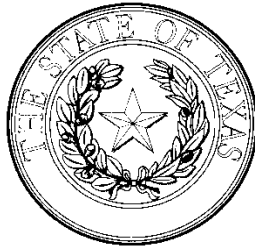


Opinion issued January 13, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00665-CV

AMERICAN JET INTERNATIONAL, INC., Appellant

V.

**R. KEITH MORRIS, SUCCESSOR ADMINISTRATOR OF THE ESTATE
OF JOSE FRANCISCO ORTIZ-VASQUEZ, a/k/a JOSE F. ORTIZ, a/k/a J.
ORTIZ, a/k/a JOSE FRANCISCO ORTIZ, a/k/a FRANSISCO ORTIZ,
DECEASED Appellee**

**On Appeal from Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 378303402**

MEMORANDUM OPINION

Appellant American Jet, Inc. (“AJI”) appeals a summary judgment granted to the administrator of the estate of Jose Francisco Ortiz-Vasquez on sworn

account and a breach of contract claim. In its summary judgment, the trial court concluded that AJI violated the statute of limitations by not filing suit within 90 days of the rejection of its claim as a creditor by the then administrator, Ana Cristina Fernandez. *See* TEX. PROB. CODE ANN. § 313 (Vernon 2003). AJI contends that (1) the order appointing Fernandez and her rejection of the claim were void; (2) Fernandez failed to provide actual notice of the rejection; and (3) the rejection memorandum named the wrong creditor. We hold that Fernandez's appointment was void and, therefore, her rejection of the claim was void. We reverse the judgment of the trial court and remand for further proceedings.

Background

Jose Francisco Ortiz-Vasquez died in May 2007. Two competing probate estates were opened: the first by his mother in Bexar County in September 2007 and the second by Fernandez, his ex-wife, in Harris County in February 2008. Vasquez's mother failed to qualify as temporary administrator in the Bexar County proceeding and that court never appointed an administrator. The Harris County probate court appointed Fernandez as administrator in March 2008. AJI filed claims in both probate courts in the amount of \$153,716.42 and served Fernandez with notice of its appearance in the Harris County probate matter. On July 11, 2008, the Bexar County probate court transferred venue to Harris County and the two cases were thereafter consolidated.

On July 23, 2008, Fernandez filed a rejection of AJI's claim with the Harris County probate court. AJI never received actual notice of the rejection, despite filing a notice of appearance and despite Fernandez giving AJI notice of other filings. Fernandez attached a copy of AJI's claim to her rejection and stated the correct amount of the claim, but misnamed AJI as "Million Air Houston." AJI believed the Harris County claim was deemed rejected 30 days after the filing of the claim, or approximately one week later, because it had no actual notice of any action taken by the administrator. *See* TEX. PROB. CODE ANN. §§ 309, 310 (Vernon 2003) (stating personal representative has 30 days to allow or reject claim, and the claims is rejected if the representative fails to take any action). AJI filed suit on the claim outside the 90 day statute of limitations as counted from the July 23, 2008 rejection date. *See* TEX. PROB. CODE ANN. § 313. Fernandez filed a motion for partial summary judgment asserting the statute of limitations as a defense. The trial court granted the motion and severed AJI's claim from the probate proceeding. AJI timely appealed the summary judgment.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life Accid. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of

material fact exists and the trial court should grant a judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215.

Order Appointing Fernandez Void

AJI contends that the Harris County probate court's March 2008 order appointing Fernandez as administrator was void because Vasquez's mother filed the Bexar County matter first. Fernandez, therefore, lacked authority to reject AJI's claim. Fernandez responds that the Bexar County probate court never appointed an administrator and, therefore, did not have exclusive jurisdiction as the first-filed court because it was not an estate proceeding.

Under Probate Code section 8(a), the first-filed estate proceeding has exclusive jurisdiction over the estate. *See* TEX. PROB. CODE ANN. § 8(a) (Vernon Supp. 2010). Section 8(b) provides that a second-filed estate proceeding is stayed pending disposition of the first-filed estate proceeding. *See* TEX. PROB. CODE ANN. § 8(b) (Vernon Supp. 2010). Any action taken in the second-filed action is void. *Stewart v. Poinboeuf*, 233 S.W. 1095, 1096 (Tex. 1921); *Carter v. Radford*, 652

S.W.2d 469, 471–72 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Derrick v. McGrew*, 636 S.W.2d 860, 861 (Tex. App.—Texarkana 1982, writ ref’d n.r.e.)

Fernandez raised the same exclusive jurisdiction issue in the Fourteenth Court of Appeals to challenge Bexar County’s jurisdiction to transfer venue. *Fernandez v. Bustamante*, 305 S.W.3d 333, 339–342 (Tex. App.—[14th Dist.] 2010, no pet.).¹ The Fourteenth Court held that Bexar County had exclusive jurisdiction as the first-filed probate proceeding. *Id.* at 341–42. Jurisdiction begins “when a person files a petition with the court that is within the court’s subject-matter jurisdiction, such as requesting to become a temporary administrator.” *Id.* at 340. The Fourteenth Court further stated, “a probate proceeding does not terminate merely because a person did not qualify as an administrator or executor; instead the court retains jurisdiction until the administration closes.” *Id.* at 341.²

Fernandez relied on *In re Guardianship of Gibbs*, 253 S.W.3d 866, 877 (Tex. App.—Fort Worth 2008, pet. dism’d), both here and in the Fourteenth Court. *Fernandez*, 305 S.W.3d at 340. In *Gibbs*, the probate court lost jurisdiction after a

¹ The suit in *Fernandez* was brought by Fernandez as the administrator of the Harris County matter while this appeal is brought by a creditor to the estate.

² To support this proposition, the Fourteenth Court cites the following cases: *Balfour v. Collins*, 25 S.W.2d 804, 806 (Tex. 1930) (noting that second county lacked jurisdiction until probate proceeding in initial county disposed); *Wallace v. Dubose*, 242 S.W. 351, 352 (Tex. Civ. App.—San Antonio 1922, no writ) (holding failure to qualify as administrator did not strip county of jurisdiction even though year had passed); *Derrick*, 636 S.W.2d at 861 (noting any actions taken by another court are void while probate pending elsewhere).

temporary guardianship expired. *Gibbs*, 253 S.W.3d at 877. The Fourteenth Court correctly distinguished *Gibbs* because it dealt with Probate Code section 608 which is specific to guardianship proceedings rather than to the probate of an estate. *See* TEX. PROB. CODE ANN. § 608 (Vernon Supp. 2010); *Fernandez* 305 S.W.3d at 340.

Fernandez attempts to distinguish the cases raised by AJI by asserting the probate courts in the first-filed proceedings appointed a personal representative in those cases. *Carter*, 652 S.W.2d at 470; *Derrick*, 636 S.W.2d at 861. Neither case, however, states that the appointment of a personal representative was the basis for the court's holding that exclusive jurisdiction existed in the first-filed proceeding. More importantly, *Fernandez* cites no authority beyond *Gibbs*, nor have we located any authority, that holds the appointment of a personal representative is necessary to confer jurisdiction in the first-filed estate proceeding. In other words, the absence of an administrator does not mean that the estate matter is not a proceeding. *See Fernandez*, 305 S.W. at 341. Neither section 8(a) nor 8(b) requires such an appointment before the first-filed court obtains exclusive jurisdiction. *See* TEX. PROB. CODE ANN. § 8(a), (b). On the contrary, section 8(a) states that the first-filed estate proceeding has and retains exclusive jurisdiction beginning when the probate application "is first filed." TEX. PROB. CODE ANN. § 8(a). This bright line rule avoids races between applicants for a court to appoint a personal representative.

We hold the Bexar County probate court had exclusive jurisdiction at the time of Fernandez's appointment in Harris County and therefore her appointment was void. Any action taken by Fernandez, including the rejection of AJI's claim, was likewise void. We sustain AJI's first issue.

Conclusion

Because we sustain AJI's first issue, it is unnecessary for us to reach the other issues. *See* TEX. R. APP. P. 47.1; *see also Barry v. Barry*, 193 S.W.3d 72, 76 (Tex. App.—Houston [1st Dist.] 2006, no pet.). We reverse the judgment of the trial court and remand for further proceedings.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.