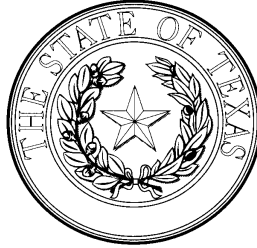


Opinion issued August 14, 2018.



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

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NO. 01-17-00230-CV

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**ERIN E. DAVIS AND JEFFREY DAVIS, Appellants**

**V.**

**BANK OF AMERICA, N.A., COUNTRYWIDE FINANCIAL  
CORPORATION, COUNTRYWIDE HOME LOANS, INC., AND  
BAYVIEW LOAN SERVICING, LLC, Appellees**

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**On Appeal from the 10th District Court  
Galveston County, Texas  
Trial Court Case No. 15-CV-1152**

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**MEMORANDUM OPINION**

Appellants Erin E. Davis and her father, Jeffrey Davis, are appealing the final judgment granting summary judgment and dismissing all of their causes of action against appellees Bank of America, N.A., Countrywide Financial Corporation,

Countrywide Home Loans, Inc., and Bayview Loan Servicing, LLC. We liberally construe appellants' brief to argue that the trial court abused its discretion by implicitly denying the agreed motion for continuance when it granted the pending motions for summary judgment.<sup>1</sup> We affirm the trial court's judgment.

### **Background**

On February 4, 2005, appellant Erin E. Davis ("Davis")<sup>2</sup> executed a note in favor of Countrywide Home Loans, Inc., in the original principal amount of \$254,238.00. To secure payment of the note, Davis executed a deed of trust which granted a first lien against the property located at 3914 Sunset Terrace Drive ("the Property") to Countrywide Home Loans, Inc.

The servicing of Davis's loan was transferred to Bank of America, N.A. ("BANA") on or about July 1, 2011. After Davis defaulted on her loan, BANA notified Davis of the total amount needed to bring the loan current and the specified

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<sup>1</sup> We construe an appellant's pro se brief liberally. *See* TEX. R. APP. P. 38.9; *see also* *Corona v. Pilgrim's Pride Corp.*, 245 S.W.3d 75, 78 n.3 (Tex. App.—Texarkana 2008, pet. denied) ("We review and evaluate pro se pleadings with liberality and patience[.]"). In doing so, however, we are mindful of our role as neutral adjudicators and cannot go so far as to effectively become a pro se appellant's advocate. *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.) ("It would be inappropriate for this Court to attempt to re-draft and articulate what we believe Valadez may have intended to raise as error on appeal.").

<sup>2</sup> Appellants contend that Jeffrey Davis is a co-owner of the property located at 3914 Sunset Terrace Drive because "he made the regular scheduled payments on the Property in the sum of \$1,524.29 for approximately six (6) years."

acceleration date. The servicing of Davis's loan was later transferred to Bayview Loan Servicing, LLC ("Bayview") in December 2013.

On October 28, 2015, appellants sued BANA, Countrywide Financial Corporation<sup>3</sup> and Countrywide Home Loans, Inc. (collectively "Countrywide"), and Bayview (collectivity with Countrywide and BANA, "appellees") alleging claims for (1) intentional infliction of emotional distress, (2) wrongful foreclosure, (3) harassment, and (4) punitive and exemplary damages.

BANA and Countrywide served appellants with interrogatories, requests for production, and requests for admission on October 12, 2016. Although appellants served responses to the requests for admission on November 14, 2016, appellants have not served responses to the interrogatories or requests for production. There is nothing in the record indicating that appellants served any appellee with discovery requests.

The record indicates that the parties, who were engaged in settlement negotiations at the time, filed an Agreed Motion for Continuance of Trial Date and Case Deadlines on December 22, 2016. In their motion, the parties asked the trial court to reset the discovery deadline from January 30, 2017 to May 1, 2017 and reset

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<sup>3</sup> Appellants named "Countrywide Financial Corporation, a Delaware corporation, d/b/a BAC Home Loans Servicing" as a defendant in this suit. "BAC Home Loans Servicing" was not a d/b/a for Countrywide Financial Corporation. Rather, it was a separate entity that, effective July 1, 2011, merged with and into Bank of America, N.A., which was also named as a defendant.

the trial date from March 22, 2017 to June 20, 2017. The parties requested these extensions, in part, “to allow the defendants to further research and investigate the plaintiffs’ claims and the Parties to respond to and conduct additional discovery. Moreover, the extension would allow the Parties to explore all settlement options without the necessity of potential continued protracted litigation.”

In a January 26, 2017 email, four days before the discovery deadline set forth in the current scheduling order, the trial court’s coordinator informed the parties:

The Court is in receipt of the Motion for Continuance filed by defendant on or about 12/22/16 in this matter. The motion and order have been given to [the trial judge] for his review. Be advised that [the trial judge] does not automatically grant continuances, and sets cases for trials within the Model Time Standards adopted by the American Bar Association. Counsel is advised to continue case progression towards trial. If the motion for continuance is granted, counsel will be notified.

BANA and Countrywide moved for no-evidence summary judgment and summary judgment as a matter of law on each of appellants’ causes of action on January 30, 2017, the discovery deadline.<sup>4</sup>

After an attorney for one of the parties inquired again about the status of the motion for continuance, the trial court coordinator sent a second email to the parties on February 9, 2017. In that email, the court directed counsel to review the court’s email from January 26th and reiterated that counsel would be notified if the court granted the motion for continuance.

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<sup>4</sup> Bayview did not file a motion for summary judgment.

BANA and Countrywide's motion for summary judgment was set for submission on March 2, 2017. On March 1, 2017, appellants filed a response to the motion for summary judgment with exhibits.<sup>5</sup>

The trial court signed an order on March 3, 2017 granting BANA and Countrywide's motion for summary judgment on all grounds. The trial court's order also states:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants<sup>6</sup> are entitled to a no-evidence summary judgment on each of Plaintiffs' claims against Defendants.

ACCORDINGLY, all claims asserted by Plaintiffs in the above-entitled action are hereby DISMISSED WITH PREJUDICE.

This is a FINAL JUDGMENT and all relief not expressly granted is hereby denied. All costs are taxed to the party incurring the same.

Appellants filed a motion for new trial on March 20, 2017, which was overruled by operation of law. This appeal followed.

### **Motion for Continuance**

Appellants argue on appeal that the trial court abused its discretion by implicitly denying the agreed motion for continuance when it granted the pending motions for summary judgment. Appellants asserted in the agreed motion for

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<sup>5</sup> In their response, appellants argue that the movants are not entitled to summary judgment as a matter of law because appellants have brought forth evidence raising a question of material fact with regard to each cause of action.

<sup>6</sup> "Defendants" is defined as BANA and Countrywide.

continuance that they needed the additional time, in part, to allow them to respond to and conduct further discovery.

The trial court has broad discretion to deny or grant a motion for continuance. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *McAleer v. McAleer*, 394 S.W.3d 613, 617 (Tex. App.—Houston [1st Dist.] 2012, no pet.). “When reviewing a trial court’s order denying a motion for continuance, we consider whether the trial court committed a clear abuse of discretion on a case-by-case basis.” *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). The trial court’s ruling on a motion for continuance may be explicit or implicit. *See West v. SMG*, 318 S.W.3d 430, 436 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that when trial court grants motion for summary judgment, it implicitly overrules nonmovant’s motion for continuance). A trial court abuses its discretion when it acts in a manner so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. *Id.* at 443. We cannot substitute our judgment for that of the trial court in matters committed to the trial court’s discretion. *McAleer*, 394 S.W.3d at 617.

To determine whether a trial court abused its discretion in denying a motion for continuance that seeks additional time for discovery, we consider the following non-exclusive list of factors: “the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the

continuance has exercised due diligence to obtain the discovery sought.” *Joe*, 145 S.W.3d at 161.

In this case, BANA and Countrywide filed their motions for summary judgment on the day the discovery period closed—fifteen months after the lawsuit began. The case had been pending a little over sixteen months when the trial court granted the no-evidence and traditional motions for summary judgment in March 2017. *Cf. Carter v. MacFadyen*, 93 S.W.3d 307, 311 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding trial court did not abuse its discretion by concluding that adequate time for discovery had passed and granting no-evidence motion for summary judgment filed eight months after petition was filed and three months before close of discovery period). The record also reflects that appellants did not exercise due diligence in procuring discovery from appellees. Specifically, appellants did not serve any appellee with discovery requests or notice a single deposition in this case after filing their petition in October 2015. Although they contend that the parties were in settlement negotiations in December 2016 and they needed the continuance in order to conduct discovery after that date, appellants have not indicated what type of discovery is needed or explained the materiality and/or purpose of such discovery. Furthermore, appellants have not offered any explanation for their delay in requesting discovery from appellees during the fourteen months prior to these negotiations.

We also find appellants' argument that the trial court abused its discretion by sending the February 9, 2017 email unavailing. The record reflects that the court sent the February 9, 2017 email in response to the parties' second request for a status update regarding the pending motion for continuance. Specifically, the trial court's coordinator stated:

[Counsel] has called about the status of the motion for continuance in this matter. I would ask that counsel review the [court's January 26, 2017 email], if [the trial judge] grants the motion for continuance, counsel will be notified.

Thanks for your cooperation and understanding in this matter.

Thus, the February email does nothing more than concisely direct the parties to the court's January 26th email in which it informed the parties that the trial judge does not automatically grant continuances, the parties would be notified if the motion was granted, and admonished the parties to proceed with their trial preparations.<sup>7</sup> The court did not make any assurances regarding the extension of pending case deadlines in either email. We further note that appellants have not brought forth any legal authority supporting this argument.

Given the length of time the case had been on file and appellants' failure to exercise due diligence to obtain any discovery, we cannot say that the trial court

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<sup>7</sup> We do not perceive the tone of the court's February 9th email to be either "forceful" or "intimidating," as appellants contend.



abused its discretion by implicitly denying the motion for continuance. *See Joe*, 145 S.W.3d at 161–62. Accordingly, we overrule appellants’ issue.

### **Conclusion**

We affirm the trial court’s judgment.

Russell Lloyd  
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.