Opinion issued February 13, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00370-CV

EARNEST JEROME TAYLOR DBA T&S ENTERPRISES AND LISA TAYLOR, Appellants

V.

JESUS VELA, BLASA VELA, AND VELA RANCH, LLC, Appellees

On Appeal from the County Court at Law No. 2 and Probate Court
Brazoria County, Texas
Trial Court Case No. CI55847

MEMORANDUM OPINION

Appellants, Earnest Jerome Taylor, doing business as T&S Enterprises, and Lisa Taylor (collectively "the Taylors"), challenge the trial court's order denying their application for a temporary injunction in the underlying bill-of-review

proceeding. In their sole issue, the Taylors contend that the trial court erred in denying their requested injunctive relief.

We affirm.

Background

In two justice court proceedings, appellees, Jesus Vela, Blasa Vela, and Vela Ranch, LLC (collectively "the Velas"), filed forcible detainer actions against the Taylors to recover possession of two tracts of real property in Brazoria County, Texas. In each proceeding, the justice court signed a default judgment against the Taylors and awarded the Velas possession of the property. The Taylors then filed, in each proceeding, their "Appeal, Plea to the Jurisdiction and Original Answer," and they deposited cash in the amount of the bonds set by the court.[1] On March 8, 2017, the Brazoria County county clerk docketed the appeals in the county court at law in Cause Numbers CI55598 and CI55602. The clerk notified the parties that "it is not our policy to automatically set cases for trial, but rather upon a written request from either party. Therefore, if you wish to have this matter heard in an expeditious manner, you will need to request so in writing." Trial in both proceedings was set for April 3, 2017.[2] Neither the Taylors nor their counsel appeared on April 3, 2017.

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1 *See* TEX. R. CIV. P. 510.9(a), (b).

2 *See id.* 510.12 (providing appeal of justice court judgment to county court "subject to trial at any time after the expiration of 8 days after the date the transcript is filed in the county court").

On April 13, 2017, the trial court signed two final judgments, awarding the Velas possession of the property, court costs, and damages in the bond amounts to be paid to the Velas from the registry of the court. That day, the county clerk sent notice of the signing of the default judgments to the parties.

On April 28, 2017, the Taylors filed, in a separate proceeding in the county court at law, their "Original Petition for Bill of Review and Request for Temporary Restraining Order and Temporary Injunction." The Taylors asserted that they did not receive notice of the April 3, 2017 trial settings in Cause Numbers CI55598 and CI55602, the "post-answer default judgment was rendered against [them] without any notice to [them] of the trial setting," and their "inability to prevent the entry of the default judgment was not the result of any fault or negligence or conscious indifference of [the Taylors], but of the lack of notice given to [them]." They requested a "judgment against [the Velas] for damages, general relief, special relief, and exemplary relief as proved." The Taylors also requested issuance of a temporary restraining order and temporary and permanent injunctions to enjoin the Velas from executing on the April 13, 2017 final judgments, "including but not limited to executing upon any Writ of Possession, or taking other steps to evict [the Taylors] or their personal property from the Real Property at issue." The Taylors attached to their original petition Lisa Taylor's affidavit in which she stated:

> I have never been served with notice of any trial settings in [t]he Brazoria County Court at Law No. 2 and Probate Court in Cause

> Number CI55598 and CI55602. I do not have any conscious indifference to the process, and had I received notice, I would have appeared with my counsel at the trial and made my defenses therein. I have read Petitioner's Original Petition For Bill Of Review & Request For Temporary Restraining Order and Temporary Injunction and the factual allegations contained therein are correct.

The trial court signed a temporary restraining order and, after a hearing, signed an order denying the Taylors' application for a temporary injunction.

Standard of Review

Issuance of a temporary injunction is an extraordinary remedy, the purpose of which is "to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). A temporary injunction applicant must plead and prove: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim." *Regal Entm't Grp. v. iPic-Gold Class Entm't, LLC*, 507 S.W.3d 337, 345 (Tex. App.—Houston [1st Dist.] 2016, no pet.). The decision to deny a temporary injunction is within the trial court's discretion. *See id.* A trial court abuses its discretion when it acts arbitrarily or unreasonably, without reference to guiding rules or principles, or misapplies the law to established facts. *See Intercontinental Terminals Co. v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 892 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *INEOS Grp. Ltd. v. Chevron Phillips Chem. Co.*, 312 S.W.3d 843, 848 (Tex. App.—Houston [1st Dist.] 2009, no pet.). A trial court does not abuse its discretion when basing its decision on conflicting

evidence or some evidence reasonably supports its decision. *Henry v. Cox*, 520 S.W.3d 28, 34 (Tex. 2017); *INEOS Grp. Ltd.*, 312 S.W.3d at 848. On appeal, we limit the scope of our review to the validity of the temporary injunction order and do not review the merits of the underlying case. *Vopak N. Am., Inc.*, 354 S.W.3d at 892. We review the evidence in the light most favorable to the trial court's ruling, drawing all legitimate inferences from the evidence and deferring to the trial court's resolution of conflicting evidence. *INEOS Grp.*, 312 S.W.3d at 848.

Temporary Injunction

In their sole issue, the Taylors argue that the trial court erred in denying their application for a temporary injunction because they proved each element for issuance of a temporary injunction. *See City of Hous. v. Hill*, 792 S.W.2d 176, 179 (Tex. App.—Houston [1st Dist.] 1990, writ dism'd by agr.) ("As in any injunction case, the bill-of-review plaintiff must show a probable right of prevailing on its petition and a probable threat of irreparable injury."). The Taylors further argue that because they "presented evidence that they did not receive notice of the [April 3, 2017] hearing," they established a probable right to the relief sought in their petition for a bill of review.

A bill of review is an equitable proceeding brought by a party to a former action who seeks to set aside a final judgment that is no longer subject to challenge by a motion for new trial or an appeal. *Mabon Ltd. v. Afri–Carib Enters., Inc.*, 369

S.W.3d 809, 812 (Tex. 2012); *see* TEX. R. CIV. P. 329b(f). Generally, 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 the plaintiff's own part. *Mabon*, 369 S.W.3d at 812. However, when a bill-of-review plaintiff alleges a lack of notice of the dispositive trial setting, the plaintiff "is relieved of proving the first two elements" but still must prove the lack of fault or negligence. *Id.* (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 87, 108 S. Ct. 896, 899 (1988)); *Grant v. Calligan*, No. 14-15-01084-CV, 2017 WL 455731, at *3 (Tex. App.—Houston [14th Dist.] Feb. 2, 2017, no pet.) (mem. op.). To prove a lack of fault or negligence, the plaintiff must show that the plaintiff diligently pursued all adequate legal remedies.[3] *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.).

[3] The third element, lack of fault or negligence, is conclusively established if the bill-of-review plaintiff can prove that the plaintiff was not served with process. *Mabon Ltd. v. Afri–Carib Enters., Inc.*, 369 S.W.3d 809, 812 (Tex. 2012); *Caldwell v. Barnes*, 154 S.W.3d 93, 97 (Tex. 2004). Here, the Taylors alleged that they did not receive notice of the trial setting and did not allege that they were not served with process.

Here, neither the Taylors nor the Velas presented any witnesses at the temporary injunction hearing. The Taylors offered, and the trial court admitted with no objection, the county clerk's letters about the docketing of the proceedings in the county court at law, the writ of possession issued in each proceeding, their "Appeal, Plea to the Jurisdiction and Original Answer" filed in each proceeding, and the April 13, 2017 final judgments in Cause Numbers CI55598 and CI55602.[4] The Velas offered, and the trial court admitted with no objection, the county clerk's letters notifying the parties of the signing of those judgments. The Velas also offered, and the trial court admitted with no objection, a letter from the Velas' counsel to the Taylors' counsel, stating that the "cases have been set for Trial on Monday, April 3, 2017 at 9:00 a.m. in County Court at Law No. 2 of Brazoria County, Texas." The letter included facsimile confirmation sheets, showing that "Result" was "OK."

The Taylors argue that they met their burden to show a probable right of recovery on their petition for a bill of review because they established that they did not receive notice of the April 3, 2017 trial setting by their counsel's testimony that his office did not receive the facsimile transmission from the Velas' counsel. *See*

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[4] The Taylors did not offer into evidence Lisa Taylor's affidavit that they had included with their petition for bill of review and application for temporary injunction. Absent the parties' agreement, an affidavit filed with an application for injunctive relief does not constitute evidence supporting the issuance of a temporary injunction. *See Shor v. Pelican Oil & Gas Mgmt., LLC*, 405 S.W.3d 737, 751 n.3 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

Vopak N. Am., 354 S.W.3d at 897 ("[T]o show a probable right of recovery, the applicant must plead a cause of action and present some evidence that tends to sustain it."). According to the Taylors, all notice "needed to go through [Corey] Sells," their attorney of record in Cause Numbers CI55598 and CI55602. At the temporary injunction hearing, he stated, but not while under oath, that his office had "an electr[onic] system that records all faxes coming in," "[t]hey have no record of that fax coming into our office," and "we didn't actually receive it."

"Normally, an attorney's statements must be under oath to be considered evidence." *Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997). However, an opponent of the testimony may waive the oath requirement "by failing to object when the opponent knows or should know that an objection is necessary." *Id.* The record reflects that Sells was not sworn before discussing his office's receipt of the facsimile transmission from the Velas' counsel. And the record establishes that he was attempting to show that his office did not receive the facsimile transmission and the Velas' counsel should have known to object to the unsworn statements. Under these circumstances, Sells's statements constituted some evidence that he did not receive the facsimile transmission from the Velas' counsel. *See Banda*, 955 S.W.2d at 272; *Martin v. Fed. Nat'l Mortg. Ass'n*, No. 04-15-00233-CV, 2016 WL 1588517, at *2 (Tex. App.—San Antonio Apr. 20, 2016, no pet.) (mem. op.).

However, even considering Sells's statements, we conclude that the Taylors have not shown that the trial court abused its discretion in denying their application for a temporary injunction. "Abuse of discretion does not exist if the trial court heard conflicting evidence and evidence appears in the record that reasonably supports the trial court's decision." *Tanguy v. Laux*, 259 S.W.3d 851, 856 (Tex. App.—Houston [1st Dist.] 2008, no pet.). We defer to the trial court's resolution of the conflicting evidence presented at the hearing. *See INEOS Grp.*, 312 S.W.3d at 848. Questions of credibility are left to the trial court, and we will not conclude that the trial court abused its discretion based on its resolution of conflicting evidence. *See Regal Entm't Grp.*, 507 S.W.3d at 351.

At the hearing, the trial court admitted into evidence a March 16, 2017 letter from the Velas' counsel addressed to the Taylors' counsel, Sells and Michael R. Casaretto.[5] The letter referenced the two county court at law cases and stated, "Please be advised that these cases have been set for Trial on Monday, April 3, 2017 at 9:00 a.m. in County Court at Law No. 2 of Brazoria County, Texas." The letter indicates that it was sent "Via Fax," and it includes facsimile confirmation sheets showing that the letter was sent on March 16, 2017 and the transmission result to

[5] The record indicates that Michael Casaretto was an attorney of record for the Taylors in the justice court proceedings. Sells, however, signed the Taylors' "Appeal, Plea to the Jurisdiction and Original Answer" filed in each proceeding.

each attorney was "OK." According to the Velas' counsel, the letters were sent to the "fax numbers, per the pleadings" of the Taylors' counsel.

Viewing this evidence in the light most favorable to the trial court's order, the trial court may have reasonably concluded that the Taylors received notice of the April 3, 2017 hearing and did not prove a probable right of recovery on their petition for a bill of review, as required for issuance of a temporary injunction. Accordingly, we hold that the trial court did not err in denying the Taylors' application for a temporary injunction.

We overrule the Taylors' sole issue.

Conclusion

We affirm the trial court's order denying the Taylors' application for a temporary injunction.

Terry Jennings
Justice

Panel consists of Justices Jennings, Massengale, and Caughey.