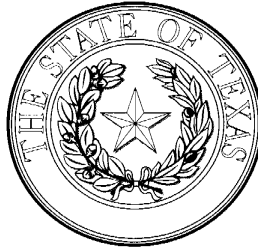


Opinion issued August 16, 2022



In The
Court of Appeals
For The
First District of Texas

NO. 01-21-00317-CV

ROBERT HARDIE TIBAUT BOWMAN AND POWERS L. BOWMAN,
Appellants

V.

MOLLY BOWMAN STEPHENS, Appellee

On Appeal from the 261st District Court¹
Travis County, Texas
Trial Court Case No. D-1-GN-13-000636

¹ Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court from the Court of Appeals for the Third District of Texas. *See* Misc. Docket No. 17-9066 (Tex. June 20, 2017); *see also* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

MEMORANDUM OPINION

This is the second appeal involving these parties. In the first appeal, two brothers—Robert Hardie Tibaut Bowman and Powers L. Bowman—challenged a judgment denying their efforts to force a partition by sale of lake property they jointly owned with their sister, Molly Bowman Stephens. The trial court had ordered a partition in kind and found that equity required that Stephens be awarded a piece of the land to which she alone had a sentimental connection. After this Court affirmed the trial court’s judgment, the matter returned to the trial court for the next phase of the partition proceeding. Appointed commissioners recommended a division of the land into three parts and presented their final report to the trial court. The Bowman brothers objected to the report and asserted a right to a jury trial on the property division. Stephens moved for no-evidence summary judgment on their objections, to allow the commissioners’ report to be confirmed. The trial court granted Stephens’s no-evidence motion after concluding that the Bowman brothers failed to timely file any response to her no-evidence motion and denying them leave to late file.

The Bowman brothers argued to the trial court and now on appeal that they were not adequately informed of the submission date for Stephens’s no-evidence motion and that the notice failure violated their due process rights. Concluding that the Bowman brothers were denied due process, we reverse and remand.

Background

This appeal is from the second stage of a partition proceeding. In the first stage, this Court affirmed the trial court's judgment that a partition in kind was feasible and that Stephens held an equitable right to a portion of the lake property where a family home and dock were located. *See Bowman v. Stephens*, 569 S.W.3d 210, 224–31 (Tex. App.—Houston [1st Dist.] 2018, no pet.). In the second stage, the assigned commissioners proposed dividing the property into three lots of equal value while granting to Stephens the area on which the house and boat dock were located. The commissioners submitted their report with the proposed division to the trial court. The Bowman brothers objected to the report and requested a jury trial on the property division.

Stephens filed a no-evidence summary-judgment motion, challenging each objection made by the Bowman brothers to the commissioners' report. The trial court's assistant sent all counsel an email on December 1, 2020 with a subject line of "RE: D-1-GN-13-000636, setting, Defendant Molly Bowman Stephens No-Evidence MSJ." The email stated:

Dear Counsel,

The Court will determine Defendant's No-Evidence Motion for Summary Judgment by written submission. All motion responses and replies must be filed in compliance with the requirements of the Texas Rules of Civil Procedure and provided to this Court by December 22, 2020. The Motion will remain under advisement pending a ruling from the Court.

Regards,

[signature block]

The Bowman brothers objected. They described the email as instructing them "to respond in accordance with the Rules by December 22nd, 2020, a scant three weeks later," and asked for additional time. They said their expert would need 60 additional days. Their objection mostly referred to December 22 as the understood response date, but they also referred to December 22 as the submission date. Stephens responded to their objection. She asked the trial court to deny the objection and allow the submission of her no-evidence motion "as scheduled."

On December 22, Stephens filed a brief in support of her no-evidence motion. In it, she stated that her motion should be granted because the Bowman brothers had filed no response. Two hours later, the Bowman brothers filed a response with two affidavits attached.

Later that evening, Stephens objected to the Bowman brothers' response, arguing that it was untimely and unaccompanied by a motion for leave to file late. She also objected to the affidavits as conclusory, based on hearsay, and otherwise deficient.

The next day, “[o]ut of an abundance of caution,” the Bowman brothers moved for leave, asserting they understood the December 22 date in the court’s email to be a filing deadline, not a submission date. A few days later, Stephens responded, arguing that the motion for leave was defective because it failed to show that the request would not result in further delay, costs, and prejudice.

The Bowman brothers responded with a letter from their counsel reaffirming their understanding that December 22 was the deadline to respond, not a submission date. This filing led to yet another response from Stephens, on December 28, requesting that the Bowman brothers’ motion for leave be denied.

In early January, the trial court issued a letter ruling that granted Stephens’s no-evidence motion and discussed the wording for a final judgment in her favor, including that the Bowman brothers’ motion for leave would be denied. The Bowman brothers objected that the trial court had not properly informed the parties of the submission date for the no-evidence motion and argued that the notice failure violated their due process rights. Stephens responded, again asserting that the Bowman brothers’ original objection admitted knowledge that December 22 was a submission date.

Two weeks later, in mid-January, a final judgment was entered. It stated that “[o]n December 22, 2020,” the trial court “took under submission and considered Defendant’s No-Evidence Motion for Summary Judgment, together with all

responses and replies thereto, as well as the filings in this case.” The judgment included multiple rulings, some of which are contradictory. The judgment:

- denied the Bowman brothers’ motion for leave to late-file a response to Stephens’s no-evidence motion for summary judgment;
- sustained some of Stephens’s objections to the affidavits attached to the Bowman brothers’ response and overruled other objections;
- granted Stephens’s no-evidence motion “in light of” the Bowman brothers’ “failure to timely come forward with admissible summary[-]judgment evidence” supporting their objections to the commissioners’ report;
- overruled the Bowman brothers’ objections to the commissioners’ report, the subject of Stephens’s no-evidence motion;
- adopted the commissioners’ report; and
- ordered that the property be divided per the commissioners’ report, with specific explanations given as to which sibling was awarded which lot.

It is unclear why the trial court ruled on Stephens’s objections to the Bowman brothers’ summary-judgment evidence considering the trial court denied the Bowman brothers’ leave to late-file their evidence and granted Stephens’s no-evidence motion “in light of” their failure to timely file evidence.

The Bowman brothers moved for a new trial, arguing, among other things, that they were denied due process because the inadequate notice of the submission prevented them from knowing when their summary-judgment response was due. Their motion was denied by operation of law. They appealed.

Special Exceptions

The Bowman brothers made 13 objections to the commissioners' report recommending how the lake property should be partitioned in kind. Stephens specially excepted to those objections. The trial court granted three of Stephens's special exceptions and, as a result, struck three objections. On appeal, the Bowman brothers challenge the trial court's ruling on the special exceptions.

Special exceptions are a vehicle to challenge a defective pleading, including an obscurity or generality in a pleading allegation. TEX. R. CIV. P. 91. If a trial court sustains a special exception and the defect is curable, the trial court must allow the pleader an opportunity to amend. *Parker v. Barefield*, 206 S.W.3d 119, 120 (Tex. 2006); see *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). If the trial court does not provide the opportunity to amend, the aggrieved party must prove that the opportunity to replead was requested and denied to preserve the error for review. *Parker*, 206 S.W.3d at 120 (citing TEX. R. APP. P. 33.1(a)).

The Bowman brothers do not identify anywhere in the record where they requested and were denied the opportunity to replead. We need not search a record for evidence of preservation. See TEX. R. APP. P. 38.1(i) (appellant's brief must contain "appropriate citations to the record"). This issue is waived by failure to adequately brief it. See *id.*; see also *Walker v. Davison*, No. 01-18-00431-CV, 2019 WL 922184, at *2 (Tex. App.—Houston [1st Dist.] Feb. 26, 2019, no pet.)

(mem. op.) (“Adequate briefing [requires] proper citation to the record,” and “[i]f record references are not made . . . the brief fails”). Even without briefing waiver, because there is no indication that the Bowman brothers preserved this issue for appeal, we must conclude it is waived. *See Parker*, 206 S.W.3d at 120; *see also* TEX. R. APP. P. 33.1(a).

Due Process

Throughout this second phase of the partition proceeding, the Bowman brothers argued to the trial court and on appeal that the lack of clear notice of the submission date for Stephens’s no-evidence motion for summary judgment violated their due process rights. They presented their due process objection to the trial court with their motion for leave to late-file their response, in their objections to the submission of the motion, and in their motion for new trial. They also argue a denial of due process in their appellate brief.

The Fourteenth Amendment to the United States Constitution protects against deprivation of life, liberty, or property by the State “without due process of law.” U.S. CONST. amend. XIV, § 1. Once a party has made an appearance in a case, he is entitled, as a matter of due process, to notice of a dispositive hearing or submission. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988); *LBL Oil Co. v. Int’l Power Servs., Inc.*, 777 S.W.2d 390, 390–91 (Tex. 1989) (per curiam). Failure to give proper notice of a submission violates “the most

rudimentary demands of due process of law.” *Peralta*, 485 U.S. at 84 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)).

Due process requires notice that is “reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.” *Id.* (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)); see *Cunningham v. Parkdale Bank*, 660 S.W.2d 810, 813 (Tex. 1983).

Due process also requires notice be given “at a meaningful time and in a meaningful manner” that would enable the party to be bound by the court’s judgment an opportunity to be heard. *Peralta*, 485 U.S. at 86; *Lawrence v. Bailey*, No. 01-19-00799-CV, 2021 WL 2424935, at *9 (Tex. App.—Houston [1st Dist.] June 15, 2021, no pet.) (mem. op.). A judgment entered without notice is constitutionally infirm. *Peralta*, 485 U.S. at 84.

Thus, proper notice to a nonmovant of a summary-judgment submission is a prerequisite to summary judgment. *Rorie v. Goodwin*, 171 S.W.3d 579, 583 (Tex. App.—Tyler 2005, no pet.) The trial court must give notice of the submission date because this date determines when the nonmovant’s response is due. *Id.*; see also TEX. R. CIV. P. 166a(d). “Without notice of hearing or submission date, the nonmovant cannot know when the response is due.” *Rorie*, 171 S.W.3d at 583.

Due to the harshness of summary judgment, reviewing courts strictly construe summary-judgment procedure against the movant. *Id.* This Court and others have reversed summary judgments because a nonmovant was not given adequate notice of the submission date. *See Lawrence*, 2021 WL 2424935, at *10; *In re Office of Att’y Gen. of Tex.*, No. 13-20-00133-CV, 2020 WL 1951544, at *5 (Tex. App.—Corpus Christi Apr. 23, 2020, orig. proceeding) (mem. op.) (trial court violated due process by granting father’s motion to release child-support lien without a hearing and without giving State notice that trial court intended to rule on motion); *In re Guardianship of Guerrero*, 496 S.W.3d 288, 292 (Tex. App.—San Antonio 2016, no pet.) (husband was denied due process when he did not receive notice of hearing at which wife’s daughter was appointed wife’s permanent guardian); *Garcia v. Escobar*, No. 13-13-00268-CV, 2014 WL 1514288, at *3 (Tex. App.—Corpus Christi Apr. 15, 2014, pet. denied) (mem. op.) (“Absence of actual or constructive notice of the submission of a summary judgment motion violates a party’s due process rights under the Fourteenth Amendment to the United States Constitution.”); *Campbell v. Stucki*, 220 S.W.3d 562, 570 (Tex. App.—Tyler 2007, no pet.) (trial court violated due process, even though appellant received notice of hearing on motion to release funds after garnishment, because trial court granted motion before hearing date and cancelled hearing); *see also Peralta*, 485 U.S. at 86–87 (holding harm analysis is not required when party was

“deprived of property in a manner contrary to the most basic tenets of due process”); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 364 (Tex. App.—Dallas 2009, pet. denied) (holding harm analysis is not needed for due process violation of failure of notice).

Here, the court assistant’s email was confusing. It did not specify a particular date as a “submission date.” Instead, it told the parties that their responses and replies to the summary-judgment motion “must be filed in compliance with” the rules and “provided to this Court by December 22, 2020.” Stephens asserts her brothers should have discerned that December 22 was intended to be a submission date. But due process requires more than providing a pathway for a party to piece together when a court might consider a motion submitted; it requires notice of a “specific submission or hearing date,” a date certain on which the motion will be heard or considered by submission. *See BP Auto. LP v. RML Waxahachie Dodge, LLC*, 517 S.W.3d 186, 211 (Tex. App.—Texarkana 2017, no pet.) (“date certain”); *Rorie*, 171 S.W.3d at 584 (“specific submission or hearing date”); *see also Peralta*, 485 U.S. at 84 (requiring notice “reasonably calculated” to “afford [parties] the opportunity to present their objections”).

The ambiguous language in the email could equally be read to state a deadline to respond to the motion, which is how the Bowman brothers understood

it. The Bowman brothers told the trial court that their understanding of the email caused them to respond on December 22. Nonetheless, the trial court denied them leave to late-file their response and then entered a no-evidence summary judgment against them. Due process cannot support such a result.

Stephens argues that reversal is improper because the Bowman brothers' motion for leave was deficient. Motions for leave must establish good cause for the late filing by showing both that the failure to timely respond resulted from an accident or mistake (versus intentional or the result of conscious indifference) and that allowing the late response will not cause undue delay or otherwise injure the summary-judgment movant. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686–87 (Tex. 2002). Stephens notes that the Bowman brothers' motion for leave addressed the accidental nature of their late filing but did not discuss the delay or injury the late filing may have caused. But our holding is not that the trial court erred in denying the motion for leave.

Thus, the trial court denied the Bowman brothers due process by failing to provide them adequate notice of the submission date so that they would know their response deadline. The Bowman brothers repeatedly objected that they were denied due process, apart from their arguments on why leave for late filing should have been granted. Any defect in their motion for leave does not invalidate their

repeated due process objections made in other contexts, including in their motion for new trial.

We conclude that the Bowman brothers' due process rights were violated because the trial court granted the no-evidence motion for summary judgment for Stephens without giving them adequate notice of the submission date.

Conclusion

We reverse the trial court's judgment and remand for additional proceedings.

Sarah Beth Landau
Justice

Panel consists of Justices Landau, Guerra, and Farris.