Reverse, Render, and Remand; Opinion Filed March 22, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00051-CV

WOLF CREEK ESTATES HOMEOWNERS' ASSOCIATION, INC., Appellant
V.
VALARIE L. JONES, Appellee

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-10675

MEMORANDUM OPINION

Before Justices Lang, Evans, and Schenck
Opinion by Justice Lang

Wolf Creek Homeowners' Association (the "Association") appeals from the trial court's final judgment dismissing with prejudice the Association's lawsuit against Valerie L. Jones ("Jones") and awarding Jones $1,000.00 in attorney's fees. In three issues on appeal, the Association asserts that (1) "the failure of the trial court to reinstate the case pursuant to Rule 165a(3) of the Texas Rules of Civil Procedure was improper and an abuse of discretion," (2) "the court's failure to dismiss [the case] without prejudice is reversible error," and (3) "the trial court committed reversible error in awarding attorney's fees to Ms. Jones." We decide in favor of the Association on all issues.

I. Factual and Procedural Background

On September 9, 2015, the Association filed suit against Jones alleging Jones "own[ed] property within the [Association's] subdivision" and "failed to pay her assessments owed to the Association pursuant to the Association's governing documents." The Association sought to "(1) obtain a judgment for unpaid assessments and other charges legally due and owing to the [Association]; and (2) foreclose its lien for unpaid assessments and other charges legally due and owing to the [Association] that are secured by the [Association's] lien on the property in question." On October 13, 2015 Jones filed an original answer that contained a general denial and asked the court to "dismiss [the] suit or render judgment that [the Association] take nothing, assess costs against [the Association], and award [Jones] all other relief to which [Jones] is entitled."

On November 9, 2015, the trial court set the case for non-jury trial on September 27, 2016 and signed a uniform scheduling order. The same day, the trial court sent a letter to the Association and Jones that stated "[i]f **ANY** plaintiff fails to announce or to appear at trial, the case will be dismissed for want of prosecution in accordance with Rule 165a, Texas Rules of Civil Procedure."

The Association did not appear for the September 27, 2016 trial setting. The trial court signed a final judgment dated October 14, 2016 that stated the Association "failed to appear [for trial] in person or through its attorney of record" and dismissed with prejudice "all claims that were or could have been brought by [the Association] against [Jones]." The judgment also "order[ed] that [the Association] take nothing and that [Jones] recover…[r]easonable and necessary attorney fees in the amount of One Thousand Dollars ($1,000.00) for defending this case through judgment."

On November 14, 2016, the Association filed a motion for new trial contending the trial court "[had] jurisdiction to vacate[] the [j]udgment, reinstate the case and set [the] case for trial." On January 9, 2017, a hearing was conducted on the Association's motion for new trial. In the hearing, counsel for the Association stated she "was not aware that there was a September trial date" and

that her "paralegal didn't tell [her] about this trial date." Further, counsel stated she "personally did not know about the trial date or [she] would have been there." The trial court did not announce a ruling or sign an order. On January 12, 2017, the Association filed this appeal.

A. Standard of Review

We review a trial court's denial of a motion to reinstate, dismissal for want of prosecution, and award of attorney's fees under an abuse of discretion standard. *See MacGregor v. Rich,* 941 S.W.2d 74, 75 (Tex. 1997); *see also Smith v. Babcock & Wilcox Const. Co.,* 913 S.W.2d 467, 467 (Tex. 1995); *see also Ridge Oil Co., Inc. v. Guinn Invs., Inc.,* 148 S.W.3d 143, 163 (Tex. 2004). We will only disturb a trial court's ruling if the trial court acted "in an arbitrary or unreasonable manner without reference to any guiding principles." *Downer v. Aquamarine Operators Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985).

II. Reinstatement

In its first issue, the Association contends "[t]he failure of the trial court to reinstate the case pursuant to Rule 165a(3) of the Texas Rules of Civil Procedure was improper and an abuse of discretion." The Association argues "its failure to appear for trial was a mistake and was not intentional" and therefore "pursuant to Rule 165a and Texas case law, the suit should have been reinstated by the trial court." We agree.

B. Applicable Law

If a trial court dismisses a case for want of prosecution, the trial court "has plenary power to reinstate [the] case within thirty days after it signs an order of dismissal for want of prosecution." *In re Valliance Bank,* 422 S.W.3d 722, 725 (Tex. App.—Fort Worth 2012, no pet.). A "motion to reinstate shall set forth the grounds therefor and be verified by the movant or his attorney" and "shall be filed with the clerk within 30 days after the order of dismissal is signed or within the period provided by Rule 306a." TEX. R. CIV. P. 165a. "The 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). "A failure to appear 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." *Smith v. Babcock & Wilcox Const. Co.*, 913 S.W.2d 467, 468 (Tex. 1995). "Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied." *Id.* Finally, "conscious indifference means more than negligence." *Id.*

C. Application of the Law to the Facts

The Association failed to appear for trial on September 27, 2016 and the trial court signed an order dated October 14, 2016 dismissing the case. On November 14, 2016 the Association filed a "Motion for New Trial" and requested the trial court to reinstate the case. In the hearing for the motion for new trial, counsel for the Association stated she "was not aware that there was a September trial date" and that her "paralegal didn't tell [her] about this trial date." Counsel further stated she "personally did not know about the trial date or [she] would have been there." On this record, we conclude counsel for the Association reasonably explained her failure to appear for the September 27, 2016 trial setting was not intentional or the result of conscious indifference. *See Dalmex, Ltd. v. Apparel Enterprises, Inc.*, 455 S.W.3d 241, 244 (Tex. App.—El Paso 2015, no pet.) ("Mistakes in internal office procedures and other circumstances that result in an event not being properly calendared demonstrate that the failure to appear [is] not intentional but due to accident or mistake."). Therefore, the trial court abused its discretion in not reinstating the case. We decide the first issue in appellant's favor.

III. Dismissal With Prejudice

In its second issue, the Association argues the "[trial] court's failure to dismiss without prejudice is reversible error." The Association contends the "only remedy available to a trial court under Rule 165a is a 'dismissal for want of prosecution' and 'such dismissal should be [sic] made without prejudice.'"

A. Applicable Law

"A trial court's authority to dismiss a case for want of prosecution stems from two sources: (1) Rule 165a of the Texas Rules of Civil Procedure, and (2) the court's inherent power." *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). Under Rule 165a, a trial court may dismiss a case on "failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice" or when a case "is not disposed of within the time standards promulgated by the Supreme Court." TEX. R. CIV. P. 165a(1), (2). Additionally, "the common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence." *Villarreal* 994 S.W.2d at 630.

"A dismissal with prejudice is an adjudication of the parties' rights; a dismissal without prejudice is not." *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 461 S.W.3d 627 (Tex. App.—Fort Worth 2015, pet. denied). "A dismissal for want of prosecution is not a trial on the merits" therefore "the proper order is a dismissal without prejudice rather than a dismissal with prejudice or a take-nothing judgment." *Texas Attorney General v. Abbs*, 812 S.W.2d 605, 608 (Tex. App.—Dallas 1991, no writ); *see also Melton v. Ryander*, 727 S.W.2d 299, 303 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) ("When a case is dismissed for want of prosecution, it is error for the trial court to dismiss the case with prejudice."); *see also Lum v. Lacy, 616 S.W.2d 260, 261* (Tex.

Civ. App.—Houston [1st Dist.] 1981, no writ) ("In rendering judgment dismissing a suit for want of prosecution, the judge must refrain from rendering a judgment against the merits of the suit.").

B. Application of the Law to the Facts

The Association failed to appear for trial set on September 27, 2016. Therefore, the trial court's final judgment dated October 14, 2016 stated the case was "dismissed with prejudice," and "[the Association] take nothing." The Association's dismissal for want of prosecution was not a trial on the merits and the proper order was a dismissal without prejudice. *See Abbs*, 812 S.W.2d 605, 608. The trial court abused its discretion in dismissing this case with prejudice. *See id.* We decide the second issue in appellant's favor.

IV. Attorney's Fees

In its third issue, the Association argues the "trial court committed reversible error in awarding attorney's fees to Ms. Jones" and therefore the trial court should be reversed. The Association contends the award was improper because a "party must affirmatively plead any claim for relief—including attorney's fees" and "a party cannot recover attorney's fees unless provided by statute or contract."

A. Applicable Law

A party requesting attorney's fees "must affirmatively plead for them to be eligible for a judgment containing a fee award." *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015). Additionally, there is a "general rule that a party may not recover attorney's fees for the litigation in which it is involved unless recovery is authorized by statute or contract." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. and Research Corp.*, 299 S.W.3d 106, 119 (Tex. 2009). "To be entitled to a discretionary award of attorney's fees, the movant must file an affirmative pleading requesting them." *Swate v. Medina Community Hosp.*, 966 S.W.2d 693, 701 (Tex. App.—San Antonio 1998, pet. denied). "A general prayer for relief will not support an award of attorney's

fees because it is a request for affirmative relief that must be supported by the pleadings." *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.).

B. Application of the Law to the Facts

Following the Association's original petition and requests for disclosure, Jones filed an original answer that included a general denial. Jones did not assert any affirmative pleadings or request attorney's fees in her original answer. In Jones' prayer in her original answer, she only "ask[ed] the [trial] court to dismiss this suit or render judgment that plaintiff take nothing, assess costs against plaintiff, and award defendant all other relief to which defendant is entitled." Because Jones' claim was not supported by an affirmative pleading and only contained a general prayer for relief, the trial court abused its discretion in awarding Jones attorney's fees. *See Alan Reuber Chevrolet*, 287 S.W.3d 877. Appellant's third issue is decided in its favor.

V. Conclusion

We conclude the trial court abused its discretion in failing to reinstate this case, dismissing the Association's claims with prejudice, and in awarding attorney's fees to Jones. Accordingly, the trial court's judgment is reversed, we render reinstatement of the case, and this matter is remanded to the trial court for further proceedings consistent with this opinion.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WOLF CREEK ESTATES HOMEOWNERS' ASSOCIATION, INC., Appellant

No. 05-17-00051-CV V.

VALARIE L. JONES, Appellee

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Trial Court Cause No. DC-15-10675.
Opinion delivered by Justice Lang. Justices Evans and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED, RENDERED,** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

Judgment entered this 22nd day of March, 2018.