Affirm and Memorandum Opinion filed July 12, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00401-CV

AL MCZEAL, Appellant

V.

EMC MORTGAGE CORPORATION, Appellee

On Appeal from the County Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 953648

MEMORANDUM OPINION

Pro se appellant, Al McZeal, brings a restricted appeal of a default judgment from County Court at Law No. 4. He argues four points of error on appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 20, 2006, Mae McCrimmon executed a deed of trust for real property at 7307 Crescent Bridge Court, Humble, Texas, 77396 ("Crescent Bridge Property"). The named trustee was "Steven Samford." (RR, Plaintiff's Exhibit 2)

On September 4, 2007, EMC Mortgage Corporation ("EMC") purchased the deed of trust for the Crescent Bridge Property from a substitute trustee named Jack Palmer at a foreclosure sale.[1] The same day, EMC sent separate notices via regular and certified mail to McCrimmon and "regular mail occupant" that they had three days to vacate the property. On November 16, 2009, EMC filed an original petition for forcible detainer in Justice Court Precinct 3, Place 1 against McCrimmon and "all occupants" of the Crescent Bridge Property. McZeal, referring to himself as an "Occupant and title owner of the [Crescent Bridge Property] via 'Adverse Possession,'" responded in a *pro se* motion to dismiss the case and answer to EMC's original petition on December 8, 2009. Below his signature on his motion, McZeal listed his address as "2222 Irish Spring Dr., Houston Texas, 77067 ("Irish Spring Property").

The Justice Court issued a "Notice of Default Judgment" against "McCrimmon and all Occupants, et al" on December 9, 2009. In that judgment, the Justice Court entered an order for EMC to take possession of the Crescent Bridge Property and for the defendants to pay $1,000 of EMC's attorney's fees.

McZeal filed an "Affidavit of Inability to Pay Costs for Appeal (Evictions)" in the Justice Court on December 14, 2009. In that document, he states that his address is the Crescent Bridge Property and that his former address is the Irish Spring Property.

On January 27, 2010, McZeal filed his appeal in County Court at Law No. 4 (herein the "trial court"). He listed the Irish Spring address below his signature. On February 1, 2010, EMC mailed three separate notices of a February 22, 2010 trial date via certified mail to McCrimmon, McZeal, and "All Other Occupants." These notices were mailed to the Crescent Bridge Property. The record does not indicate where the trial court sent McZeal's notice of trial.

[1] The record does not include documentation of the transfer of trust from Steven Samford to Jack Palmer.

On February 22, 2010, the trial court stated on the record that the "courtroom having been sounded three times for the defendant Mae McCrimmon, Mae McCrimmon, Mae McCrimmon, the defendant is not present despite having been given notice to be here for trial." The trial court issued a final judgment that day stating, "in the event Defendants Mae McCrimmon, Al McZeal and All Other Occupants do not vacate the [Crescent Bridge Property] on or before February 28, 2010, a writ of possession shall issue to enforce [EMC's] right of possession."

McZeal filed a restricted appeal to this court on May 4, 2010.

DISCUSSION

I. McZeal is Presumed to Have Received Notice of the Trial Date from the Trial Court. Consequently, the Default Judgment was Properly Entered.

McZeal argues in his first point of error that service was not complete because EMC sent its notice of trial to the Crescent Bridge Property rather than the Irish Spring Property. His second point of error states that as a result of the allegedly improper notice, the trial court erred by ordering a default judgment. McZeal contends in his third point of error that his due process rights were violated because the trial court entered the default judgment. We address these issues together.

A. Standard of Review

To prevail in a restricted appeal, McZeal must establish that: (1) he filed notice of the restricted appeal within six months after the judgment was signed; (2) he was a party to the underlying lawsuit; (3) he did not participate in the hearing that resulted in the complained-of judgment and did not timely file any post-judgment motions or requests for findings of fact or conclusions of law; and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique,* 134 S.W.3d 845, 848 (Tex. 2004). "A restricted appeal

requires error that is apparent on the face of the record; error that is merely inferred will not suffice." *Ginn v. Forrester,* 282 S.W.3d 430, 431 (Tex. 2009) (per curiam).

B. Analysis

Only the fourth element of the restricted appeal requirements is argued by the parties. *Alexander,* 134 S.W.3d at 848. McZeal argues that error is apparent on the face of the record because there is evidence that EMC sent notice of the trial date to McZeal at the Crescent Bridge Property, but not to the Irish Springs Property.

McZeal was entitled to eight days' notice of the trial date for his appeal to the county court on the forcible detainer action. Tex. R. Civ. P. 753. A trial court has a duty to inform the parties of the trial date, but does not have a duty to record that the notices were mailed. Tex. R. Civ. P. 245; *Ginn,* 282 S.W.3d 430, 432. We presume a trial court will hold a trial only after proper notice is given. *Welborn-Hosler v. Hosler*, 870 S.W.2d 323, 328 (Tex. App.—Houston [14th Dist.] 1994, no writ). An appellant challenging that presumption has an affirmative duty to show lack of notice. *Id.*

Silence of the record is insufficient to show error on the face of the record. *Ginn,* 282 S.W.3d at 433. The appellate record is silent regarding where the trial court sent notice of the trial date. We therefore presume the trial court's notice was properly served and timely. Consequently, we overrule McZeal's first two points of error because he is deemed to have received notice of the trial date. *Ginn,* 282 S.W.3d 430, 432; *Welborn-Hosler v. Hosler,* 870 S.W.2d 323, 328 (Tex. App.—Houston [14th Dist.] 1994, no writ). The default judgment is proper because McZeal did not appear for trial after he was deemed to have received proper notice from the trial court.

McZeal also argues that because EMC did not give him notice at the Irish Springs Property, he was not afforded due process. If a party does not receive notice of a post-answer default judgment proceeding, he is deprived of due process. *LBL Oil Co. v. Int'l Power Servs., Inc.,* 777 S.W.2d 390, 390-91 (Tex. 1989). We have previously

determined the trial court is presumed to have given proper notice of the trial date, so there is no due process violation.

Nonetheless, even if McZeal did not receive notice, McZeal's due process rights were not violated if the method of service was reasonably calculated to give him notice of the proceedings and an opportunity to be heard. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84-85 (1988). This appeal is taken from a forcible detainer action to evict McZeal from the Crescent Bridge Property. McZeal refers to himself in a brief to the Justice Court as "Occupant and title owner of the [Crescent Bridge Property] via 'Adverse Possession.'" EMC sent notice to the Crescent Bridge Property which, under the circumstances, was reasonably calculated to give McZeal notice. *Peralta*, 485 U.S. at 84-85.

We overrule McZeal's first three points of error.

II. The Default Judgment Prevents this Court From Reviewing McZeal's Adverse Possession Claim

McZeal chose to file a restricted appeal into this court. A restricted appeal is for the limited purpose of providing a party that did not participate at trial a chance to correct an erroneous judgment. *Franklin v. Wilcox*, 53 S.W.3d 739, 741 (Tex. App.—Fort Worth 2001, no pet.). We have determined the default judgment was an appropriate resolution of this case. Consequently, we are precluded from reviewing McZeal's fourth issue addressing his adverse possession claim. *See, e.g., Berger v. King*, No. 01-06-00871-CV, 2007 WL 1775991 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (mem. op.). We overrule McZeal's fourth issue.

CONCLUSION

Having overruled each of McZeal's points of error, we affirm the trial court's default judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Seymore, and McCally.