Opinion issued July 28, 2011.

In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00447-CV

SAM LEWIS and SHIRLEY LEWIS, Appellants

V.

CAPITAL ONE AUTO FINANCE, INC., Appellee

On Appeal from County Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 936629

MEMORANDUM OPINION

Appellants, Sam Lewis and Shirley Lewis, appearing pro se,[1] appeal a post-answer default judgment rendered in favor of appellee, Capital One Auto Finance,

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[1] "We note that parties who appear pro se must comply with all applicable laws and rules of procedure and are held to the same standards as are licensed attorneys." *Douglas v. Williams*, No. 01-09-00777-CV, 2011 WL 2499886, at *1 n.1 (Tex.

Inc. ("Capital One"), on its claim for breach of contract and on their counterclaims. In seven issues, the Lewises contend that the trial court erred by (1) failing to file findings of fact and conclusions of law and asking Capital One to prepare the same, (2) the manner in which it held trial, granted judgment, and dismissed their counterclaims, which it then refused to reinstate, (3) refusing to rule on and grant their motion for summary judgment, (4) refusing to rule on and grant their other motions, (5) refusing to allow them a trial by jury, (6) allowing Capital One to continue in the cause of action without curing or pleading in regards to their special exceptions, lack of standing, lack of jurisdiction, statute of limitations, waiver, failure of consideration, repudiation, failure to mitigate, and failure to prove the elements of the cause of action, and (7) granting damages and attorney's fees that were not provided for by the contract. For the reasons stated below, we affirm.

Background

In June 2004, the Lewises purchased a new truck from Sonic Automotive of Texas LP, doing business as Lone Star Ford, pursuant to an installment-sale contract. Under the contract, the Lewises agreed to make monthly payments for

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App.—Houston [1st Dist.] June 23, 2011, no pet h.) (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184 (Tex. 1978); *Kanow v. Brownshadel*, 691 S.W.2d 804, 806 (Tex. App.—Houston [1st Dist.] 1985, no writ)).

six years. The contract assigned without recourse the seller's interest in the contract to Capital One.

Beginning in August, the Lewises made regular monthly payments under the contract. However, after July 2007, the Lewises stopped making further payments, leaving a remaining balance of $15,722.21.

In March 2009, Capital One sued the Lewises for breach of contract and attorney's fees. In July, the Lewises filed their original answer and counterclaims. In October, they filed their first supplement to their original answer and counterclaims. Under the caption "Special Exception," they asserted that Capital One had failed to (1) plead or address limitations, (2) plead lack of jurisdiction or venue, (3) clearly define or list the names of all plaintiffs, (4) prove capacity and standing, (5) prove the elements of the claims, (6) clearly and completely define or list its claims, or (7) prove the facts or claims contained in their supplement.

In October, the trial court issued an order setting the case for trial on January 20, 2010. On December 14, the Lewises filed responses and objections in which they stated, "The cause of action is scheduled for trial in approximately thirty (30) days." The day before trial, the Lewises filed an emergency motion for a continuance.

On January 20, 2010, the trial court conducted a bench trial. The Lewises failed to appear. Capital One offered into evidence the installment-sale contract,

the transaction history of the Lewises' account, and the affidavit of Capital One's attorney of record in support of attorney's fees. In his affidavit, Capital One's attorney attests that pursuant to sections 38.003 and 38.004 of the Texas Civil Practices and Remedies Code, reasonable, customary, and usual attorney's fees for this case were $3,144.44.

On February 24, the trial court signed the final judgment against the Lewises, awarding Capital One $15,722.21 in actual damages for breach of contract and $3,144.44 in attorney's fees with post-judgment interest to accrue at 5% per year and disposing of all other claims in this cause of action, including the Lewises' counterclaims.

On March 16, the Lewises requested findings of fact and conclusions of law.

On March 24, the Lewises filed a motion for new trial, asking whether a secret ex parte nonjury trial took place without their knowledge.

On April 22, the trial court requested Capital One submit its proposed findings of fact and conclusions of law. On April 28, the trial court entered findings of fact and conclusions of law. The trial court found that it had personal jurisdiction over all the parties, that it had subject-matter jurisdiction over the case, that all the parties were properly notified of the trial setting, but that the Lewises failed to appear. The court also found that Capital One proved the elements of its claim by presenting evidence at the trial and that it denied the Lewises'

counterclaims due to their failure to appear. Having considered the Lewises' motion for new trial and the subsequent objections and replies, the court also found that there was insufficient ground to grant a new trial because the Lewises failed to provide sufficient evidence of a good cause for their failure to appear or that they had a meritorious defense.

On May 21, the Lewises filed a verified motion to reinstate. On May 28, the Lewises filed their appeal with this Court.

Special Exceptions

In their sixth issue, the Lewises contend that the trial court erred by allowing Capital One to continue in the cause of action without curing or pleading in regard to their special exceptions concerning Capital One's lack of standing, the lack of jurisdiction, their defense of limitations, their defense of waiver, their defense of failure of consideration, their defense of repudiation, their defense of failure to mitigate damages, and Capital One's failure to prove the elements of the cause of action. However, in the absence of a written order on a special exception, the special exception is waived. *Gallien v. Washington Mut. Home Loans, Inc.*, 209 S.W.3d 856, 862 (Tex. App.—Texarkana 2006, no pet.); *see also Winfield v. Pietsch*, No. 07-09-0261-CV, 2011 WL 336131, at *6 (Tex. App.—Amarillo Feb. 3, 2011, no pet.) (mem. op.); *In re D.C.M.*, No. 14-06-00844-CV, 2008 WL 4146785, at *6 (Tex. App.—Houston [14th Dist.] Sept. 9, 2008, pet. denied) (mem.

op.). Because the Lewises failed to obtain a written order on their special exceptions, they waived their special exceptions.

We overrule the Lewises' sixth issue.

Lewises' Motions

In their third and fourth issues, the Lewises contend that the trial court erred by refusing to rule on or grant their many pre- and post-trial motions, including their motion for summary judgment. In support, they proffer two arguments. First, they note that Capital One did not file a response to any of their motions other than their motion for new trial. Thus, they contend that their motions were unopposed and that the trial court should have granted their motions. However, the Lewises failed to provide any argument or citation to legal authority supporting this conclusion. *See* TEX. R. APP. P. 38.1(i) ("[An appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

Second, they contend that a trial court abuses its discretion by refusing to rule on a motion or objection within a reasonable time. *See, e.g., Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) ("When a motion is properly filed and pending before a trial court, . . . a trial court must consider and rule upon the motion within what, when all the surrounding circumstances are taken into account, constitutes a reasonable time. . . . [A] trial

court has no discretion to refuse to act."); *see also Grant v. Wood*, 916 S.W.2d 42, 45 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding) (citing *Cooke v. Millard*, 854 S.W.2d 134, 135 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding)).[2] Assuming the trial court abused its discretion by failing to rule, we nevertheless conclude that the Lewises have failed to show any harm. A judgment may be reversed on appeal on the ground that the trial court made an error of law only if (A) the error probably caused the rendition of an improper judgment or (B) the error probably prevented the appellant from properly presenting the case to the court of appeals. TEX. R. APP. P. 44.1(a). Although they broadly assert that the trial court's refusal to rule on their many motions harmed them by causing a judgment to be rendered against them, the Lewises fail to show that, had the trial court ruled on their motion, it would have granted their motions. Additionally, the Lewises fail to show how the granting of their motions would have lessened the probability of an improper judgment.

We overrule the Lewises' third and fourth issues.

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[2] We note that the only legal authorities that the Lewises cite in support of the proposition that a trial court abuses its discretion by refusing to rule on a properly filed motion concern the context of a mandamus proceeding, not a direct appeal, as in the present case. They provide no argument or authority to support the proposition that the same legal standard applies on direct appeal.

Manner in Which Court Held Trial and Granted Judgment

In their second issue, the Lewises contend that the trial court erred by the manner in which it held the trial and granted the judgment and by dismissing their counterclaims and failing to reinstate.

A. Default Judgment on Capital One's Contract Claim

A default judgment should be set aside and a new trial granted when the defaulting party establishes that (1) the failure to appear was not intentional or the result of conscious indifference but was the result of an accident or mistake; (2) the motion for new trial sets up a meritorious defense; and (3) granting the motion will occasion no delay or otherwise injure the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939); *see Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966) (applying *Craddock* test to post-answer default judgments). We review a trial court's decision on a motion for new trial for an abuse of discretion. *Cliff v. Huggins*, 724 S.W.2d 778, 778 (Tex. 1987).

The Lewises offer only one explanation for their failure to appear at the January 20 trial setting: They assert that they did not receive notice. However, the Lewises have failed to provide any citation to the record indicating that they did not receive notice of the January 20 trial setting. Likewise, they failed to attach to their motion for new trial any evidence of their purported failure to receive notice. Moreover, we note that in their responses and objections filed on December 14,

2009, the Lewises stated, "The cause of action is scheduled for trial in approximately thirty (30) days." We conclude that the Lewises have failed to show that their failure to appear was not intentional or the result of conscious indifference but was the result of an accident or mistake.

B. Dismissal of the Lewises' Counterclaims

A trial court may dismiss a party's claims for affirmative relief if the party fails to appear for a hearing or trial of which the party had notice. TEX. R. CIV. P. 165a(1). "Notice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk . . . to each party not represented by an attorney . . . ." *Id.* "At the dismissal hearing, the court shall dismiss for want of prosecution unless there is good cause for the case to be maintained on the docket." *Id.* The failure to provide adequate notice of the trial court's intent to dismiss for want of prosecution requires reversal if not cured. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999).

The Lewises assert that they did not receive a notice of intent to dismiss and that the trial court never held a pre-dismissal hearing. However, the Lewises have failed to provide any evidence that they did not receive notice of intent to dismiss.[3] Rather, in their request for documents to be included in the clerk's record, the

[3] We note that the Lewises alleged in their verified motion to reinstate that they did not receive notice of intent to dismiss. However, as explained below, the Lewises' motion to reinstate was not timely filed.

Lewises referred to a notice of intent to dismiss signed on February 12, 2010, which stated that the case was set for March 8, 2010 at 9:30 a.m. We conclude that the Lewises have failed to show that they did not receive notice of intent to dismiss.

C. Failure to Reinstate the Lewises' Counterclaims

A party may file a verified motion to reinstate within 30 days after the order of dismissal is signed. TEX. R. CIV. P. 165a(3). "The court shall reinstate the case upon finding after a hearing that the failure of the party . . . 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." *Id.* We review a trial court's decision on a motion to reinstate for an abuse of discretion. *Brown v. Howeth Invs., Inc.*, 820 S.W.2d 900, 903 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

The trial court signed the final judgment dismissing the Lewises' counterclaims on February 24, 2010, and the Lewises filed their motion to reinstate on May 21, 2010. Because they failed to file their motion to reinstate by the 30-day deadline, the trial court did not abuse its discretion by allowing their motion to reinstate to be overruled by operation of law. *See* TEX. R. CIV. P. 165a(3).

D. Capital One's Attorney at Trial

Also in their second issue, the Lewises assert that Capital One did not attend the January 20 trial because counsel other than Capital One's attorney of record appeared. However, the Lewises fail to provide any citation to the record indicating that the attorney who appeared was not authorized to represent Capital One. In their reply brief, the Lewises note that the reporter's record does not indicate that the trial court ever asked the attorney to identify himself. However, they fail to cite to any legal authority establishing that the reporter's record's silence on this issue constitutes error. Moreover, the Lewises also fail to show how the attorney's appearance caused them harm—that is, how it probably caused the rendition of an improper judgment or how it probably prevented the appellant from properly presenting the case to the court of appeals.

We overrule the Lewises' second issue.

No Trial By Jury

In their fifth issue, the Lewises contend that the trial court abused its discretion by refusing to allow them a trial by jury. They Lewises provide no argument or citation to legal authority to support this proposition. We conclude that the Lewises have waived their first issue for failure to adequately brief. *See* TEX. R. APP. P. 38.1(i).

We overrule the Lewises' fifth issue.

Findings of Fact and Conclusions of Law

In their first issue, the Lewises contend that the trial court erred by failing to file its own findings of fact and conclusions of law and by asking Capital One to prepare the same. They further assert that this action hinted of a possible bias, fraud, and conspiracy. According to the Lewises, a trial court has a responsibility to prepare its own findings of fact and conclusions of law. However, the Lewises provide no argument or citation to legal authority to support their assertions. We conclude that the Lewises have waived their first issue for failure to adequately brief. *See* TEX. R. APP. P. 38.1(i).

We overrule the Lewises' first issue.

Award of Damages and Attorney's Fees Not Provided for By Contract

In their seventh issue, the Lewises contend that the trial court erred by granting damages and attorney's fees that were not provided for by the contract. Specifically, the Lewises assert that prior to signing the contract, they struck out certain terms concerning remedies and the recovery of attorney's fees in the event of their default.

The installment sale contract at issue is a form contract printed on both sides of a long piece of paper. On the front, the contract displays the Lewises' signatures and the material terms of the bargain, including a description of the vehicle; the amount borrowed; the interest rate; and the number, frequency, and

amount of payments due. Also on the front, immediately underneath the Lewises' signatures, appears the phrase, "See back for other important agreements." The terms that the Lewises alleged that they struck out appear on the backside of the contract, which they attached as an exhibit to their original answer.[4]

However, at trial, Capital One admitted into evidence only the front side of the contract. Capital One also admitted a transaction history for the Lewises'

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[4] The copy of the backside of the contract that the Lewises attached to their original answer appears in pertinent part as follows:

> You may have to pay all you owe at once. ~~If you break your promises (default), or if the contract is impaired, we may demand that you pay all you owe on this contract at once. You will be in default if:~~
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> - You do not pay any amount when due;
> - You file bankruptcy, bankruptcy is filed against you, or the vehicle becomes involved in a bankruptcy.
> - You allow a judgment to be entered against you or the collateral; or
> - You break any of your promises in this contract.
>
> . . . .
>
> You may have to pay collection costs. ~~If we hire an attorney who is not a salaried employee to collect what you owe; you will pay any reasonable attorney's fees plus any court costs and disbursement as the law allows.~~

Even as supposedly modified, the contract still provides that the Lewises "may have to pay all you owe at once . . . [and] may have to pay collection costs." Although the contract may not expressly authorize attorney's fees, it does not prohibit them either.

account, which displayed a remaining balance of $15,722.21, and an affidavit from its attorney attesting that reasonable, customary, and usual attorney's fees for this case were $3,144.44. The trial court awarded damages in exactly these amounts. The Lewises failed to appear, and thus they offered no contravening evidence. Because the purportedly altered terms were not admitted at trial, the trial court did not erred by awarding damages and attorney's fees.

We overrule the Lewises' seventh issue.

Conclusion

We affirm.

Laura Carter Higley
Justice

Panel consists of Justice Keyes, Higley, and Matthews.[5]

[5] The Honorable Sylvia Matthews, judge of the 281st District Court of Harris County, participating by assignment.