In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00082-CV

PABLO BERLANGA AND PHYLLIS BERLANGA, Appellants

V.

FLORINDA BERLANGA, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 09-04-03478 CV

MEMORANDUM OPINION

This is a *pro se* appeal from a summary judgment ordering the partition of real property. Appellants Pablo Berlanga and his wife Phyllis Berlanga sued Florinda Berlanga for partition of a jointly owned residence in Montgomery County, Texas. Florinda filed an answer. Eleven months later, appellants filed a "notice of appearance" informing the trial court that they would be "proceeding pro se," and that all notices and correspondence should be sent to "Pablo & Phyllis Berlanga" at a designated Friendswood, Texas address. Florinda filed a counterclaim for partition.

The parties agree the property should be partitioned and sold. The disagreement is over the division of the proceeds which will be received after the court-ordered sale. Florinda filed a motion for summary judgment and accompanying affidavit. Florinda's affidavit sets out the purchase price of the house, the amount she contributed to the purchase price, and an additional amount she gave Pablo for improvements to the property.

REQUEST FOR ADMISSIONS

The summary judgment motion also states that Florinda filed requests for admissions, and that the answers were deemed admitted because appellants did not answer the requests. Florinda's motion states that the unanswered requests for admissions were attached to the motion. They are not in the record. Appellants challenge the deemed admissions on lack-of-notice grounds. They did not raise these issues in the motion for new trial and did not request that the trial court withdraw the deemed admissions. *See* Tex. R. App. P. 33.1(a). Although appellants filed an amended motion for new trial relating to this and other issues, the amended motion was not timely filed. *See Low v. Henry*, 221 S.W.3d 609, 619 (Tex. 2007) (quoting *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003)) (When read together, Rules 5, 329b(b), and 329b(e) of the Texas Rules of Civil Procedure "demonstrate that an amended motion for new trial filed more than thirty days after the trial court signs a final judgment is untimely."). Appellants have not preserved appellate issues two and three for review. *See Moritz*, 121 S.W.3d at 720-21

("[A]n untimely amended motion for new trial does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period.").

SUMMARY JUDGMENT

In issue four, appellants challenge the summary judgment granted in favor of Florinda. A movant for summary judgment under Rule 166a(c) must establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether there is a disputed material fact issue, the reviewing court takes the evidence favorable to the nonmovant as true and indulges reasonable inferences and doubts in the nonmovant's favor. *Nixon*, 690 S.W.2d at 548-49.

A plaintiff is entitled to summary judgment on a cause of action if she conclusively proves all essential elements of the claim. *See* Tex. R. Civ. P. 166a(a), (c); *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *Boudreau v. Fed. Trust Bank*, 115 S.W.3d 740, 743 (Tex. App.—Dallas 2003, pet. denied). "Evidence is conclusive only if reasonable people could not differ in their conclusions . . . ." *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the plaintiff establishes her right to summary judgment as a matter of law, the burden shifts to the defendant as nonmovant to present evidence that raises a genuine issue of material fact, thereby precluding summary judgment.

Boudreau, 115 S.W.3d at 743 (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678-79 (Tex. 1979)).

Appellants did not file a response to the motion for summary judgment, but no response is required. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). Without a response, however, the nonmovant may only contend on appeal that the movant's evidence supporting the motion is insufficient as a matter of law or that the grounds in the motion do not dispose of the claims in this case. *Id.*; *Clear Creek Basin Auth.*, 589 S.W.2d at 678. When the trial court's order granting summary judgment does not specify the basis for the ruling, the reviewing court affirms the trial court's judgment if any of the theories advanced are meritorious. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

The issue was the appropriate division of the proceeds. Florinda's summary judgment motion establishes through her affidavit that she and appellants had purchased the property; the affidavit sets out the purchase price and the amount that Florinda contributed to that purchase price. The affidavit also states she loaned Pablo Berlanga $15,000 for improvements. The affidavit provides a basis for a division on a 76% to 24% split, as reflected in the summary judgment. The motion and the affidavit establish entitlement to the judgment. *See* Tex. R. Civ. P. 756, 760; Tex. Prop. Code Ann. §§ 23.001-23.005 (West 2000). Issue four is overruled.

MOTION FOR NEW TRIAL

Appellants contend in issue one that they did not respond to the motion for summary judgment because they did not receive it. "'[D]ue process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.'" *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).[1] In their motion for new trial, appellants raised due process challenges to the granting of the motion for summary judgment because of an alleged lack of notice of the motion itself and the hearing date. The motion for new trial was overruled by operation of law. A denial of a motion for new trial is reviewed for abuse of discretion. *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).

The right to summary judgment exists only when the requirements of Rule 166a are satisfied. *See Tanksley v. CitiCapital Commercial Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied). Rule 166a(c) requires that the motion and any

[1]Appellants assert in issues one and five that their due process rights were violated because the trial court did not consider and rule on their post-judgment motions and evidence. The motion for new trial was overruled by operation of law. This disposition does not establish that the trial court did not consider the motion. The fact that the trial court did not expressly rule on the other post-judgment motions does not mean the trial court did not consider them. We overrule those parts of issues one and five relating to this argument.

supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Tex. R. Civ. P. 166a(c).

Rule 21a sets out the service requirements. *See* Tex. R. Civ. P. 21a. A motion may be served on a party by delivering a copy via certified or registered mail to the party's last known address. Tex. R. Civ. P. 21a. Service by mail is complete upon deposit of the document, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. *Id.* A certificate of service by a party or an attorney of record is prima facie proof of the fact of service. *Id.*; *see Rabie v. Sonitrol of Houston, Inc.*, 982 S.W.2d 194, 196 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *see also Thomas v. Ray*, 889 S.W.2d 237, 238-39 (Tex. 1994). "[N]otice properly sent pursuant to Rule 21a raises a presumption that notice was received." *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005). The opposing party may attempt to rebut this presumption of receipt by offering proof that the notice or document was not received. *See* Tex. R. Civ. P. 21a.

The certificate of service on Florinda's motion for summary judgment states that a true copy of the motion was served on each attorney of record or *pro se* party; the address listed for appellants on the certificate of service is a Friendswood, Texas address. The certificate of service on the notice of submission date for the summary judgment motion states the same address. The address is the one provided by appellants for service.

A default judgment should be set aside and a new trial granted when the defendant's failure to answer before judgment was not intentional, or a result of conscious indifference, but was due to mistake or accident; (2) the non-movant's motion for new trial sets up a meritorious defense; and (3) the motion demonstrates that the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). When lack of notice is the ground, the Supreme Court does not require a showing of a meritorious defense. *Mathis*, 166 S.W.3d at 744. The Supreme Court held in *Carpenter v. Cimarron Hydrocarbons Corporation*, however, that "*Craddock* does not apply to a motion for new trial filed after summary judgment is granted on a motion to which the nonmovant failed to timely respond when the respondent had notice of the hearing and an opportunity to employ the means our civil procedure rules make available to alter the deadlines Rule 166a imposes." *Cimarron*, 98 S.W.3d 682, 683-84 (Tex. 2002).

The trial judge could reasonably reject appellants' assertion that they lacked notice. In lengthy affidavits accompanying their motion for new trial, appellants explained their reasons for not responding to the motion for summary judgment, and also many other views they have of appellee. First, they asserted they never received it. Then they offered additional reasons: they had medical problems, moved to Florida in May 2010, and for "about the next month" had no address. Based on their prior experience

with another suit (which was not dismissed for a year), they believed the partition suit was simply inactive.

Section 30.015 of the Texas Civil Practice and Remedies Code provides that a party to a civil action filed in a district court, county court, statutory county court, or statutory probate court "must provide the clerk of the court with written notice of the party's new address." Tex. Civ. Prac. & Rem. Code Ann. § 30.015(a),(d) (West 2008); *see Binnie v. Coyle*, No. 13-09-00227-CV, 2010 WL 4812995, at *6 (Tex. App.—Corpus Christi Nov. 23, 2010, no pet.). Appellants initiated litigation against Florinda. When appellants were no longer represented by an attorney, they notified the court they would be appearing *pro se* and that their address had changed. They provided the trial court with the Friendswood address and requested that all correspondence and notices be sent to the address.

Appellants state they received an envelope addressed to their Friendswood address and forwarded to a Florida post office box; the envelope contained the court's notice of entry of the summary judgment. This suggests appellants were relying on a forwarding address and received mail forwarded from the Friendswood address. The trial court could also reasonably conclude appellants did not show that their failure to update their address was unintentional or the result of something other than conscious indifference. *See Munoz v. Rivera*, 225 S.W.3d 23, 27-28 (Tex. App.—El Paso 2005, no pet.) (citing *Johnson v. Edmonds*, 712 S.W.2d 651, 653 (Tex. App.—Fort Worth 1986, no writ))

("Conscious indifference has been defined as failing to take some action which would seem obvious to a person of reasonable sensibilities under the same circumstances."). Appellants stated in their affidavit that they were without a new address for approximately a month beginning May 9, 2010. The motion for summary judgment, however, was not filed until September 2010, at least two months after appellants indicated they had a new address in Florida, to which mail was forwarded from the Friendswood address.

From the record here, the trial court could conclude appellants understood they should notify the court and the parties of any address change, because they notified the court of an address change once before. *See Mathis*, 166 S.W.3d at 746 ("[A]ssuming there is such a duty, unless noncompliance [nonappearance at trial] was intentional rather than a mistake, due process requires some lesser sanction than trial without notice or an opportunity to be heard."). Apparently, appellants assumed the litigation would become inactive based on their experience with other litigation. In considering appellants' explanations in their affidavits, the trial court could reasonably conclude that appellants were receiving mail forwarded to their new address from the Friendswood address, and appellants assumed the suit would be inactive in the absence of a response. Under the circumstances, we do not see an abuse of discretion by the trial court. We overrule issues one and five.

The trial court's judgment is affirmed.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on October 26, 2011
Opinion Delivered January 26, 2012

Before McKeithen, C.J., Gaultney and Horton, JJ.