Affirmed and Memorandum Opinion filed February 2, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01084-CV

PAUL L. GRANT, II, Grant

V.

JENNIFER D. CALLIGAN, Appellee

On Appeal from the 246th District Court
Harris County, Texas
Trial Court Cause No. 2014-70184

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

Paul L. Grant, II, appeals from the trial court's denial of his bill of review based on his claim that he did not receive notice of the trial that resulted in the divorce decree in the underlying case. Concluding the trial court did not err in impliedly finding Grant did not establish that he diligently pursued all available and adequate legal remedies, we affirm.

I. BACKGROUND

In 2013, Grant filed a petition for divorce against Jennifer D. Calligan. The trial court entered a scheduling order on September 12, 2013, which set trial for January 13, 2014. The scheduling order states that the "trial date is a date certain set by Scheduling Order issued by the Court Coordinator and mailed to all attorneys of record." The address of Grant's trial attorney Major Adams appears on one copy of the scheduling order. The record does not indicate whether the court mailed Adams the scheduling order.

Grant did not appear at trial on the scheduled date. The trial court subsequently signed a final divorce decree on January 31, 2014, based on the January 13, 2014 bench trial conducted in Grant's absence. In the divorce decree, the trial court treats Grant as the petitioner and Calligan as the respondent, without any mention of a counter-petition by Calligan. Nonetheless, in his petition for bill of review, Grant asserted that Calligan filed a counter-petition in the underlying case and that the divorce decree is a post-answer default judgment against Grant as counter-respondent. We presume that these assertions are correct and refer to the divorce decree as the "default judgment." The court lost its plenary power on March 2, 2014. Grant filed a first amended petition for bill of review on February 27, 2015, alleging a due process violation for non-notice of the trial setting. Grant did not allege in his bill-of-review petition that the trial court failed to send notice of the default judgment.

At the trial on the bill of review, Calligan's attorney conceded that he did not notify Adams of the trial setting. Adams testified that neither he nor Grant received notice of the trial setting prior to the trial date or prior to the default judgment. Adams also testified that neither the trial court nor Calligan's counsel notified him of the trial setting. Finally, Adams testified that when he received notice of the

default judgment, he called Rodney Moton, Grant's appellate counsel. No evidence or testimony was presented about the date that Adams received notice of the default judgment. The trial court denied Grant's petition for bill of review, and this appeal followed.

II. DISCUSSION

In four issues, Grant challenges the trial court's denial of his bill of review. Grant argues that: (1) his bill-of-review petition contained the necessary language to support relief by bill of review; (2) non-notice of the trial setting conclusively establishes that Grant was not negligent in allowing a default judgment to be rendered against him; (3) Grant established a rebuttable presumption that he received notice of a default judgment rendered against him after the trial court lost its plenary power and cannot be at fault for not challenging the default judgment before filing a bill of review; and (4) Grant is not required to first pursue other post-judgment remedies before filing a bill of review because he did not receive notice of the trial setting or default judgment. We consider Grant's fourth issue first because it is dispositive. *See* Tex. R. App. P. 47.1.

a. Standard of review

In reviewing the grant or denial of a bill of review, we indulge every presumption in favor of the trial court's ruling, which we will not disturb unless the trial court abused its discretion. *Nguyen v. Intertex, Inc.*, 93 S.W.3d 288, 293 (Tex. App.—Houston [14th Dist.] 2002, no pet.), *overruled on other grounds by Glassman v. Goodfriend*, 347 S.W.3d 772 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (en banc). When, as here, no findings of fact or conclusions of law are requested, it is implied that the trial court made all of the necessary findings to support its judgment. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989).

b. Notice under Texas Rules of Civil Procedure 21a and 245 and bill of review

The rules of civil procedure require reasonable notice of a trial setting to the parties. Tex. R. Civ. P. 245. A party is entitled to notice of the trial setting as a matter of fundamental due process. *See In re K.M.L.*, 443 S.W.3d 101, 119 (Tex. 2014) (holding that non-notice of trial setting to party in parental rights termination case violates the demands of due process of law); *see also Vining v. Vining*, 782 S.W.2d 261, 262 (Tex. App.—Houston [14th Dist.] 1989, no writ) (reversing post-answer default judgment taken against a defendant who did not receive notice of the trial setting because it constituted a denial of due process); *LBL Oil Co. v. Int'l Power Serv., Inc.*, 777 S.W.2d 390 (Tex. 1989) (same).

A bill of review is an equitable action brought by a party to a prior action who seeks to set aside a judgment that is no longer appealable or subject to motion for new trial. *See Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979). Rule 329b(f) of the Texas Rules of Civil Procedure provides that after the expiration of trial court's plenary power, a judgment still may be set aside by the trial court "by bill of review for sufficient cause." Tex. R. Civ. P. 329b(f). The "sufficient cause" upon which a judgment may be set aside on bill of review is narrowly construed because of the policy favoring finality of judgments. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). Injustice alone "is not sufficient to justify relief by bill of review." *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999) (per curiam).

For a trial court to set aside a judgment by bill of review, a bill-of-review plaintiff is normally required to prove at trial, by a preponderance of the evidence, these three elements:

(1) a meritorious defense to the cause of action alleged to support the

judgment in the underlying case;

(2) which the plaintiffwas prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake;

(3) unmixed with any fault or negligence of the plaintiff.

Mabon Ltd. v. Afri-Carib Enters., Inc., 369 S.W.3d 809, 812 (Tex. 2012).

A bill-of-review plaintiff who shows non-service of process[1] is relieved of proving the first two elements set out above. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 87 (1988); *Caldwell v. Barnes (Barnes)*, 154 S.W.3d 93, 96–97 (Tex. 2004) (per curiam). This relief has been extended beyond non-service of process. *See Mabon*, 369 S.W.3d at 812–813 (non-notice of trial setting); *Gutierrez v. Lone Star Nat'l Bank*, 960 S.W.2d 211, 215–16 (Tex. App.—Corpus Christi 1997, pet. denied) (non-notice of dismissal for want of prosecution hearing); *Saint v. Bledsoe*, 416 S.W.3d 98, 109 (Tex. App.—Texarkana 2013, no pet.); *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (because defendant had no notice of trial setting, defendant was not required to prove meritorious defense as a condition to granting motion for new trial).

The complaining party may conclusively prove the third element by demonstrating that he was never served with process. *Ross v. Nat'l Ctr. for the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006); *Barnes*, 154 S.W.3d at 97 n.1. A party who becomes aware of the proceedings without proper service of process has no duty to act, diligently or otherwise. *Ross*, 197 S.W.3d at 797–98. However, and more important here, "*[d]iligence is required from properly served parties or those who have appeared*." *Id.* at 798 (emphasis added); *see also Gold v. Gold*, 145 S.W.3d 212, 214 (Tex. 2004).

[1] The phrase "service of process" here refers to the service of citation that gives a defendant notice of the pending suit. *See* Tex. R. Civ. P. 99.

To be diligent, a party must pursue all available and adequate legal remedies against the underlying judgment. *Caldwell v. Barnes*, 975 S.W.2d. 535, 537–38 (Tex. 1998). A party must pursue these remedies before filing the bill of review. *Id.* If legal remedies were available but ignored, relief by equitable bill of review is unavailable. *See id*.; *see also Gold*, 145 S.W.3d at 214 (failure to seek reinstatement or new trial, if available, normally would be negligence). "We have only applied this rule to motions that could have been filed in the trial court's first proceeding." *Gold*, 145 S.W.3d at 214.

Contrary to Grant's assertion, this diligence requirement was not abandoned by the Supreme Court of Texas in *Mabon*. While the *Mabon* court stated that it has never required a bill-of-review plaintiff to show that plaintiff diligently monitored the case status after hiring an attorney for representation, it still required the properly served bill-of-review plaintiff to demonstrate that it diligently pursued all available and adequate legal remedies against the post-answer, default judgment. *Mabon*, 369 S.W.3d at 813.[2]

c. Analysis

i. Notice and diligence

At the bill-of-review trial, Grant's counsel testified that neither he nor Grant received the scheduling order providing the trial setting prior to trial. We presume for the purposes of our analysis that Grant established that he had no notice of the dispositive trial setting. Grant was therefore relieved from proving the first two bill-of-review elements.

---

[2] We need not discuss whether *Mabon* disapproved of the requirement that *an attorney* demonstrate diligence by making reasonable inquiries regarding the status of the case. This is because we hold Grant failed to demonstrate diligence in another way—by failing to pursue available legal remedies against the judgment.

However, Grant still had the burden of proving that he diligently pursued all available and adequate legal remedies against the default judgment. *Id.* Grant argues that he was not required to show diligence because proving that he had no notice of the trial setting conclusively established his absence of negligence. We disagree; that relief is appropriate only when a defendant is never served with process. *See id.* at 812–13; *Ross*, 197 S.W.3d at 797–98. Grant does not assert that he was not served with process, and the failure to give notice of the trial setting does not excuse Grant from having to prove the third bill-of-review element. *See Mabon*, 369 S.W.3d at 812–13. Accordingly, Grant was required to avail himself of all available and adequate legal remedies to address the default judgment before filing his bill of review. *See id*; *Ross*, 197 S.W.3d at 797–98; *see also Barnes*, 154 S.W.3d at 97; *Gold*, 145 S.W.3d at 214.

Grant asserts that he was not required to pursue any post-judgment remedies before filing his bill of review because he did not receive notice of the default judgment until after the trial court lost its plenary power. If that is true, Grant could not have filed a timely motion for new trial[3] after the default judgment. *See Wembley*, 11 S.W.3d at 927–28 (defendant's attorneys provided affidavits that they had no notice that default judgment had become final and did not lack due diligence in failing to pursue available legal remedies within deadlines).

Grant does not cite any document in the record as proof that he did not receive notice of the default judgment.[4] Grant refers to unsworn declarations attached to his First Amended Petition for Bill of Review. Pleadings are not

[3] Tex. R. Civ. P. 329b(a) ("A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.").

[4] Grant's petition for bill of review did not allege non-notice of the default judgment. We discuss the non-notice of default judgment here solely to determine whether Grant pursued adequate legal remedies before filing the bill of review.

evidence. *Derbigny v. Bank One*, 809 S.W.2d 292, 295 (Tex. App.—Houston [14th Dist.] 1991, no writ) ("Pleadings simply outline the issues; they are not evidence, even for purposes of summary judgment, let alone a trial on the merits."). Further, documents that are not introduced into evidence at trial may not be considered as evidence on appeal. *See e.g.*, *Celadon Trucking Sers., Inc. v. Titan Textile Co., Inc.*, 130 S.W.3d 301, 307 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *City of Galveston v. Shu*, 607 S.W.2d 942, 945 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ). The unsworn declarations were not admitted as evidence at trial and, accordingly, we cannot consider them as evidence.[5]

Grant also refers to "uncontroverted testimony" of Adams to support his assertion. Upon reviewing the testimony, we disagree that it showed Adams did not receive notice of the default judgment before the trial court lost its plenary power. Adams testified that he did not receive notice of the trial setting before trial or before entry of the default judgment. Adams did *not* testify that he never received notice of the default judgment. The trial court asked Adams, "What did you do when you got the notice of the clerk that the default had been granted?" Adams responded, "That's when I contacted my client to see if he received any—anything in the mail or was served—personally served and he said no and then contacted Mr. Moton." The testimony did not indicate the date that Adams received notice of the default judgment, much less the date Adams contacted Grant or Moton.

In light of the record before us, we conclude Grant did not present evidence

[5] The unsworn declarations were not sworn to under penalty of perjury. *See* Tex. Civ. Prac. & Rem. Code Ann. § 132.001(a),(c) (West Supp. 2016) ("an unsworn declaration may be used in lieu of a written sworn declaration . . . , or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law . . . [and] must be: (1) in writing; and (2) subscribed by the person making the declaration as true under penalty of perjury."). We cannot assume that Calligan would not have objected to or rebutted the unsworn declarations had Grant offered the declarations into evidence. At trial, Calligan's counsel said he had exhibits to prove Grant's notice of the judgment. Calligan's exhibits also were not admitted into evidence.

that he received notice of the default judgment after the trial court lost its plenary power. Grant did not show that he was unable to seek relief from the default judgment in the trial court before it lost plenary power over the judgment. After reviewing the evidence presented to the trial court below, we conclude that the trial court did not err by impliedly finding that Grant failed to prove that he diligently pursued all available and adequate legal remedies against the default judgment. We overrule Grant's four issues.

ii. Sanctions

In a single cross-point, Calligan seeks sanctions against Grant under Texas Rule of Appellate Procedure 45, which provides for damages for frivolous appeals in civil cases. *See* Tex. R. App. P. 45. The question of whether to grant sanctions is a matter of discretion, which the court exercises with prudence, caution, and careful deliberation. *Angelou v. African Overseas Union*, 33 S.W.3d 269, 282 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Under rule 45, we may award just damages if we objectively determine, after considering the record and briefs, that an appeal is frivolous. *Glassman v. Goodfriend*, 347 S.W.3d 772, 782 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). To determine whether an appeal is frivolous, we look at the record from the viewpoint of the advocate and decide whether the advocate had reasonable grounds to believe the case could be reversed. *Id.* After reviewing the record, we deny appellee's request for damages under rule 45.

III. CONCLUSION

We affirm the judgment of the trial court and deny Calligan's request for rule 45 damages.

/s/ Marc W. Brown
Justice

Panel consists of Chief Justice Frost, and Justices Brown and Jewell.