Opinion issued January 18, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00581-CV

HOWARD GRANT, Appellant

V.

ARIANN M. GRANT, Appellee

On Appeal from the 387th District Court
Fort Bend County, Texas
Trial Court Case No. 15-DCV-226932

MEMORANDUM OPINION ON REHEARING[*]

Appellant Howard Grant and appellee Ariann M. Grant Pradia have been married, divorced, remarried, and divorced again. Howard appeals from the denial of a bill of review regarding their first divorce decree from 2011. He contended that he had no notice of the trial setting and did not receive notice of the entry of default judgment because Ariann gave the trial court an incorrect last known address for him. Ariann denied the allegations and asserted that the bill of review was barred by the four-year residual statute of limitations. On appeal, Howard raises four issues, arguing that the statute of limitations should have been tolled because he proved extrinsic fraud and that the court erred by denying his bill of review.

We affirm.

Background

Howard and Ariann were married in 1994. In 2010, Ariann sued for divorce. Howard answered and filed a counterpetition for divorce. In spite of this, they continued to live in the same house in Missouri City. Meanwhile, before the divorce was finalized, Howard was convicted of health-care fraud and sentenced to three years in prison. An order dated February 25, 2011 required him to surrender to federal prison in Beaumont on March 15, 2011.

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[*] Appellant moved for rehearing of our September 7, 2017 memorandum opinion, and also for en banc reconsideration. The motions are denied. The original panel withdraws its prior opinion and issues this opinion in its stead.

According to testimony from Vicki Pinak, the attorney who represented Ariann in the first divorce, the trial date was set to ensure that it occurred before Howard had to leave for federal prison, and that issue was discussed with the trial judge. Trial was set for March 8, 2011. A notice of trial, which stated the date, time, and location of trial, was sent to Howard, who was representing himself in the divorce. The certificate of service on the notice of trial stated that a "true and correct copy of the foregoing instrument was sent to Howard Grant by Certified Mail . . . Return Receipt Requested, and U.S. Regular Mail, on this the 15th day of January, 2011."

Ariann appeared for trial, but Howard did not. At the close of evidence in the first divorce proceeding, the trial court awarded Ariann property that Howard now contends was his separate property. Ariann did not claim that she had a community interest in the property. The record on appeal does not show when the court rendered judgment, but on April 5, 2011, after Howard reported to prison, a notice of the trial court's entry of a final decree of divorce was sent to him at the Missouri City address. Neither party notified the trial court of Howard's change of address. Howard acknowledges that he learned of the first divorce decree no later than a year after it was entered.

The year after the first divorce, Howard and Ariann remarried. While Howard was incarcerated, Ariann sold, through a trustee, some of the property awarded to

her in the first divorce. Howard now contends that property was his separate property. In late 2015, Howard and Ariann divorced for a second time. After entry of the second divorce decree, on October 7, 2015, Howard filed a bill of review assailing the first divorce decree. Ariann filed a motion for summary judgment arguing that the bill of review was barred by limitations and that Howard failed to use due diligence to set aside the default judgment in the first divorce.

The trial court held a hearing on the bill of review. Ariann testified that Howard "opted not to show up" for trial. She testified that Howard had actual notice of the trial setting because her attorney had conducted a deposition at their home the prior week. Ariann testified, "He was properly notified, whether he signed the green card or not. Ms. Pinak came to our home, she did a deposition with him . . . . Howard was fully aware that we were going to trial." She also said, "He used the excuse that he had a home monitor on his ankle and he couldn't go. Okay. That may be true, but you can get permission to do everything else. You could have appeared. So I can't respond why he didn't appear; and I don't know why he didn't sign the green card."

In addition, both Ariann and her attorney testified that neither of them represented to the court that the property in question was community property. The attorney explained the trial court's award of the property to Ariann, saying that Howard was not "there to put on evidence."

Howard alleged that at the time of the first divorce's trial setting, he was living in the same house and sleeping in the same bed as Ariann. He asserted that Ariann did not inform him of the trial date, and her actions misled him to believe that she was not pursuing the divorce. However, Howard did not support this assertion with testimony or other evidence.

The trial court denied the bill of review and a subsequent motion for new trial. Howard appealed.

Analysis

A bill of review is an equitable proceeding, which is brought by a party who seeks to set aside a judgment that no longer can be challenged by a motion for new trial or by appeal. *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 812 (Tex. 2012). "Ordinarily, a bill-of-review plaintiff must plead and prove: '(1) a meritorious defense to the underlying cause of action, (2) which the plaintiff[] [was] prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence on [its] own part.'" *Id.* (quoting *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004)). When a bill-of-review plaintiff alleges lack of notice of a trial setting, he is relieved of proving the first two elements, but he still must prove lack of fault or negligence. *Id.*; *see Caldwell*, 154 S.W.3d at 96–97. To do that, a bill-of-review plaintiff must show that he has diligently pursued all adequate legal remedies. *Mabon*, 369 S.W.3d at 813; *Bernat*

v. Sotelo, No. 01-16-00235-CV, 2016 WL 7164062, at *1 (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, pet. denied) (mem. op.).

We review a trial court's ruling on a bill of review for an abuse of discretion, indulging every presumption in favor of the court's ruling. *Davis v. Smith*, 227 S.W.3d 299, 302 (Tex. App.—Houston [1st Dist.] 2007, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles. *Id.* "Courts narrowly construe the grounds on which a plaintiff may obtain a bill of review due to Texas' fundamental public policy favoring the finality of judgment." *Mabon*, 369 S.W.3d at 812.

Ordinarily a bill of review must "be filed within four years of the date the judgment is signed unless extrinsic fraud is established or an express limitations period is prescribed by statute." *Valdez v. Hollenbeck*, 465 S.W.3d 217, 221 (Tex. 2015); *see* TEX. CIV. PRAC. & REM. CODE § 16.051 (prescribing four-year residual statute of limitations if "there is no express limitations period"); *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 275 (Tex. 2012) (tolling limitations period because there was some evidence of extrinsic fraud). "Extrinsic fraud is fraud that denies a litigant the opportunity to fully litigate at trial all the rights or defenses that could have been asserted." *PNS Stores*, 379 S.W.3d at 275. "It occurs when a litigant has been misled by his adversary by fraud or deception, or was denied knowledge of the suit." *Id.*

Howard filed the bill of review on October 7, 2015, more than four years after the first divorce decree was signed on April 5, 2011. Thus, his bill of review is barred by the four-year statute of limitations unless he established extrinsic fraud.

In his appellate brief, Howard argues that Ariann committed extrinsic fraud in two ways. First, "through her representations," Ariann allegedly made him "believe that she was not proceeding with the divorce." In particular, he contends that she awoke, kissed him goodbye, went to court, obtained a default judgment of divorce, and never told him the case was set for trial. Howard also contends that Ariann committed extrinsic fraud by providing the trial court with the address of the marital residence in Missouri City as his last known address instead of giving the court the address for the prison in Beaumont. In his brief, he argued that she knew he "was not going to be at the marital residence."

Howard also makes an argument based on a file stamp on the 2011 divorce decree, which was included in the appendix to his appellate brief. But documents in an appendix are not part of the record for appeal and cannot be considered by the court. *See Maher v. Maher*, No. 01-14-00106-CV, 2016 WL 4536283, at *5 (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet.) (mem. op.).

At or immediately prior to the time an interlocutory or final default judgment is rendered, "the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is

taken, which certificate shall be filed among the papers in the cause." TEX. R. CIV. P. 239a. Rendition of judgment is not synonymous with signing a judgment. *See Leonard v. Hearst Corp.*, No. 01-04-01023-CV, 2005 WL 3118700, at *2 n.3 (Tex. App.—Houston [1st Dist.] Nov. 23, 2005, pet. denied) (mem. op.); *Burns v. Bishop*, 48 S.W.3d 459, 465 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A judgment is rendered when the trial court officially announces its decision. *State v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015); *Garza v. Tex. Alcoholic Beverage Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002). When a judgment is rendered orally in open court, the subsequent signing and entry of the judgment are purely ministerial acts. *Dunn v. Dunn*, 439 S.W.2d 830, 832 (Tex. 1969); *Leonard*, 2005 WL 3118700, at *2 n.3. When the trial court's judgment is not announced orally in open court, "then the act of signing the judgment is the official act of rendering judgment." *Leonard*, 2005 WL 3118700, at *2 n.3.

The first divorce trial was set for March 8, 2011. At that time, Howard was still living in the marital residence in Missouri City, making it his last known address at that point in time. Howard has identified two dates, March 8, 2011 and March 11, 2011, as the date when the divorce judgment allegedly was rendered. In his appellate brief, he argues that the divorce was rendered on March 8, but in the trial court he filed a motion "to set aside [the] divorce decree of March 11, 2011." Neither of these dates matches the date when the court signed the divorce decree, April 4, 2011. The

notice that was sent to Howard recited that the final decree of divorce was signed on April 4, 2011, but it did not indicate whether the divorce was rendered at an earlier time.

Howard's last known address up to the time he surrendered to federal custody was the Missouri City address, and Ariann was required to provide the court with his last known address immediately prior to rendition of default judgment. *See* TEX. R. CIV. P. 239a. Thus to demonstrate extrinsic fraud, Howard would have had to show that judgment was rendered after he was incarcerated, and that after that date but before judgment was rendered, Ariann knowingly but falsely certified to the court that his last known address was in Missouri City.

Howard did not make this argument or show that this is what happened. Instead, he argued that Ariann had a duty to inform the court where he would be residing at some time in the future. That is not required by Rule 239a. Thus, we conclude that Howard has not shown extrinsic fraud in regard to certification of his last known address.

Howard also argued in his brief that Ariann misled him to believe that she would not pursue the divorce because they were living together. He presented no evidence of this, and thus he has not shown extrinsic fraud in this regard either.

Finally, Howard did not state a claim for extrinsic fraud by arguing that Ariann's actions in obtaining a judgment in the first divorce proceeding resulted in

his separate property being awarded to her as her share of the community property. If anything, that stated a claim for intrinsic fraud, which includes "any matter which was actually presented to and considered by the trial court in rendering the judgment." *Alexander v. Hagedorn*, 148 Tex. 565, 574, 226 S.W.2d 996, 1001 (1950). A bill-of-review plaintiff is not entitled to relief when he asserts intrinsic fraud. *Id.* The bill-of-review plaintiff is entitled to relief only from extrinsic fraud, i.e., "wrongful conduct of the successful party practiced outside of an adversary trial and which is practiced directly and affirmatively upon the defeated party, or his agents, attorneys or witnesses." *Id.* Howard contends that Ariann made substantive misrepresentations to the court about the characterization of the property that the court awarded to her, which he now claims was his separate property. Although Ariann denies the allegations, the substance of the allegations is intrinsic fraud, not extrinsic fraud. *See id.*

We conclude that Howard has not demonstrated extrinsic fraud. As such, the four-year statute of limitations was not tolled, and the trial court correctly denied his bill of review. *See* TEX. CIV. PRAC. & REM. CODE § 16.051.

In addition to his arguments about extrinsic fraud, Howard argued that because he did not receive notice of a trial setting, his bill-of-review burden was lightened under *Mabon*. Howard's arguments about improper notice of the trial setting pertain to the merits of his bill-of-review appeal. However, in light of our

conclusion that the trial court correctly denied the bill of review because it was barred by the statute of limitations, we do not reach Howard's arguments that the trial court erred by denying his bill of review on the merits. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.

En banc court consists of Chief Justice Radack and Justices Jennings, Keyes, Higley, Bland, Massengale, Brown, Lloyd, and Caughey.