



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00012-CV

John E. **RODARTE**, Sr.,
Appellant

v.

Ralph **LOPEZ**, et al.,
Appellees

From the 166th Judicial District Court, Bexar County, Texas
Trial Court No. 2005-CI-18884
Honorable Michael E. Mery, Judge Presiding

Opinion by: Jason Pulliam, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Jason Pulliam, Justice

Delivered and Filed: December 30, 2015

AFFIRMED

John E. Rodarte, Sr. appeals the trial court's order denying his bill of review, contending: (1) the trial court erred in denying his bill of review because he established a due process violation based on the absence of notice of a hearing; and (2) the trial court erred in depriving him of his right to a jury trial on his bill of review. Because the issues in this appeal are settled by well-established precedent, we overrule Rodarte's issues and affirm the trial court's order in this memorandum opinion. *See* TEX. R. APP. P. 47.4.

DENIAL OF BILL OF REVIEW

In a bill of review proceeding, the plaintiff must ordinarily plead and prove: (1) a meritorious defense to the underlying cause of action; (2) which the plaintiff was prevented from making by the fraud, accident, or wrongful act of the opposing party or by official mistake; (3) unmingled with any fault or negligence on his own part. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). When a bill of review plaintiff claims a due process violation based on lack of notice, however, he is relieved of proving the first two elements and must only prove that his own fault or negligence did not contribute to cause the lack of notice. *Id.*

In this case, Rodarte's lawsuit was set for trial on the merits; however, before trial commenced, the trial court *sua sponte* reviewed the file and granted a no evidence motion for summary judgment which previously had been heard and denied.¹ In his first issue, Rodarte contends he did not have notice of the hearing at which the trial court reconsidered the no evidence motion for summary judgment; therefore, the trial court erred in denying his bill of review.

“A trial court may, in the exercise of discretion, properly grant summary judgment after having previously denied summary judgment without a motion by or prior notice to the parties, as long as the court retains jurisdiction over the case.” *Note Inv. Group, Inc. v. Assocs. First Capital Corp.*, No. 09-12-00573-CV, 2015 WL 5604682, at *23 (Tex. App.—Beaumont Sept. 24, 2015, no. pet. h.) (quoting *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 876-77 (Tex. App.—Corpus Christi 1996, writ denied)); *see also KSWO Television Co. v. KFDA Operating Co., LLC*, 442 S.W.3d 695, 699 (Tex. App.—Dallas 2014, no pet.); *Rush v. Barrios*, 56 S.W.3d 88, 98-99 (Tex. App.—Houston [14th Dist.] 2001, pet denied). Because the trial court retained jurisdiction

¹ The trial court also granted a plea to the jurisdiction. Because we affirm the trial court's order based on the properly granted no evidence summary judgment, we do not address whether the order also could be affirmed based on the granting of the plea to the jurisdiction. *See* TEX. R. APP. P. 47.1 (providing court of appeals should address only issues necessary to final disposition of appeal).

over the case pending trial on the merits, the trial court was not required to provide Rodarte with notice before reconsidering and granting the no evidence motion for summary judgment. *See Note Inv. Group, Inc.*, 2015 WL 5604682, at *23; *KSWO Television Co.*, 442 S.W.3d at 699; *Rush*, 56 S.W.3d at 98-99; *H.S.M. Acquisitions, Inc.*, 917 S.W.2d at 876-77. Because Rodarte was not entitled to notice, he cannot establish lack of notice as a basis for granting his bill of review. Therefore, his bill of review was properly denied.

RIGHT TO JURY TRIAL

Rodarte next contends the trial court erred because he timely requested a jury trial on his bill of review, but the trial court denied the bill of review after a bench hearing. “A refusal to grant a jury trial is harmless error [] if the record shows that no material issues of fact exist and an instructed verdict would have been justified.” *Halsell v. Dehoyos*, 810 S.W.2d 371, 372 (Tex. 1991); *see also Caldwell v. Barnes*, 154 S.W.3d 93, 97 (Tex. 2004) (noting “question of service is properly resolved at trial and not by the trial court in a pretrial proceeding ***if the material facts are disputed***”) (emphasis added).

In resolving Rodarte’s first issue, we upheld the trial court’s granting of a no evidence motion for summary judgment which disposed of Rodarte’s bill of review. The trial court could only grant a no evidence summary judgment if no material fact issues existed. *See* TEX. R. CIV. P. 166a(i). In this appeal, Rodarte does not challenge the granting of the no evidence summary judgment on the basis that material issues of fact existed. Therefore, because the trial court’s order granting the no evidence summary judgment establishes that no material issues of fact existed, any error by the trial court in refusing to grant Rodarte a jury trial is harmless error. *See Caldwell*, 154 S.W.3d at 97; *Halsell*, 810 S.W.2d at 372.

CONCLUSION

The trial court's order is affirmed.

Jason Pulliam, Justice