Opinion issued October 27, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00581-CV

DANIEL PANTLITZ, Appellant

V.

EDWIN J. SIKKENGA, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2007-67477

MEMORANDUM OPINION

Appellant, Daniel Pantlitz, appeals from a final judgment entered in favor of Appellee, Edwin J. Sikkenga. Pantlitz brought suit against Sikkenga claiming negligence in an automobile accident between the two parties. In three issues, Pantlitz contends the trial court abused its discretion in denying his (1) emergency

motion for continuance prior to trial, (2) motion for new trial and (3) motion for continuance at the time of trial in order to call the investigating officer as a witness. Sikkenga asks this Court to award sanctions on the ground that Pantlitz's appeal is frivolous because he failed to provide a reporter's record.[1]

We affirm the judgment of the trial court and deny Sikkenga's motion for sanctions.

Background

On January 24, 2007, Daniel Pantlitz was involved in an automobile accident with Edwin J. Sikkenga, who was driving a Federal Express truck at the time of the accident. Pantlitz brought a negligence suit against Sikkenga in the 151st Harris County district court on November 1, 2007.

The suit between Pantlitz and Sikkenga was first set for trial for the week starting April 6, 2009, with discovery to be completed by March 6, 2009. On January 12, 2009, the parties filed a joint motion for continuance to continue discovery. The trial court granted the motion and reset the trial for July 6, 2009.

About a month before a trial setting, Pantlitz amended his petition to join Federal Express to the suit as a defendant. Following this amendment, Pantlitz filed a motion for continuance on June 16, 2009. In the motion, Pantlitz stated that discovery was incomplete and he intended to depose the officer who investigated

[1] *See* Tex. R. App. P. 45.

the accident and the eyewitness. The trial court granted the motion for continuance and reset the trial for the two-week docket beginning March 1, 2010.

In response to Federal Express's motion for summary judgment, Pantlitz filed his third motion for continuance on September 4, 2009 on the grounds that discovery was incomplete and he needed to depose the same persons identified in his second motion for continuance. The trial court denied this motion and granted summary judgment in favor of Federal Express.

In preparation for trial, the trial court ordered the parties to exchange deposition excerpts on or before February 18, 2010, and file any motion for continuance before February 19, 2010. Sikkenga subpoenaed and deposed the investigating officer and the eyewitness to the accident on February 9, 2010. Pantlitz was present at both depositions.

Pantlitz filed an emergency motion for continuance on February 23, 2010, on the grounds that he had not received the transcripts of the depositions, placing him at great disadvantage in preparing for trial since opposing counsel had received the transcripts earlier. Pantlitz claims he requested a copy of the deposition transcripts and expected to receive them on February 19, 2010. He planned to use the deposition to call into question the credibility of the eyewitness at trial. The trial court heard and denied this motion for continuance on February 25, 2010, but ordered Sikkenga to send copies of the depositions to Pantlitz by

11:00 a.m. on Friday, February 26, 2010. Pantlitz claims he did not receive a legible copy of the transcripts until Monday, March 1, 2010.

The case was transferred from the 151st district court to the 190th district court on March 2, 2010 and went to trial on March 3, 2010. In his brief on appeal, Pantlitz claims he unsuccessfully orally re-urged his emergency motion for continuance at the start of trial on the grounds he was not adequately prepared for trial because he did not receive the deposition transcript on time.

Pantlitz also claims he moved for continuance during trial because the investigating officer, whom he had subpoenaed to appear, was not present. Pantlitz further asserts the trial court denied this motion as well. According to Pantlitz, the officer went to the 151st court, the clerk did not redirect the officer to the 190th court, and Pantlitz was unable to reach the officer on the day of trial.

The case was submitted to the jury on March 3, 2010. The jury returned a verdict for Sikkenga and the trial court rendered a take-nothing judgment on March 30, 2010. Pantlitz filed a motion for a new trial, which the trial court denied on June 18, 2010. The trial court vacated its March 30, 2010 judgment on June 14, 2010, and fully reinstated it on June 18, 2010. Pantlitz filed an amended motion for a new trial on June 29, 2010. The amended motion was overruled by operation of law.

Pantlitz then brought this appeal contending the trial court abused its discretion in denying his (1) pretrial emergency motion for continuance, (2) motion for new trial, and (3) motion for continuance during trial in order to call the investigating officer as a witness. On April 15, 2011, Pantlitz filed a motion asking this Court to reverse the trial court without a reporter's record. This Court granted the motion in part and denied it in part, stating the Court would consider the appeal without a reporter's record. In his brief, Sikkenga moved to impose sanctions on Pantlitz for frivolous appeal for failing to provide a reporter's record.

Motions for Continuance

In three issues, Pantlitz contends that the trial court erred in denying his (1) pretrial emergency motion for continuance for lack of preparation for trial, (2) motion for new trial, and (3) motion for continuance during trial in order to call the investigating officer as a witness. Pantlitz's second issue on appeal, concerning the trial court's denial of his motion for new trial was based on the denial of his emergency motion for continuance. Pantlitz contends in his brief that, by denying his motion for continuance, the court deprived him of "material testimony to develop the merits of his case." Accordingly, we consider his second issue on appeal together with his first, which concerns the trial court's denial of the same emergency motion for continuance.

A. Standard of Review

An appellate court reviews the trial court's ruling on a motion for continuance for an abuse of discretion. *See Landers v. State Farm Lloyds*, 257 S.W.3d 740, 747 (Tex. App. — Houston [1st Dist.] 2008, no pet.) (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)). The trial court has broad discretion to deny or grant a motion for continuance, and the appellate court will not reverse the trial court's decision absent a clear abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *see also Roob v. Von Beregshasy*, 866 S.W.2d 765, 767 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Considering the circumstances at the time the motion is denied, a trial court abuses its discretion if it acts in an arbitrary and unreasonable manner without reference to any guiding rules or principles. *Landers*, 257 S.W.3d at 747. To decide if a trial court has abused its discretion, the appellate court considers the following non-exclusive factors: (1) the length of time the case has been on file; (2) the materiality of the discovery sought; and (3) whether due diligence was exercised in obtaining discovery. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). The appellate court may not substitute its judgment for that of the trial court in matters committed to the trial court's discretion. *In re Spooner*, 333 S.W.3d 759, 763 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding).

B. Waiver

As an initial matter, we must determine whether any of Pantlitz's issues on appeal have been waived. Sikkenga argues that all of Pantlitz's issues on appeal have been waived because Pantlitz failed to obtain a reporter's record. Pantlitz contends that the reporter's record is not necessary to reach the merits of his appeal.

To preserve error for appellate review, the appellant must make a timely request, objection, or motion stating the grounds for the ruling the appellant is seeking with sufficient specificity to make the trial court aware of his complaint. TEX. R. APP. P. 33.1(a)(1)(A). In addition, the trial court must rule on the motion either expressly or implicitly. TEX. R. APP. P. 33.1(a)(2)(A). Otherwise, the complaint is waived and cannot be brought up on appeal. TEX. R. APP. P. 33.1(a). It is the appellant's burden on appeal to establish that any error complained of has been preserved. *See Hunt Constr. Group, Inc. v. Konecny*, 290 S.W.3d 238, 242 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

Pantlitz contends on appeal that the trial court abused its discretion by denying his (1) motion for continuance for lack of preparation for trial because he did not receive the deposition transcripts and (2) motion for continuance to call the investigating officer as a witness when the officer did not appear at trial. Pantlitz

also claims that he re-urged the motion for continuance for lack of preparation during trial on additional grounds and it was denied.

No motion for continuance can be granted "except for sufficient cause supported by affidavits, or by consent of the parties, or by operation of law." TEX. R. CIV. P. 251. An oral motion for continuance unsupported by affidavit preserves nothing for appeal. *Dempsey v. Dempsey*, 227 S.W.3d 771, 776 (Tex. App.—El Paso 2005, no pet.); *Taherzadeh v. Ghaleh-Assadi*, 108 S.W.3d 927, 928 (Tex. App.—Dallas 2003, pet. denied).

Moreover, without the reporter's record, there is no proof that Pantlitz made a timely motion to the trial court during trial or that the trial court ruled on any such motion. Pantlitz, as the appellant, had the burden of bringing a record sufficient to show that the trial court abused its discretion. *Nicholson v. Fifth Third Bank*, 226 S.W. 3d 581, 583 (Tex. App.—Houston [1st Dist.] 2007, no pet); *see also In re Mott*, 137 S.W. 3d 870, 877 (Tex. App.—Houston [1st Dist.] 2004, orig. proceeding) (holding "[i]t is axiomatic that the person complaining about a matter in the trial court has the burden to furnish the reviewing court the record demonstrating the matter about which the person is complaining").

Pantlitz's first two issues on appeal relate to his emergency motion for continuance. Pantlitz claims he re-urged the emergency motion for continuance at trial on additional grounds. The re-urging of the motion on additional grounds has

not been preserved for appellate review. *See* TEX. R. APP. P. 33.1(a). However, Pantlitz made his emergency motion for continuance before trial and obtained a ruling on that motion on February 25, 2010. Because this motion was written and verified and because the trial court ruled on the motion, we are able to review whether the trial court abused its discretion in denying Pantlitz's February 2010 emergency motion for continuance.

Pantlitz's third issue on appeal relates to his motion for continuance to call the investigating officer as a witness. Because there is no record of this oral motion and there is no evidence that the motion was supported by affidavit, the issue has not been preserved for appellate review. *See id.*

We overrule appellant's third issue on appeal.

C. February 2010 Motion for Continuance

In the February 2010 motion for continuance, Pantlitz sought a continuance on the grounds that he was at a great disadvantage in preparing for trial because he had not received copies of the deposition transcripts and opposing counsel had received them. Pantlitz asserts he requested a copy of the deposition transcript, expected to receive it by February 19, 2010, and planned to use it to call into question the credibility of the eyewitness. The trial court heard and denied this motion for continuance but ordered Sikkenga to send copies of the transcript to Pantlitz by 11:00 a.m. on Friday, February 26, 2010.

To decide if a trial court has abused its discretion, the appellate court considers the following non-exclusive factors: (1) the length of time the case has been on file; (2) the materiality of the discovery sought; and (3) whether due diligence was exercised in obtaining discovery. *Joe*, 145 S.W.3d at 161.

The length of time the case was on file strongly suggests the trial court did not abuse its discretion in denying Pantlitz's motion for continuance. *See id.* Pantlitz brought suit against appellee Sikkenga on November 1, 2007, and trial was set for April 6, 2009. On January 12, 2009, the parties filed a joint motion for continuance to complete discovery which the trial court granted and trial was reset for July 6, 2009. Appellant filed a motion for continuance on June 16, 2009 in which he stated he intended to depose the investigating officer and the eyewitness—the very witnesses that were not deposed until the eve of trial. The court granted this motion and reset the trial for the week of March 1, 2010. Appellant then filed another motion for continuance on September 4, 2009 on the grounds he needed to depose the same witnesses from the earlier motion. The court denied this motion for continuance.

By the time appellant filed his emergency motion for continuance, this case had been on file for more than two years and the trial court had already granted two continuances specifically to complete discovery, and one continuance premised on the need to depose the investigating officer and the eyewitness. The

denial of the September 4, 2009 motion for continuance should have signaled to appellant that the March 1, 2010 trial date would not likely be continued. *See Perrota v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (stating that trial court's earlier denial of motion for continuance should have alerted appellant to unlikelihood trial date would be continued). The trial court could have reasonably concluded that Pantlitz had had enough time to prepare his case for trial. *See Joe*, 145 S.W.3d at 161.

Additionally, appellant's lack of diligence in pursuing the deposition of the investigating officer and the eyewitness strongly supports the conclusion that the trial court did not abuse its discretion. *See id.* While appellant presented evidence in his emergency motion for continuance stating the materiality of the evidence to his case, the appellant's failure to acquire this evidence sooner suggests a lack of due diligence in obtaining discovery. Appellant was aware of the materiality of the testimony of the investigating officer and the eyewitness at least as early as the June 16, 2009 motion for continuance. Moreover, later motions for continuances were based on the need to continue discovery, specifically to depose the investigating officer and the eyewitness. Pantlitz did not show in these motions why he had not yet deposed the witnesses or why he had waited for appellee to subpoena these witnesses for deposition a month before the trial date. With the trial date looming, Pantlitz's emergency motion did not show what steps he had

taken to obtain the transcripts of the deposition when he did not receive them by February 19, 2010, as he expected. The trial court could have reasonably concluded that any hardship Pantlitz faced was largely a product of his own lack of diligence in securing these depositions earlier in the nearly two-and-a-half years that this case was pending prior to trial. *See id.*

Given the length of time the case was on file and the demonstrated lack of diligence in obtaining discovery, we cannot conclude that the trial court abused its discretion in denying the emergency motion for continuance. We overrule appellant's first and second issues on appeal.

Motion for Sanctions

Sikkenga urges this Court to impose sanctions on Pantlitz pursuant to rule 45 of the Texas Rules of Appellate Procedure for filing a frivolous appeal. Under rule 45, we may award "just damages" for a frivolous appeal on the motion of any party or on our own initiative. Tex. R. App. P. 45; *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). We apply an objective test to determine whether an appeal is frivolous and conduct a full examination of the record and all the proceedings from the viewpoint of the advocate. *Smith*, 51 S.W.3d at 381. The goal of this inquiry is to determine whether the advocate had reasonable grounds to believe that the trial court's judgment should be reversed. *Id.* We exercise prudence and caution and deliberate most carefully before

awarding damages under rule 45. *Id.* We award sanctions in truly egregious circumstances. *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 657 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

An appellant's failure to provide a reporter's record does not, standing alone, make his appeal frivolous. *Sam Houston Hotel, L.P. V. Mockingbird Rest, Inc.*, 191 S.W.3d 720, 721 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Although certain matters raised by Pantlitz on appeal were waived due to his decision not to obtain a reporter's record, not all matters were waived. Additionally, from the viewpoint of Pantlitz, we cannot say that he did not have reasonable grounds to believe that the trial court's judgment should be reversed.

We deny Sikkenga's motion.

Conclusion

We affirm the judgment of the trial court and overrule Sikkenga's request for sanctions.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Massengale.