Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00526-CV

Patrick **MINOR**,
Appellant

v.

DIVERSE FACILITY SOLUTIONS, INC.,
Appellee

From the 131st Judicial District Court, Bexar County, Texas
Trial Court No. 2019-CI-00808
Honorable Aaron S. Haas, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: November 10, 2021

REVERSED AND REMANDED

Patrick Minor appeals from the trial court's order dismissing his claims pursuant to Texas Rule of Civil Procedure 91a. We reverse and remand.

BACKGROUND

The clerk's record reflects that on January 14, 2019, Minor sued Appellee Diverse Facility Solutions, Inc. ("Diverse") for "wrongful termination, retaliation, and discrimination." Although Minor attempted to serve Diverse, a corporation, he did not name Diverse's registered agent or attempt substituted service of process through the Texas Secretary of State. *See* TEX. BUS. ORGS.

CODE § 5.201-.255. Thus, the record shows that service on Diverse was defective. On April 18, 2019, Minor moved for default judgment. The clerk's record does not indicate whether his motion was ever set for a hearing.

One year later, on April 22, 2020, Minor filed a first amended petition; however, this amended petition did not allege any additional claims or facts. The record reflects that Minor served Diverse's registered agent on May 8, 2020. On June 4, 2020, Diverse filed an original answer. On July 7, 2020, Diverse filed a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a. On July 21, 2020, Minor filed an "Answer to Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim." On August 10, 2020, Diverse filed a motion for extension for the court to rule on its Rule 91a motion. In the motion, Diverse represented that Minor was unopposed to the motion. On September 4, 2020, the trial court granted Diverse's Rule 91a motion and dismissed all of Minor's claims with prejudice. No record of the hearing was taken; thus, no reporter's record was filed. On September 17, 2020, Minor filed a "Motion to Set Aside Default Judgment," claiming that he did not appear at the Rule 91a motion to dismiss hearing because he did not receive proper notice of the hearing. Minor now appeals.[1]

DISCUSSION

In his brief, Minor first asks why his motion for default judgment was denied "in [an] earlier court setting" and why he was not "given a default judgment." The appellate record does not indicate that his motion for default judgment was heard by the trial court or that his motion

[1]While this appeal was pending, Minor moved for this court to appoint appellate counsel to represent him. We denied his request. Minor now makes the same request in his pro se brief. "Historically, we have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function." *Gibson v. Tolbert*, 102 S.W.3d 710, 712 (Tex. 2003) (internal quotations omitted). "But we have suggested, in the context of discussing the courts' inherent power to appoint counsel in civil cases, that under exceptional circumstances, the public and private interests at stake may be such that the administration of justice may best be served by appointing a lawyer to represent an indigent civil litigant." *Id*. We see no "exceptional circumstances" in this case that would warrant Minor being appointed counsel. *See id*.

was denied by the trial court. Thus, the record does not reflect that the trial court committed any error with respect to Minor's motion for default judgment.

Minor next asks in his brief "[w]as this a legitimate dismissal of [his] case." *See Li Li v. Pemberton Park Cmty. Ass'n*, No. 20-0571, 2021 WL 4483503, at *4 (Tex. Oct. 1, 2021) (instructing courts to "review and evaluate pro se pleadings with liberality and patience").[2] Under Texas Rule of Civil Procedure 91a, a party may move for dismissal on the ground that a cause of action has no basis in law or fact. *See* TEX. R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id*. "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id*. "In ruling on a Rule 91a motion to dismiss, a court may not consider evidence but 'must decide the motion based solely on the pleading of the cause of action, together with any [permitted] pleading exhibits.'" *In re Farmers Tex. Cty. Mut. Ins. Co*., 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding) (quoting TEX. R. CIV. P. 91a.6). "We review the merits of a Rule 91a ruling de novo [because] whether a defendant is entitled to dismissal under the facts alleged is a legal question." *Id*.

In determining whether a cause of action should be dismissed pursuant to Rule 91a, a court considers "the allegations of the live petition and any attachments thereto." *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 183 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). "We apply the fair notice pleading standard to determine whether the allegations of the petition are sufficient to allege a cause of action." *Wooley v. Schaffer*, 447 S.W.3d 71, 76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). We thus "construe the pleadings liberally in favor

[2]We note that Diverse argues in its appellee's brief that we should hold Minor failed to preserve error on appeal because his pro se brief is inadequately briefed. *See* TEX. R. APP. P. 38.1(i). In light of the supreme court's decision in *Li Li*, 2021 WL 4483503, at *4, we decline to hold that Minor has waived his appeal.

of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact." *Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied). "We remain cognizant that '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Vasquez v. Legend Nat. Gas III, LP*, 492 S.W.3d 448, 451 (Tex. App.—San Antonio 2016, pet. denied) (quoting *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 754 (Tex. App.—Beaumont 2014, pet. denied)).

A motion to dismiss under Rule 91a must identify each cause of action it attacks and specify "the reasons the cause of action has no basis in law, no basis in fact, or both." TEX. R. CIV. P. 91a.2. When a defendant moves to dismiss a cause of action on the grounds that it has no basis in law or fact, a plaintiff may amend the pleadings at least three days before the date of the hearing. *See id*. R. 91a.5(b). "[T]he court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any [permissible] pleading exhibits . . . ." *Id*. R. 91a.6.

In its motion to dismiss pursuant to Rule 91a, Diverse argued that Minor's first amended petition "contain[ed] nothing except baseless allegations against" it. According to Diverse, while Minor appeared to be attempting to assert a claim for wrongful termination on the basis of discrimination and retaliation, he failed "to allege any facts which would support his *prima facie* case." Diverse emphasized that a cause of action has no basis in law when the petition alleged too few facts to demonstrate a viable, legally cognizable right to relief. *See Stallworth v. Ayers*, 510 S.W.3d 187, 189-90 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

To present a *prima facie* case of discrimination, a plaintiff must allege that he was (1) a member of a protected class under the Texas Commission on Human Rights Act; (2) qualified for his position; (3) terminated by his employer; and (4) replaced by someone outside his protected

class or treated less favorably than similarly situated members of the opposing class. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 640, 642 (Tex. 2012). To make a prima facie showing of retaliation, a plaintiff must show that: (1) she engaged in a protected activity, such as filing a charge or complaint; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse action. *Pineda v. United Parcel Serv., Inc*., 360 F.3d 483, 487 (5th Cir. 2004); *Hernandez v. Grey Wolf Drilling, L.P.*, 350 S.W.3d 281, 286 (Tex. App.—San Antonio 2011, no pet.).

The allegations in Minor's first amended petition did not allege *prima facie* claims for wrongful termination on the basis of discrimination or retaliation. As Minor's first amended petition was defective, under Rule 91a.5, Minor, as a respondent to the motion to dismiss, had one of two options with regard to this defective petition: (1) at least three days before the date of the hearing on the motion to dismiss, Minor could file a nonsuit of the challenged causes of action; or (2) at least three days before the date of the hearing, Minor could amend the challenged causes of action. *See* TEX. R. CIV. P. 91a.5. On July 21, 2020, Minor filed an "Answer to Defendant's Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim."

In this "answer," Minor attempted to correct the defective allegations in his first amended petition. Although Minor did not title his pleading a second amended petition, it is clear from the substance of his pleading that his intent was to file a second amended petition in response to Diverse's Rule 91a motion to dismiss. *See Li Li*, 2021 WL 4483503, at *4 (explaining that pleadings should be construed by looking to the pleader's intent and that a court's "construction of a party's filings in part 'turns on a [litigant's] state of mind'" (quoting *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005)). Thus, the trial court and Diverse should have treated Minor's "answer" as a second amended petition filed in response to the Rule 91a motion.

Pursuant to Rule 91a.5, if a respondent amends the challenged cause of action at least three days before the date of the hearing, as Minor did here, the movant "may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action." TEX. R. CIV. P. 91a.5(b). Diverse did neither. Thus, the trial court was required to rule on Diverse's original Rule 91a motion. *See* TEX. R. CIV. P. 91a.5(c) ("Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b)."); *Drake v. Walker*, No. 05-14-00355-CV, 2015 WL 2160565, at *2 (Tex. App.—Dallas May 8, 2015, no pet.). However, because Minor, in substance, filed a second amended petition more than three days before the hearing, the trial court was required to consider Diverse's Rule 91a motion to dismiss in light of Minor's second amended petition. *See* TEX. R. CIV. P. 91a.5(c) (precluding trial court only from considering amendment to pleading that was not filed more than three days before the hearing); *Drake*, 2015 WL 2160565, at *2.

Unlike Minor's first amended petition, his second amended petition contains sufficient factual allegations to state a prima facie case of discrimination. He alleges that he is African-American and thus a member of a protected class, that he is qualified to perform the job of floor tech, that he was fired, and that he was replaced by someone outside his protected class. *See Mission Consol. Indep. Sch. Dist.*, 372 S.W.3d at 640, 642. With regard to his claim of retaliation, he alleges that he was retaliated against "for blowing the whistle" and complaining that his supervisor had wrongfully terminated him. He alleges that he was then rehired by "Carlos," was given his employee badge back, and was allowed to "time clock in and out." According to his second amended petition, he was rehired under "a different job description and then after that falsely accused and terminated a second time." *See Pineda*, 360 F.3d at 487 (stating elements of retaliation claim); *Hernandez*, 350 S.W.3d at 286 (same). We emphasize that under the fair-notice

standard governing pleadings, "a party's filing need only provide enough 'notice of the facts upon which the pleader bases his claim' such that 'the opposing party [has] information sufficient to enable him to prepare a defense.'" *Li Li*, 2021 WL 4483503, at *4 (quoting *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982)). Under this standard, we hold that Minor's second amended petition sufficiently stated a prima facie claim for wrongful termination on the basis of discrimination and retaliation. *See id*. Accordingly, we conclude the trial court erred in granting Diverse's Rule 91a motion to dismiss.

CONCLUSION

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Liza A. Rodriguez, Justice