

Affirmed and Memorandum Opinion filed September 22, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-01055-CV

DAVID JAMES, Appellant

V.

**METROPOLITAN TRANSIT AUTHORITY, MS. THERESA CHANG, ET. AL.,
Appellees**

**On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2008-76278**

M E M O R A N D U M O P I N I O N

Appellant David James appeals the dismissal of his personal injury suit against the Metropolitan Transit Authority (“Metro”) on the grounds that (1) the trial court abused its discretion when it failed to perform ministerial duties and rule on appellant’s motions, and (2) the trial court failed to notify appellant of the dismissal for want of prosecution and to hold hearings. We affirm.

Background

On March 29, 2004, appellant was injured while riding on a Metro bus that was involved in an accident. On February 13, 2006, appellant filed a personal injury suit against Metro, which was dismissed for want of prosecution on May 21, 2007. Appellant did not appeal from the 2007 dismissal. On October 8, 2008, appellant filed a petition for bill of review seeking reinstatement of his personal injury suit. There is no evidence in the record that Metro was served with appellant's bill of review. In response to a notice that the bill of review would be dismissed for want of prosecution, appellant filed a "Verified Motion to Retain." On December 17, 2009, the trial court retained the bill of review on its docket. On May 3, 2010, the court sent another notice that appellant's suit was eligible for dismissal for want of prosecution. On August 16, 2010, the trial court signed an order denying appellant's motion to retain due to lack of service on the defendant. The court specifically found "that the record lacks any indication that Petitioner has attempted to serve Respondent with the Petition for Bill of Review." The court noted that, "Although the motion includes a certificate of service, it does not indicate service on Respondent." On October 7, 2010, the trial court dismissed appellant's petition for bill of review.

Dismissal for Want of Prosecution

In two issues, appellant argues the trial court wrongly dismissed his suit for want of prosecution. A trial court's authority to dismiss for want of prosecution stems from the express authority of rule 165a of the Texas Rules of Civil Procedure as well as from the court's inherent power to manage its own docket. *Villarreal v. San Antonio Truck & Equip. Co.*, 994 S.W.2d 628, 630 (Tex. 1999); *3V, Inc. v. JTS Enterprises, Inc.*, 40 S.W.3d 533, 541 (Tex. App.—Houston [14th Dist.] 2000, no pet.). A trial court may dismiss a case when (1) it finds that the case has not been prosecuted with due diligence; (2) the case has not been disposed of within the Texas Supreme Court's time standards; or (3) a party fails to appear at a hearing or trial. *Villarreal*, 994 S.W.2d at 630. In determining whether a plaintiff has prosecuted his case with due diligence, the trial court

may consider the entire history of the case, including the length of time the case was on file, the amount of activity in the case, the request for a trial setting and the existence of reasonable excuses for delay. *Nawas v. R & S Vending*, 920 S.W.2d 734, 737 (Tex. App.—Houston [1st Dist.] 1996, no writ). We may reverse a trial court’s dismissal of a claim for want of prosecution only if the court clearly abused its discretion. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997).

In his brief appellant argues the trial court abused its discretion because he attempted to have Metro served on March 8, 2006 and March 23, 2006. Appellant further contends he filed a motion for default judgment on August 21, 2006, but the court failed to rule on the motion. Appellant appears to be complaining about the trial court’s dismissal of his personal injury suit in 2007. Appellant, however, failed to appeal that judgment; therefore, we have no jurisdiction to consider the propriety of the first dismissal. *See generally* Tex. R. App. P. 26.1. The judgment appellant appealed is the dismissal of his petition for bill of review.

The record reflects that appellant made no attempt to serve Metro with his petition for bill of review. The Texas Rules of Civil Procedure permit a party to request the court clerk to issue and deliver citations to the defendant. *See* Tex. R. Civ. P. 99(a). A party may rely on the clerk to serve the defendant within a reasonable time. *Auten v. DJ Clark, Inc.*, 209 S.W.3d 695, 705 (Tex. App.—Houston [14th Dist.] 2006, no pet.). When a party learns, or by exercise of due diligence should have learned, that the clerk failed to fulfill his duty under Rule 99, the party must ensure the defendant is properly served. *Id.* Because appellant failed to exercise due diligence to ensure proper service on Metro, the trial court did not abuse its discretion in dismissing appellant’s petition for bill of review for want of prosecution. Appellant’s two issues are overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.