In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00238-CV

IN RE JOHN ADDISON

Original Proceeding

MEMORANDUM OPINION

In this mandamus proceeding, John Addison asks this Court to stay all proceedings in the court below, order the trial court to set aside its order granting a new trial, and strike the petition in intervention filed by Keri Berotte. We deny the relief requested.

The underlying suit is a wrongful death and survival action filed by John Addison individually and as representative of the Estate of Brooke Blackerby, Deceased. According to Addison, Brooke died after falling in the home of the defendants, Johnny Vestal and Leler D. Vestal. Addison stated in his mandamus petition that he and the Vestals settled the case. On March 3, 2009, the trial court granted Addison's "Motion for Non-Suit with Prejudice" as to the survival action. On March 30, 2009, the parties appeared in court through their attorneys and announced that "all matters of fact as well as of law had been settled by and

between the parties," and the trial court dismissed the entire case with prejudice. Alleging that she is a statutory beneficiary and necessary party to the case and that the parties purposely failed to include her in the wrongful death settlement, Keri Berotte, Brooke's mother, filed a petition in intervention and a motion for new trial on April 15, 2009. Addison filed a motion to strike Berotte's petition in intervention as untimely filed. After conducting a hearing, the trial court granted Berotte's motion for new trial on April 29, 2009. Relator has not presented this Court with a record of the hearing.

Addison contends the dismissal of the case was a ministerial act and the trial court abused its discretion by reinstating the case based upon a motion for new trial filed by Berotte. Addison also argues Berotte cannot "unilaterally revive" the claims by filing a petition in intervention after the trial court dismissed the entire case by agreement of the parties. Generally, plaintiffs have the right to take a non-suit. *See* TEX. R. CIV. P. 162. A request for dismissal with prejudice based upon a settlement resulting in what amounts to an adjudication of the merits may be "different from the ordinary non-suit that involves no adjudication and is without prejudice. . . ." *See De La Rosa v. Vasquez,* 748 S.W.2d 23, 26 (Tex. App.--Amarillo 1988, no writ).

The trial court's plenary power runs from the date of the order. *See In re Bennett,* 960 S.W.2d 35, 38 (Tex. 1997); TEX. R. CIV. P. 329b(d). Even when a party files a notice of non-suit, the trial court does not have to dismiss the case immediately. *Univ. of Tex. Med. Branch*

at Galveston v. Estate of Blackmon ex rel. Shultz, 195 S.W.3d 98, 100 (Tex. 2006). Rule 162 permits the trial court to hold hearings and enter orders while it retains plenary power. *Estate of Blackmon*, 195 S.W.3d at 101. In this case, the trial court retained its plenary power on the date it reinstated the case. "New trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct." TEX. R. CIV. P. 320.

Mandamus relief is available only to correct a clear abuse of discretion for which the relator has no adequate remedy at law. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 135-36 (Tex. 2004). The relator has not shown that the benefits of a mandamus review in this case outweigh the detriments of pre-trial review. *See Id.* Accordingly, we deny the petition for writ of mandamus. The motion for temporary relief is denied as moot.

PETITION DENIED.

PER CURIAM

Opinion Delivered June 25, 2009

Before Gaultney, Kreger, and Horton, JJ.