees' objections to Riegel's affidavit and struck the affidavit. The trial court also took judicial notice of its own files and the contents of the file in Riegel's divorce. Riegel did not appear at the hearing, and the only witness was Riegel's counsel, who testified he had known Riegel since 1974 and knew his family intimately. Counsel then briefly testified to some of the matters contained in the affidavit, including that Riegel had been unable to "comply with his obligations under his fee agreement" due to "economic duress" as a result of his divorce. On cross-examination, however, he said he did not know whether two of Riegel's sons were in college, one in Austin and the other in Louisiana, although he had "no reason" to believe they were not. He also was unable to answer specific questions about Riegel's finances or other litigation matters. After hearing argument of counsel, the trial court granted the motions to dismiss. In a later signed order, the trial court dismissed all of appellants' claims against all defendants without prejudice.

Appellants timely filed a combined verified motion to reinstate and motion for new trial. In the motion, appellants cite the following as reasons for the delay in complying with the trial court's order: Riegel's divorce, his wife's bankruptcy filed during the divorce, Riegel's caretaking duties of his father, Riegel's own health, an interlocutory appeal by one of the appellees in this case, and the financial consequences of a "contentious divorce and his wife's bankruptcy." The trial court held an evidentiary hearing on the motion; Riegel was the sole witness. Additionally, the trial court took judicial notice "as to what's contained in the filings in this case" but not "for any assertions of truth therein," the divorce case, and the bankruptcy case. After hearing the evidence, the trial court took the motion under advisement but did not rule, and the motion was consequently overruled by operation of law. Appellants requested findings of fact and conclusions of law, but none were made. This appeal ensued.

In their first issue, appellants contend the trial court erred by compelling them to arbitrate their claims against Manhattan because they are not parties, signatories, or third-party beneficiaries to the contract containing the arbitration clause.

As a general rule, a party is required to present a timely complaint to the trial court before being allowed to raise the issue on appeal. *See* TEX. R. APP. P. 33.1. A timely objection is one that is made "at a point in the proceedings which gives the trial court the opportunity to cure any alleged error." *Crews v. Dkasi Corp.*, 469 S.W.3d 194, 201 (Tex. App.—Dallas 2015, pet. denied). As noted previously, appellants did not file a response or any objections to the motion to compel arbitration nor did they raise the issue in their motion to reinstate/motion for new trial, assuming such a complaint in a post-dismissal filing would be timely. Having failed to object below, appellants have waived this complaint on appeal. *See also Gumble v. Grand Homes 2000, L.P.*, 334 S.W. 1, 4 (Tex. App.—Dallas 2007, no pet.) (waiving complaint that party's motion to compel was untimely when not raised at time judge ordered case to arbitration); *Garcia v. Walker*, No. 04-05-00343-CV, 2006 WL 397950, at *1 (Tex. App.—San Antonio Feb. 22, 2006, no pet.) (mem. op.) (waiving objections to motion to compel arbitration not presented in trial court).

Regardless, even if preserved, appellants' issue lacks merit. A litigant who sues based on a contract subjects him or herself to the contract's terms. *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 755 (Tex. 2001) (orig. proceeding). Count three of appellants' petition, entitled breach of contract/warranty, alleged:

> One or more of the Defendants breached their agreements with, and/or warranties and/or representations to, one or more of the Plaintiffs, and otherwise failed to perform their agreements. Plaintiffs are also third party beneficiaries under contracts by and/or among the Defendants, including, but not limited to, the contracts and subcontracts relating to the building, the plumbing and fire protection system, and the Property. As a result of such breaches, Plaintiffs have been damaged in excess of the minimum jurisdictional limits of the Court.

By suing appellees on the contracts and subcontracts relating to the building, appellants subjected themselves to the contract's terms, including the arbitration clause. *See id.* To the extent appellants also claim their personal injury claims are not arbitrable, they have waived this complaint for failing to provide any substantive analysis. *See* TEX. R. APP. P. 38.1(i). We overrule the first issue.

In issues two, three, and four, appellants complain the trial court improperly dismissed their lawsuit and then failed to reinstate the case or grant their motion for new trial.

When a party seeks appellate review of a case that has been dismissed for want of prosecution and has not been reinstated, the party may cast its argument in one of three ways: First, a party may argue the trial court erred in dismissing the case; second, a party may contend it was error for the trial court to refuse to reinstate the case; and finally, a party may challenge both the dismissal and the denial of reinstatement. *Maida v. Fire Ins. Exch.*, 990 S.W.2d 836, 838 (Tex. App.—Fort Worth 1999, no pet.). Each challenge, if sustained, is independently sufficient to obtain reinstatement, but the subtle distinctions among the challenges affect the scope of our review. *Id.*

Here, appellants do not separately brief issues related to the dismissal and reinstatement; rather, they argue the issues together. Within their argument, they do not challenge the evidence supporting the dismissal order; rather, they direct their evidentiary arguments to the trial court's failure to reinstate the case. With respect to the dismissal, they argue (1) the motion to dismiss was mooted when they filed an arbitration demand against Manhattan with AAA three days before the dismissal hearing, (2) the trial court acted unfairly in dismissing their lawsuit without first giving them an "opportunity to cure," and (3) the punishment does not "fit the crime."

With respect to the first argument, appellants have not offered authority to support their argument the motion was mooted by the filing of an arbitration demand made nearly two years

after being ordered to do so. Consequently, this issue is inadequately briefed. *See* TEX. R. APP. P. 33.1(i). Moreover, any suggestion that the order is "vague" because it did not set out a date for compliance is without merit. Inherent in the court's order to arbitrate was that the arbitration would be completed within a reasonable time. *See 3V, Inc. v. JTS Enters., Inc.,* 40 S.W.3d 533, 540 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Appellants cite two cases in support of their second argument. *See Garcia*, 2006 WL 397950; *Solis v. Int'l Bank of Commerce*, No. 13-06-699-CV, 2009 WL 153813, (Tex. App.—Corpus Christi Jan. 22, 2009, no pet.) (mem. op.). Neither case, however, held nor suggested that a trial court must provide a party with an "opportunity to cure" its failure to comply with a court order before dismissing.

Lastly, appellants suggest the trial court imposed "death penalty sanctions" without considering lesser sanctions or penalties. Again, appellants have cited no authority; thus, this complaint is waived. *See* TEX. R. APP. P. 38.1(i). Regardless, nothing in the record suggests the trial court issued a "death penalty" sanction. Rather, appellees filed a motion to dismiss for appellants' lack of diligent prosecution, and the trial court granted the motion. Having concluded appellants' issues related to the dismissal are without merit, we now turn to the remainder of appellants' arguments, which address the trial court's failure to reinstate the case.

A trial court has the inherent authority to dismiss a case that has not been diligently prosecuted. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *Veterans' Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976) (per curiam). This authority stems from a trial court's power to maintain and control its docket. *Maida*, 990 S.W.2d at 839.

We review the denial of a motion to reinstate a case dismissed for want of prosecution under an abuse of discretion standard. *Franklin v. Sherman Indep. Sch. Dist.*, 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied). In reviewing whether there was an abuse of

discretion, the key question is whether the trial court acted without reference to any guiding rules and principles, or in an arbitrary and unreasonable manner. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

Here, the parties do not dispute the dismissal for failure to arbitrate was under the trial court's inherent authority. They do disagree, however, as to the appropriate rules and principles guiding the trial court's discretion in refusing to reinstate the case. Appellants argue the reinstatement standard set out in Texas Rule of Civil Procedure 165a(3) applies. Under rule 165a(3), a court "shall reinstate the case upon finding after a hearing that the failure of the party or his attorney was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." TEX. R. CIV. P. 165a(3). Appellants assert rule 165a(4) makes "[[t]he same reinstatement procedures and timetables . . . applicable to all dismissals for want of prosecution, including cases which are dismissed pursuant to the court's inherent power. . . ." TEX. R. CIV. P. 165a(4).

Relying on case law, appellees counter that the "intent/conscious indifference" standard applies only to dismissals for failure to appear, not to dismissals for want of prosecution. They assert reasonable diligence is measured by the length of time the lawsuit was on file, the extent of activity, periods of inactivity, and the reasons for inactivity, and the relevant question is whether the plaintiffs here "acted as a prudent person would have acted under the same or similar circumstances." We need not resolve this issue today because even under the "intentional/conscious indifference" standard, which is more favorable to appellants, we conclude the trial court did not abuse its discretion.[2]

[2] Our sister court in *Carpetta v. Hermes*, 222 S.W.3d 160, 164–67 (Tex. App.—San Antonio 2006, no pet.), provides a reasoned analysis of this issue.

A failure is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification. Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied. *Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995) (per curiam). Conscious indifference must amount to more than mere negligence or mistake; it means "failing to take some action which would seem indicated to a person of reasonable sensibilities under the same circumstances." *21st Century Home Mortg. v. City of El Paso*, 281 S.W.3d 83, 86 (Tex. App.—El Paso 2008, no pet.).

Appellants assert the delay in filing their arbitration demand was not intentional or the result of conscious indifference or was otherwise reasonably explained. They rely on various circumstances in Riegel's life to explain the delay: a divorce, his wife's bankruptcy, caring for his father, his own health/disability, and the financial consequences of his divorce and his wife's bankruptcy.

Riegel testified his wife left him and their three sons, who were 17, 15, and 12, in 2011, and he filed for divorce in May of that year. The divorce, which was contentious, was finalized in December 2014. During and after it, Riegel was primarily responsible for raising his children and providing economic support.

On July 31, 2013, while the divorce was pending, Riegel's wife filed for Chapter 7 bankruptcy. Riegel testified his wife claimed the plaintiff-entities in this case were owned as community property. The Riegels mediated their divorce action and reached a property settlement, but the chapter 7 trustee complained about that settlement. Ultimately, the bankruptcy trustee and the Riegels settled their dispute, and the bankruptcy court approved the settlement agreement on September 19, 2014. As part of that settlement, Riegel said he acquired his wife's community property interest in the plaintiff-entities.

As a result of the bankruptcy and divorce proceedings, Riegel said he incurred about $65,000 in attorney's fees, which impacted his ability to pay costs, expenses, and attorney's fees in this case. Finally, Riegel also testified he is the primary caregiver for his 85-year-old father, who has late stage Parkinson's disease.

When asked on cross-examination to explain how the bankruptcy and divorce proceedings impaired his ability to go forward with this lawsuit, he said "financially, and time and effort." Nevertheless, Riegel acknowledged he was able to hire three different divorce attorneys while going through his divorce, hired lawyers to represent him in an eviction action arising out of the foreclosure of the unit that is the subject of this dispute, and hired a lawyer to represent him in his wife's bankruptcy. He also testified he drove a 2011 Range Rover and owned a home in Plano. When asked if his home had been appraised by the Collin County Appraisal District at $1.3 million, he said he did not know nor did he know its value, but he admitted he paid over $2,000 a month in property taxes.

Riegel further testified he is disabled by sleep apnea and a central nervous system disorder that affects his sleep and receives a monthly disability payment of $7,000. When asked his adjusted gross income in 2011, 2012, 2013, and 2014, he said he did not know. When asked if he ever disclosed to the bankruptcy trustee when he purchased his wife's interest in the plaintiff-entities that the entities had a $4 million claim asserted in this lawsuit, he said he could not remember "if that specifically came up." Finally, he testified he had taken three or four vacations since January 2013, when this lawsuit was filed.

Having considered this evidence, we conclude the trial court could have reasonably determined appellants' conduct in failing to initiate arbitration proceedings for more than nineteen months after ordered to do so was the result of conscious indifference. Riegel's divorce had been ongoing for eighteen months when Riegel filed this lawsuit, thus it was no impediment

to filing. To the extent appellants argue Riegel's wife's community property interest in the plaintiff-entities somehow impacted their ability to commence arbitration, they cite no authority or provide further explanation. Moreover, that reasoning did not prevent them from bringing this suit in the first place. As for the bankruptcy, nothing in our record suggests the bankruptcy court stayed this proceeding, and appellants fail to explain with any authority how the bankruptcy prevented them from commencing arbitration. Even if Riegel "could not act on behalf of the community property entities" during the pendency of the bankruptcy as he asserts, this does not explain appellants' failure to act for the eight months between the end of the bankruptcy proceedings and the filing of their notice with AAA.

The trial court could have found Riegel's explanation of financial difficulty lacked credibility. He admitted he had funds to pay for lawyers in other litigation matters that were pending at the same time as this one. Further, the trial court could have determined Riegel's lack of knowledge as to the value of his home and his adjusted gross income in the previous four years was unbelievable. In sum, the trial court could have believed appellants prioritized other legal matters while intentionally or with conscious indifference refusing to comply with the order to commence arbitration. Even after Southstar filed the motion to dismiss and the other appellees joined, appellants waited until just days before the dismissal hearing to file their notice with AAA. And, as explained previously, by that time, Riegel's divorce had been finalized for five months and the bankruptcy had been concluded for eight months. Having reviewed the evidence, we conclude the trial court did not abuse its discretion by failing to reinstate the case. We overrule issues two, three, and four.

In their fifth issue, appellants contend the trial court erred by failing to issue findings of fact and conclusions of law with respect to their motion to reinstate, which was overruled by operation of law.

Rule 296 provides "[i]n any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. The purpose of 296 is to give a party a right to findings of fact and conclusions of law finally adjudicated after a conventional trial on the merits before the court. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). In other cases, findings and conclusions are proper, but a party is not entitled to them because (1) they are often unnecessary, (2) requiring them in every case would unduly burden the courts, and (3) appellate courts are not obliged to give them the same level of deference. *Id.*; *Willms v. Americas Tire Co.,* 190 S.W.3d 796, 801 (Tex. App.—Dallas 2006, pet. denied).

Here, appellants requested findings of fact and conclusions of law with respect to their motion to reinstate, which was overruled by operation of law. Although a trial court may make findings of fact and conclusions of law following an evidentiary hearing on a motion to reinstate or motion for new trial, the trial court is not required to do so and either motion may be overruled by operation of law. *See* TEX. RS. CIV. P. 165a.3; 329b(c), (e); *Puri v. Mansukhani*, 973 S.W.2d 701, 707–08 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *In re Marriage of Brumley*, No. 07-99-0411-CV, 2000 WL 640809, at *2 (Tex. App.—Amarillo May 18, 2000, no pet.) (not designated for publication); *Clegg v. Laughlin Partners Ltd.*, No. 04-06-00387-CV, 2007 WL 56707, at *1 n.1 (Tex. App.—San Antonio Jan. 10, 2007, no pet.) (mem. op.). We overrule the fifth issue.

We affirm the trial court's order of dismissal.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MY THREE SONS, LTD., MY THREE SONS MANAGEMENT, LLC, PRESTONWOOD OB/GYN ASSOCIATES, P.A., CHRISTOPHER RIEGEL, M.D., P.A., AND CHRISTOPHER RIEGEL, Appellants

No. 05-15-01068-CV V.

MIDWAY/PARKER MEDICAL CENTER, L.P., KINSMAN VENTURES, LLC, MANHATTAN CONSTRUCTION COMPANY, TD INDUSTRIES, INC., SOUTHSTAR FIRE PROTECTION COMPANY, CMA MANAGEMENT COMPANY, AND MIDWAY MEDICAL CENTER OWNERS ASSOCIATION, INC., Appellees

On Appeal from the 380th Judicial District Court, Collin County, Texas
Trial Court Cause No. 380-00398-2013.
Opinion delivered by Justice Francis; Justices Fillmore and Stoddart participating.

In accordance with this Court's opinion of this date, we **VACATE** our March 9, 2017 judgment. This is now the judgment of the Court.

The trial court's order of dismissal is **AFFIRMED**.

It is **ORDERED** that appellees MIDWAY/PARKER MEDICAL CENTER, L.P., KINSMAN VENTURES, LLC, MANHATTAN CONSTRUCTION COMPANY, TD INDUSTRIES, INC., SOUTHSTAR FIRE PROTECTION COMPANY, CMA MANAGEMENT COMPANY, AND MIDWAY MEDICAL CENTER OWNERS ASSOCIATION, INC. recover their costs of this appeal from appellants MY THREE SONS, LTD., MY THREE SONS MANAGEMENT, LLC, PRESTONWOOD OB/GYN ASSOCIATES, P.A., CHRISTOPHER RIEGEL, M.D., P.A., AND CHRISTOPHER RIEGEL.

Judgment entered May 31, 2017.