

Opinion issued March 31, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00425-CV

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**MICHAEL W. ELLIOTT, Appellant**

**V.**

**JAMES A. WEST AND ROSS REPORTING, INC., Appellee**

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**On Appeal from the Civil County Court at Law Number Four  
Harris County, Texas  
Trial Court Case No. 932254**

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**MEMORANDUM OPINION**

Appellant Michael W. Elliott appeals from a no-evidence summary judgment granted against him. In a single issue, Elliott argues that the county court at law erred in granting summary judgment because the time for discovery

had not passed and because he put forth sufficient evidence to raise a question of fact on the elements of his claims. We overrule Elliott's single issue and affirm the county court at law's judgment.

### **Background**

Appellee Ross Reporting Services, Inc. ("Ross") is a court reporting agency that provides transcripts for depositions taken in lawsuits, among other services. In April of 2006, Elliott attended a deposition at which Ross provided the court reporting services. The parties dispute whether Elliott owes Ross fees for its services at that deposition. Ross brought an action against Elliott in justice court to recover \$175.76 in unpaid fees, and Elliott filed a counterclaims. In April of 2008, the justice court entered a summary judgment on Ross's claims against Elliott, awarding \$175.76 plus interest and attorneys' fees. The April 2008 summary judgment did not dispose of Elliott's counterclaims. In August of 2008, the justice court entered a final summary judgment that Elliott take nothing on his counterclaim.

In December of 2008, Elliott sought a bill of review, asserting that he had not received notice of the summary judgment motion or hearing. The justice court ruled against Elliott on his bill of review, and Elliott did not appeal from that decision. Instead, Elliott filed suit against Ross and its legal counsel, appellee James A. West, in the county court at law based on the underlying dispute over

court reporting fees and Ross and West's conduct in the justice court suit. Ross and West filed a motion for summary judgment, asserting that Elliott's claims against Ross were barred by res judicata or as an impermissible collateral attack on the judgment in the justice court suit and Elliott's claims against West were barred by the qualified immunity afforded to attorneys representing an opposing party in litigation; Ross and West also requested summary judgment on their counterclaim against Elliott for attorneys' fees. Elliott filed a response containing counterarguments but not attaching any summary judgment evidence. After the summary judgment hearing on April 15, 2009, Elliott filed a sworn affidavit with the trial court.

On April 16, the county court at law granted summary judgment in favor of Ross and West on all of Elliott's claims against them and on their counterclaim for attorneys' fees, awarding \$750 plus interest. Elliott filed this appeal from the county court at law's judgment against him.

### **Summary Judgment**

#### **A. Standard of Review**

We review a trial court's decision to grant summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). On a motion for traditional summary judgment, the movant bears the burden of

demonstrating that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant-movant may meet this burden by conclusively negating at least one essential element of each of the plaintiff's causes of action or by conclusively establishing each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Fielding*, 289 S.W.3d at 848; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

## **B. Analysis**

Elliott argues that the county court at law erred in granting summary judgment because the time for discovery had not passed and because he put forth sufficient evidence to raise a question of fact on the elements of his claims. Elliott appears to construe the trial court's judgment as a no-evidence summary judgment. We disagree. Although the summary judgment motion filed by Ross and West states in its introductory section that it is a "Traditional and No-Evidence Motion for Summary Judgment," the motion does not assert any no-evidence challenges to

any of Elliott's claims. Instead, the motion argues only traditional grounds for summary judgment: qualified immunity and res judicata/impermissible collateral attack. Because the trial court's order grants Ross and West's motion for summary judgment, which asserts only grounds for traditional summary judgment, we treat the judgment as a traditional summary judgment rather than a no-evidence summary judgment.

In his first argument, that he was not afforded "adequate time for discovery," Elliott relies on Rule 166a(i), which applies only to no-evidence summary judgments. TEX. R. CIV. P. 166a(i) (requiring an "adequate time for discovery" before a party may move for summary judgment "on the ground that there is no evidence of one or more essential elements of a claim"). Elliott does not assert that he filed an affidavit under Rule 166a(g), nor does he rely on any other basis upon which he contends he was entitled to additional time. *Cf.* TEX. R. CIV. P. 166a(g) (permitting a party to seek additional time to obtain affidavits in response to any summary judgment motion). Further, Elliott has not preserved this complaint. To do so, Elliott was required to request more time from the trial court and support that request with either affidavit testimony establishing the need for more time or a verified motion for continuance. *RHS Interests, Inc. v. 2727 Kirby Ltd.*, 994 S.W. 2d 895, 897 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (citing *Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W. 2d 640, 647 (Tex. 1996)); *see also* TEX. R. CIV. P.

166a(g) (providing requirements for affidavit requesting more time to obtain affidavit evidence); TEX. R. CIV. P. 251, 252 (providing requirements for obtaining a continuance). Elliott did not request a continuance or extension of time and did not file any affidavit testimony until after the summary judgment hearing. The county court at law was not required to consider Elliott's post-hearing affidavit, which Elliott filed without seeking or obtaining leave of court. TEX. R. CIV. P. 166a(c) (providing that, in deciding the summary judgment, the trial court considers the evidence "on file at the time of the hearing, or filed thereafter and before judgment with permission of the court"). We therefore conclude that the county court of law did not err by failing to afford Elliott additional time.

In his second argument, Elliott asserts that he has put on sufficient evidence to raise an issue of fact on his claims. Again, we note that the summary judgment granted by the trial court did not attack the sufficiency of Elliott's evidence to support his claims but, rather, argued that Ross and West were entitled to traditional summary judgment on the basis of their affirmative defenses. Even if this had been a no-evidence summary judgment, Elliott filed no evidence with his summary judgment response. The only evidence filed by Elliott was his own affidavit, which he did not file until after the summary judgment hearing, without leave. As noted above, a trial court is not required to consider affidavits filed after the summary judgment hearing without leave of court. TEX. R. CIV. P. 166a(c).

Elliott put no timely-filed summary judgment evidence before the county court at law. *See id.*

Although not addressed in his issue presented, Elliott does make arguments in his brief attacking Ross and West's right to summary judgment on their affirmative defenses. With regard to West's qualified immunity defense, Elliott argues that a fact issue exists as to whether West fell outside of his immunity because he committed "willful and premeditated fraudulent actions," citing *Albert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 407 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). However, the Court in *Albert* held that an attorney could be liable for such fraudulent actions only if they are "outside the scope of his legal representation of the client" or "foreign to the duties of an attorney." *Id.* The summary judgment evidence shows that West was legal counsel for Ross in the litigation on which Elliott's claims are based, and Elliott's pleadings demonstrate that the conduct by West of which Elliott complains occurred in the scope of that legal representation. Additionally, Elliot filed no controverting evidence tending to show actions by West outside the scope of his representation of Ross. The evidence therefore supports the trial court's summary judgment on Elliott's claims against West on the basis of qualified immunity.

With respect to his claims against Ross, Elliott argues that this action is not an impermissible collateral attack on the prior judgment issued by the justice court.

Elliott first asserts that Ross and West failed to serve him with hearing notices in the previous lawsuit and had ex parte communications with the justice court in that action. Elliott does not provide any argument or legal authority for the implication that such lack of notice could be raised in this separate action against Ross and West. The summary judgment evidence demonstrates that Elliott raised his lack of notice complaints in the previous action through a bill of review from the justice court's summary judgment. The justice court ruled against Elliott on his bill of review, and Elliott did not appeal from that decision. He may not now relitigate that complaint in this action. *See, e.g., Barr v. Resolution Trust Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992); *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996); *Davis v. Helm*, No. 01-01-00110-CV, 2002 WL 1041314, at \*5-6 (Tex. App.—Houston [1st Dist.] May 23, 2002, no pet.) (not designated for publication).

Elliott next argues that the justice court lacked jurisdiction because he does not reside in Harris County and the alleged breach did not occur in Harris County. To the extent this is a jurisdictional challenge,<sup>1</sup> it relates to personal jurisdiction rather than subject-matter jurisdiction. *See, e.g., CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (distinguishing personal and subject-matter jurisdiction). A party waives his challenge to personal jurisdiction over him by making a general

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<sup>1</sup> Appellant does not assert that he does not reside in Texas, only that he does not reside in Harris County.



appearance before the court. *E.g.*, *Velco Chems., Inc. v. Polimeri Europa Ams., Inc.*, No. 14–03–00395–CV, 2004 WL 1965643, at \*1–2 (Tex. App.—Houston [14th Dist.] Sept. 7, 2004, no pet.) (mem. op.) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14, 105 S. Ct. 2174, 2182 n.14 (1985)); *In re Guardianship of Parker*, 275 S.W.3d 623, 627–28 (Tex. App.—Amarillo 2008, no pet.). The summary judgment evidence demonstrates that Elliott filed an answer and counterclaim in the previous lawsuit, which was not made subject to any special appearance and which expressly states that the justice court has jurisdiction over the parties and requests affirmative relief. Elliott therefore waived any challenge to the justice court’s jurisdiction over him in the prior litigation. *See Velco Chems., Inc.*, 2004 WL 1965643, at \*1–2; *In re Guardianship of Parker*, 275 S.W.3d at 627–28.

Elliott also asserts that this action does not collaterally attack the judgment in the prior litigation. Elliott does not support the assertion with legal argument or authority nor does he cite to the appellate record. In his petition, Elliot urges that Ross and West were not entitled to the funds awarded to them in the previous action because they allegedly committed fraud, breach of the underlying transcript agreement, and various other acts of misconduct. The misconduct alleged by Elliott here relates to the merits of the issues that were presented in the prior litigation, either in the original action or in the bill of review proceeding where Elliott

complained of Ross and West's conduct in the original action. This constitutes an impermissible collateral attack on the judgment in the prior litigation. *See, e.g., Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005); *Henderson v. Chambers*, 208 S.W.3d 546, 550–51 (Tex. App.—Austin 2006, no pet.).

Finally, Elliott's civil conspiracy claim fails as a matter of law because we have concluded that the trial court properly granted summary judgment on Elliott's underlying tort claims against West and Ross. *See Gonzales v. Am. Title Co. of Houston*, 104 S.W. 3d 588, 594 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (noting that civil conspiracy is a derivative action premised on an underlying tort and holding that civil conspiracy claim failed where underlying tort failed).

We overrule Elliott's single point of error.

### **Conclusion**

We affirm the judgment of the county court at law.

Elsa Alcala  
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.