Opinion issued December 7, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00198-CV

TED L. ROBERTSON, Appellant

V.

URITA EMANUEL-JOHNSON, Appellee

On Appeal from the 247th District Court
Harris County, Texas
Trial Court Case No. 2019-28369

MEMORANDUM OPINION

Appellant Ted L. Robertson sued Urita Emanuel-Johnson seeking a declaration that a default judgment and protective order previously obtained by Emanuel-Johnson were void. Robertson and Emanuel-Johnson both moved for

summary judgment, and the trial court granted summary judgment for Emanuel-Johnson and denied Robertson's motion. We affirm the trial court's judgment.

BACKGROUND

In 2001, Emanuel-Johnson filed an application for a protective order against her ex-husband, Robertson. The 247th Judicial District Court in Harris County issued a citation instructing Robertson to appear before the court on August 15, 2001, for a hearing on the protective-order application. A constable served Robertson, who was in the custody of the Harris County Sheriff's Department, with the citation on August 13, 2001. Robertson did not appear on the day of the hearing, which was conducted by the 312th Judicial District Court, and that court issued a default judgment and protective order against him. Robertson was later criminally charged for violating the protective order, convicted by a jury, and sentenced to 25 years in prison.

In 2019, Robertson filed a declaratory-judgment action, seeking to declare the 2001 default judgment and protective order void. He filed two motions for summary judgment on his claims, and Emanuel-Johnson also filed a motion for summary judgment, arguing the default judgment and protective order were not void and thus not subject to any challenges now; she also raised the affirmative defenses of res judicata, collateral estoppel, and limitations. The trial court granted Emanuel-

Johnson's motion for summary judgment and denied Robertson's motions. Robertson now appeals.

STANDARD OF REVIEW

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In conducting our review, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* When both parties move for summary judgment and the trial court grants one motion and denies the other, as here, we consider the summary-judgment evidence presented by both sides, determine all questions presented, and, if we determine the trial court erred, render the judgment the trial court should have rendered. *Id.*

DISCUSSION

Robertson raises 12 issues on appeal; however, many of these issues are repetitive, and we have identified only three unique points of error in his brief: (1) the trial court erred in not declaring the 2001 default judgment and protective order void; (2) the trial court engaged in judicial misconduct by refusing to transfer the lawsuit and refusing to rule on pending motions; and (3) the trial court awarded excessive attorney's fees to Emanuel-Johnson.

We first note that Robertson filed this action as a request for declaratory judgment. A declaratory judgment can be a proper method to collaterally attack an

earlier judgment, but there must be a "justiciable controversy" between the parties. *See Wagner v. D'Lorm*, 315 S.W.3d 188, 195 (Tex. App.—Austin 2010, no pet.) (although court has no jurisdiction to render declaratory judgment to interpret prior judgment, court may render declaratory judgment declaring prior judgment void); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) ("A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought."). A controversy is justiciable when there is a "real controversy between the parties that will be actually resolved by the judicial relief sought." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). There does not appear to be a justiciable controversy between Robertson and Emanuel-Johnson, given that the underlying protective order expired in 2003, but we decline to consider the issue at this time because Robertson's claim fails for a more fundamental reason: the default judgment and protective order are not void.

A. The underlying default judgment and protective order are not void

Both Robertson and Emanuel-Johnson moved for summary judgment regarding the validity of the default judgment and protective order. Robertson argued that there were technical defects in the citation he received notifying him to appear for the 2001 hearing on the protective order, and so the trial court never obtained personal jurisdiction, making the ensuing default judgment and protective order

void. Emanuel-Johnson argued, however, that Robertson was properly served, and so the default judgment and protective order were not void and thus not subject to being challenged now.

1. Applicable law

A court must acquire personal jurisdiction over a defendant to properly render a default judgment against him. *See Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). Personal jurisdiction depends on citation issued and served in a manner provided for by law. *Id.* If the court rendering the default judgment lacks personal jurisdiction over the defendant, the default judgment is void. *See Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010). Further, a default judgment entered without notice or service violates a defendant's rights under the Due Process Clause of the United States Constitution. *Peralta v. Heights Med. Ctr., Inc*. 485 U.S. 80, 84 (1988). When a default judgment violates a defendant's due process rights, the judgment is void and may be challenged through a collateral attack. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 273 (Tex. 2012). But mere technical defects in service do not rise to the level of a due process violation to render a default judgment void. *Id.* at 274.

A void judgment, as opposed to a voidable judgment, is subject to a collateral attack, which may be raised at any time. *Id.* at 272. A collateral attack is an attempt to set aside the binding force of a judgment in a separate proceeding. *Browning v.*

Prostok, 165 S.W.3d 336, 346 (Tex. 2005). If a judgment is not void, it is not subject to collateral attack. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (per curiam). Any errors that render a judgment voidable, instead of void, must be corrected through a direct attack, such as a motion for new trial, a direct appeal, a restricted appeal, or a bill of review, all of which are subject to limitations. *Id.*; *PNS Stores*, 379 S.W.3d at 271, 272 n.7.

2. Analysis

Robertson has raised a collateral attack against the 2001 default judgment and protective order on the grounds that the judgment and order are void. He argues the 247th Judicial District Court issued the citation ordering him to appear at the protective order hearing, not the 312th Judicial District Court that ultimately issued the default judgment and protective order, and so the 312th Judicial District Court never issued a citation that was in accordance with Rule 106 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 106(a). He also argues that the citation he received did not include a copy of the application for protective order, in violation of Rule 106. *See id.* Finally, he argues that the return of service was not on file with the clerk for ten days before the court entered the default judgment against him, in violation of Rule 107. *See* TEX. R. CIV. P. 107(h).

Robertson has alleged only technical defects in service, not a "complete failure or lack of service" that would violate due process. *See PNS Stores*, 379

S.W.3d at 274 (distinguishing between improper service resulting from technical defects and complete lack of service and holding only lack of service violates due process). Robertson received service of the citation and was notified of the application for protective order against him. Robertson's complaints about the defects in service do not rise to the level of a due process violation that would render the default judgment and protective order void and subject to collateral attack. *See id.* at 275 ("When a defective citation is served, but the citation puts the defendant on notice of asserted claims in a pending suit, and the technical defects are not of the sort that deprive a litigant of the opportunity to be heard, we reject them as grounds sufficient to support a collateral attack.").

Because the default judgment and protective order are not void, only voidable, they can only be subject to a direct attack. *See id.* at 271 ("It is well settled that a litigant may attack a void judgment directly or collaterally, but a voidable judgment may only be attacked directly."). Robertson did not raise a direct attack, and the limitations for doing so have run. *See id.* at 272 n.7 (explaining limitations periods for direct attacks, which in no event may be brought later than four years after judgment).

Robertson also argues on appeal that Emanuel-Johnson deliberately refused to file her discovery responses in an intentional attempt to exclude these responses from the appellate record. Emanuel-Johnson's attorney filed a letter stating he had

no objection to including the responses in the record, partly because they are inconsequential to the appeal. We agree that these discovery responses do not affect the outcome of the appeal. In his request for admissions, Robertson only asked Emanuel-Johnson to admit facts that have already been established—like the fact that Emanuel-Johnson sought a protective order—or to admit legal conclusions—like whether a judgment issued without personal jurisdiction is void. Emanuel-Johnson's responses, denials, and admissions do not change the analysis that the defects in service of which Robertson complains did not violate due process and did not render the default judgment and protective order void.

The default judgment and protective order were not void, and so Robertson cannot now collaterally attack them. Therefore, the trial court did not err in denying Robertson's motion for summary judgment and granting Emanuel-Johnson's motion. We overrule this point of error.

B. Any error resulting from potential judicial misconduct was not preserved

Robertson's second issue on appeal is that the trial court engaged in judicial misconduct by refusing to transfer the suit to the 312th Judicial District Court and refusing to rule on his pending motions, in violation of canon 3 of the Texas Code of Judicial Conduct. We note at the outset that a violation of the code, even if true, does not automatically amount to reversible error. *Kemp v. State*, 846 S.W.2d 289,

305 (Tex. Crim. App. 1992). At any rate, we may not consider these issues because they have not been preserved for our review.

1. Applicable law

To preserve a complaint for appellate review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion and the trial court either ruled on the party's request, objection, or motion, or refused to rule, and the party objected to that refusal. TEX. R. APP. P. 33.1(a). If a party fails to do this, error is not preserved, and the complaint is waived. *See Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam) (op. on reh'g).

2. Analysis

Here, the record does not show that Robertson requested a transfer of this suit to another court, nor does the record show any motions on which the trial court refused to rule or that Robertson objected to the refusal. Robertson's pro se status does not relieve him of the preservation-of-error requirements applicable to licensed attorneys. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005) (per curiam) (stating "pro se litigants are not exempt from the rules of procedure"); *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978) ("There cannot be two sets of procedural rules, one for litigants with counsel and the other for litigants representing themselves."). Robertson points us to no evidence showing that he

preserved his complaints regarding the trial court's refusal to transfer or refusal to rule on motions through a timely request, objection, or motion.

One of Robertson's complaints against the trial court was that it should have transferred the case to the 312th Judicial District Court because that is the "'only' court to maintain continuing jurisdiction" over the application for protective order with authority to declare the default judgment and protective order void. While we may not consider this issue because error has not been preserved, we note that in civil cases, a trial court retains jurisdiction over a case for 30 days after signing a final judgment or order, and, after the 30 days have run, the trial court loses its plenary power and lacks jurisdiction to act in the matter. TEX. R. CIV. P. 329b(d); *Fuentes v. Zaragoza*, 534 S.W.3d 658, 662 (Tex. App.—Houston [1st Dist.] 2017, no pet.). The 312th Judicial District Court lacks jurisdiction over the 2001 default judgment and protective order, and, to the extent Robertson's request to transfer the case to the 312th Judicial District Court was based on his belief that the 312th Judicial District Court was the only court with jurisdiction over the default judgment and protective order, Robertson was mistaken.

Robertson did not preserve any potential errors regarding the trial court's refusal to transfer the suit or refusal to rule on his motions for our review, and so these issues are waived. We overrule this point of error.

C. The trial court granted reasonable and necessary attorney's fees

Finally, Robertson's third issue on appeal is that the trial court erred by granting excessive attorney's fees.

1. Applicable law

A party may only recover attorney's fees in an action when there is specific statutory or contractual authority allowing it. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 487 (Tex. 2019). An attorney's affidavit can sufficiently establish reasonable attorney's fees on a motion for summary judgment, but the nonmovant may submit an affidavit challenging the reasonableness of the fees, creating a fact issue precluding summary judgment. *See Am. 10-Minute Oil Change, Inc. v. Metro. Nat'l Bank-Farmers Branch*, 783 S.W.2d 598, 602 (Tex. App.—Dallas 1989, no writ). To demonstrate the reasonableness of an attorney's fee calculation, the attorney's affidavit should include "documentation of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 764 (Tex. 2012).

2. Analysis

The Texas Uniform Declaratory Judgments Act authorizes a court to award reasonable and necessary attorney's fees. TEX. CIV. PRAC. & REM. CODE § 37.009. Here, Emanuel-Johnson's attorney filed a declaration in lieu of an affidavit stating

his qualifications, that a reasonable rate for the services his firm provided was $400 per hour, that his firm spent six hours preparing and filing Emanuel-Johnson's motion, and that he anticipated spending three more hours at the hearing on the motion, totaling a fee of $3,600. Therefore, Emanuel-Johnson sufficiently established reasonable attorney's fees, and Robertson did not controvert the reasonableness or necessity of these fees.

The trial court did not err in awarding attorney's fees to Emanuel-Johnson on summary judgment. We overrule this point of error.

D. Emanuel-Johnson's request for damages is denied

Emanuel-Johnson, without citing any authority, asked this court to award her damages because Robertson's appeal is frivolous and seeks to relitigate issues that have already been decided.

Rule 45 of the Texas Rules of Appellate Procedure authorizes a court of appeals to award "just damages" to a prevailing party if the court determines that an appeal is frivolous. TEX. R. APP. P. 45. An appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed. *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation. *Glassman v.*

Goodfriend, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc). Rule 45 does not require the court to award just damages in every case in which an appeal is frivolous. *Id.* After a review of the record, briefing, and other papers filed in this court, we deny Emanuel-Johnson's request for damages. *See* TEX. R. APP. P. 45; *Smith*, 51 S.W.3d at 381; *Glassman*, 347 S.W.3d at 782.

CONCLUSION

Having overruled all of Robertson's issues on appeal, we affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Countiss.