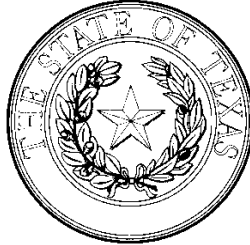


Opinion issued August 25, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00237-CV

RICHARD GUERRERO AND GUISEPPE RECINE, Appellants
V.
MEMORIAL TURKEY CREEK, LTD. AND GEORGE N. POLYDOROS,
Appellees

On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2008-21312

MEMORANDUM OPINION

Richard Guerrero and Guiseppe Recine appeal from (1) the grant of both traditional and no-evidence motions for summary judgment in favor of appellees

Memorial Turkey Creek Ltd. and George N. Polydoros; (2) the grant of their first attorney's Motion to Withdraw; and (3) the denial of their motion for new trial.

We affirm.

BACKGROUND

Guerrero and Recine's commercial lease from Memorial Turkey Creek Ltd. encountered "build-out" delays resulting in their not taking possession or commencing rent payments pursuant to the lease and Memorial Turkey Creek sued for breach of contract. Appellants added Polydoros, the contractor for the build-out, as a third-party defendant and counterclaimed for breach of contract, deceptive trade practices, common law fraud, statutory fraud, and conversion.

The trial court granted appellants' attorney's motion to withdraw for unpaid attorney's fees. Eleven days later, appellees filed both a traditional and a no-evidence motion for summary judgment to which Guerrero and Recine, now without counsel, failed to respond. The court subsequently granted both motions for summary judgment and awarded judgment against appellants, jointly and severally, for \$69,688.36, an additional \$23,000.00 in attorney's fees, and post-judgment interest.

Guerrero, acting *pro se*, filed a timely handwritten and unverified motion for new trial on behalf of both himself and his business partner, Recine, contending that the trial court erred in granting the motions for summary judgment because it

did so “without knowing all the facts” and stating that their failure to respond to the summary judgment motions was “due to confusion created by the deceptive trade practices.” Guerrero alone signed the motion.

Seeking to vacate the order granting both motions for summary judgment and the opportunity to submit a response, appellants’ newly-hired second attorney filed a document entitled “Brief in Support of Defendants’ and Third-Party Plaintiffs’ Motion for New Trial.” This brief clarified that the prior failure to respond to the summary judgment motions was due to the fact that, as *pro se* litigants, the appellants neither knew that a response was required nor appreciated the consequences of not responding. Appellants also challenged the sufficiency of the summary judgment evidence for the first time in this brief.

During the hearing on the motion for new trial, the appellants’ second attorney acknowledged that his clients were notified of the motions’ submission date, but urged the court to set aside the default summary judgments under the *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex. 1939) line of cases because, as unrepresented laymen, Guiseppe and Recine did not understand the practical implications of that notice. This motion was unaccompanied by any affidavits or supporting testimony. Four days later, the trial court denied the motion for new trial and three days thereafter, Guerrero, once again *pro se*, filed a notice of appeal reciting: “Richard Guerrero and Guiseppe Recine desire to appeal

from the order signed on March 11 denying their motion for retrial/reconsideration of summary judgment” Like the prior *pro se* Motion for New Trial, this *pro se* notice of appeal, too, bore Guerrero’s lone signature.

After receiving the notice of appeal, this Court issued an order acknowledging that both the motion for new trial and the notice of appeal were signed only by Guerrero who, unlicensed as an attorney, could not sign for Recine. This Court gave further notice that it might, without further notice, dismiss Recine’s appeal for want of jurisdiction unless he filed a document with the Court Clerk demonstrating why this Court had jurisdiction to hear his appeal.

Recine, through his and Guerrero’s newly hired third attorney, responded by filing an unopposed motion to retain his appeal and a motion for extension of time to file his brief. This Court then issued an order in which we noted that Guerrero’s notice of appeal was filed 4 days late and that he had not filed a motion for extension of time. We informed Guerrero that if he did not reasonably explain his failure to timely file his notice of appeal within 15 days of the date of the order we would dismiss his appeal for want of jurisdiction.

Guerrero and Recine filed a motion for extension of time to file their notice of appeal in which they stated that Guerrero filed the notice of appeal for both of them and he did so “based on his understanding of the advice of his former counsel

regarding when the notice of appeal was due” and that the late filing was not intentional, but rather “was the result of inadvertence, mistake or mischance.”¹

Recine

Subject matter jurisdiction cannot be waived and may be raised by the court on its own motion or for the first time on appeal. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). Recine was not represented by counsel at the time the notice of appeal was due. *See* TEX. R. APP. P. 26.1(a) (“[T]he notice of appeal must be filed within 90 days after the judgment is signed if *any party* timely files . . . a motion for new trial”) (emphasis added). Instead, his business partner and co-defendant Guerrero attempted to file a *pro se* notice of appeal on both his and Recine’s behalf.

Although a layperson has the right to represent himself, those without a license to practice law have no right to represent others. *Jimison by Parker v. Mann*, 957 S.W.2d 860, 861 (Tex. App.—Amarillo 1997, no writ). While Guerrero could represent himself *pro se*, he could not act as an attorney for Recine or file a notice of appeal on Recine’s behalf. *See Paselk v. Rabun*, 293 S.W.3d 600, 605 (Tex. App.—Texarkana 2009, no pet.) (holding notice of appeal filed by one *pro se* litigant on behalf of himself and second *pro se* litigant, who did not sign the notice, was not proper as to non-signing litigant and dismissing second

¹ The Court granted Guerrero’s motion for an extension of time to file his appeal.

litigant's appeal for want of jurisdiction); *see also* Tex. R. App. P. 9.1(b) ("A party not represented by counsel must sign any document that the party files. . . .").

Although Recine's third attorney subsequently filed an amended notice of appeal on his and Guerrero's behalf, that notice was well beyond the ninety-day deadline. Accordingly, the record contains no timely notice of appeal filed by Recine. Therefore, this Court lacks jurisdiction over Recine and we dismiss Recine's appeal and his pending motions for want of jurisdiction.

Guerrero

Guerrero presents the following four issues on appeal: (1) the trial court abused its discretion when it granted appellees' no-evidence motion for summary judgment in violation of its own docket control order, (2) the trial court erred when it granted appellees' no-evidence motion for summary judgment without allowing adequate time for discovery, (3) the trial court abused its discretion when it granted summary judgment against him after the court improperly allowed appellant's first counsel to withdraw and did not give him time to secure new counsel, and (4) the trial court's granting of appellees' no-evidence motion for summary judgment, which was done in violation of the court's own docket control order, effectively deprived him of notice that the motion was being considered and violated his due process rights.

Docket Control Order and Due Process

In his first issue, Guerrero contends that the trial court abused its discretion when it granted appellees' no-evidence motion for summary judgment in violation of its own docket control order and violated his due process rights.

Trial courts have the inherent power to control their docket. *See Choucroun v. Sol L. Wisenberg Ins. Agency-Life & Health Div., Inc.*, No. 01-03-00637-CV, 2004 WL 2823147, at *4 (Tex. App.—Houston [1st Dist.] Dec. 9, 2004, no pet.) (mem. op.) (citing *Ocean Transp., Inc. v. Greycas, Inc.*, 878 S.W.2d 256, 262 (Tex. App.—Corpus Christi 1994, writ denied)). This discretion includes the power to modify a docket control order. *See id.* (holding trial court did not err in allowing party to file motion for summary judgment in violation of existing docket control order); *Trevino v. Trevino*, 64 S.W.3d 166, 170 (Tex. App.—San Antonio 2001, no pet.) (stating trial court implicitly modified docket control order by overruling plaintiffs' motion to strike defendants' late-filed motion for summary judgment) (quoting *Ocean Transp.*, 878 S.W.2d at 262 (trial court impliedly modified scheduling order by denying motion to strike expert witnesses and did not abuse its inherent right to change or modify scheduling order)). Accordingly, the trial court did not abuse its discretion by considering appellees' no-evidence summary judgment motion prior to the deadline set in the court's earlier docket control order.

For the first time on appeal, Guerrero contends that the trial court’s granting of the no-evidence motion for summary judgment in direct contravention of its existing docket control order effectively deprived him of notice and violated his right to due process. The record does not reflect that Guerrero raised his due process challenge with the trial court. Accordingly, Guerrero has failed to preserve error with regard to this issue. See *In re L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003) (holding that due process challenge must generally be preserved); *Mitchell v. Verizon Bus. Network Servs., Inc.*, No. 01-08-00132-CV, 2009 WL 1086951, at *4 (Tex. App.—Houston [1st Dist.] Apr. 23, 2009, no pet.) (mem. op.) (applying same rule to due process challenge with respect to grant of summary judgment motion).²

We overrule Guerrero’s first issue.

Inadequate Time for Discovery

In his second issue, Guerrero contends that the trial court erred when it granted appellees’ no-evidence motion for summary judgment without allowing adequate time for discovery. To preserve a complaint that the trial court’s decision on a summary judgment motion was premature, the party claiming it did not have adequate time for discovery must file either an affidavit explaining the need for

² We note that the fact that Guerrero was proceeding pro se for a portion of the time does not excuse his failure to preserve error. *Weaver v. E-Z Mart Stores, Inc.*, 942 S.W.2d 167, 169 (Tex. App.—Texarkana 1997, no pet.) (stating “[a] party proceeding pro se must comply with all applicable procedural rules” and is held to same standards as licensed attorney).

further discovery or a verified motion for continuance. *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). Guerrero did neither. Accordingly, Guerrero failed to preserve any alleged error.

We overrule Guerrero's second issue.

Motion to Withdraw

In his third issue, Guerrero contends that the trial court abused its discretion when it granted summary judgment against him after the court improperly allowed Guerrero's first counsel to withdraw and did not give him time to secure new counsel.

An attorney may withdraw from representation of a client only if the attorney satisfies the requirements of Rule 10 of the Texas Rules of Civil Procedure. *O'Kane v. Chuoke*, No. 01-05-00523-CV, 2007 WL 926494, at *2 (Tex. App.—Houston [1st Dist.] Mar. 29, 2007, no pet.) (mem. op.) (citing to *Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex. 1990)). Rule 10 permits counsel to withdraw only upon written motion showing good cause. *Id.* If no counsel is substituting for the withdrawing attorney, counsel's motion must state "that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion; the party's last known address and all pending settings and deadlines." TEX. R. CIV. P. 10. A trial court abuses its discretion when it grants a motion to

withdraw which does not comply with the mandatory requirements of Rule 10. *Gillie v. Boulas*, 65 S.W.3d 219, 221 (Tex. App.—Dallas 2001, pet. denied).

Guerrero is challenging the order granting his counsel's motion to withdraw for the first time on appeal. Guerrero did not raise this issue in his motion for new trial, the brief offered in support of his motion, or during the hearing on his motion where he was represented by counsel. Accordingly, the error, if any, was waived. *See O'Kane*, 2007 WL 926494, at *2 (noting that failure to specify any pending settings or deadlines in motion to withdraw may violate client's right to due process; concluding alleged error was not fundamental and party's failure to object to motion to withdraw at trial court level waived error).

We overrule Guerrero's third issue.

Motion for New Trial

In his fourth issue on appeal, Guerrero contends that he was entitled to rely upon the docket control order which provided that no-evidence motions for summary judgment would not be considered until a certain date and that by considering and granting the no-evidence motion before that date, the trial court ignored its own order, and in doing so, effectively deprived him of notice that the motion was being considered and violated his due process rights. Guerrero further contends that as a result, his motion for new trial should have been granted without appellant having to prove anything else, citing to *Lopez v. Lopez*, 757 S.W.2d 721,

723 (Tex. 1988) (stating that because record established that appellant had no actual or constructive notice of trial setting, lower court erred in requiring him to show that he had a meritorious defense as a condition to granting his motion for new trial under *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex. 1939)).

First, Guerrero did not raise either his due process challenge or his lack of notice challenge with the trial court. Second, even if Guerrero had raised these issues below, he would still not be entitled to relief on either basis. Unlike in *Lopez*, Guerrero's counsel acknowledged during the hearing on his motion for new trial that both Guerrero and Recine had *actual notice* of the motion's submission date, but that they simply did not understand the implications of the notice provided to them. Moreover, as previously discussed, the trial court's implicit modification of its own docket control order does not necessarily constitute an abuse of discretion. *See Choucroun*, 2004 WL 2823147, at *4 (holding trial court did not err in allowing party to file motion for summary judgment in violation of existing docket control order); *Ocean Transp.*, 878 S.W.2d at 262 (trial court impliedly modified scheduling order by denying motion to strike expert witnesses and did not abuse its inherent right to change or modify scheduling order)).

We overrule Guerrero's fourth issue.

CONCLUSION

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.