In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00246-CV

ABNER LEONARD WASHINGTON, Appellant

V.

TIM SIMMONS AND JOHNNY MASON, JR., Appellees

On Appeal from the 411th District Court
Polk County, Texas
Trial Cause No. 21498

MEMORANDUM OPINION

Abner Leonard Washington appeals from the trial court's order dismissing his lawsuit for want of prosecution, which he attributes to the trial court's inactivity. We affirm the trial court's judgment.

In 2004, Washington filed a petition against the Texas Department of Criminal Justice, two prison wardens, a grievance coordinator for the prison unit where Washington was confined, and a dentist assigned to the unit. Washington's claim against the unit's dentist, Dr. Johnny Mason, Jr., alleges a claim of malpractice arising from

failing to prescribe sufficient pain medication for him to treat him properly regarding the extraction of one of his teeth in April 2004. With respect to this claim, Washington invoked a repealed medical liability statute and a federal civil rights statute. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039 (as amended) (Medical Liability and Insurance Improvement Act), repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884 (effective September 1, 2003); 42 U.S.C.A. § 1983 (West 2003).

Against the unit's employees who were not medical providers, Washington alleged claims for trover and conversion, claims that relate to the seizure and destruction of various records and material that he was using on his legal matters and those of other prisoners. With respect to his claim that prison employees illegally seized his personal records, Washington named the Polunsky Unit of the Texas Department of Criminal Justice, Warden Chuck Biscoe, an Assistant Warden James Jones, and Grievance Coordinator Warren Worthy.

In 2004, the trial court dismissed Washington's suit for non-compliance with procedural requirements for indigent inmates, but the Waco Court of Appeals reversed the trial court's order and remanded the case to the trial court. *See Washington v. Tex. Dep't of Criminal Justice*, 10-04-00253-CV, 2005 WL 1484037 at *4 (Tex. App.—Waco Jun. 22, 2005, no pet.) (mem. op.). After remand, Washington filed a supplemental complaint adding claims against three more Department employees.

Out of the defendants who were named in Washington's original and supplemental petitions, only two individuals filed answers, Johnny Mason, Jr. and Tim Simmons, who filed a joint answer in 2007. Their answer notes that Washington's petition did not plead a claim against Simmons, and his petition did not mention Simmons. Simmons also filed an affidavit stating that he became the warden of the Polunsky Unit in 2007, and that he did not work there before June 2007. In their answer, Simmons and Mason complained that Washington failed to provide fair notice of his claims. Mason also complained that Washington failed to explain how Dr. Mason's medical care violated the Eighth Amendment, and that Washington's petition failed to state the elements of a health care liability claim.

Shortly after Simmons and Mason answered, Washington filed a response that, although vague with respect to whether he intended to assert any claim against Simmons, we interpret to allege that Simmons was responsible for conduct of the Polunsky Unit's wardens. The trial court scheduled a hearing in the case for November 30, 2007, but the trial court passed the hearing when defense counsel failed to appear.

In April 2008, the trial court sustained the special exceptions in a teleconference hearing. That same month, the trial court signed an order requiring that Washington amend his pleadings to re-plead his claims against Simmons and Mason within thirty days, stating that if he did not, Washington's suit would be dismissed with prejudice.

Shortly after the trial court ordered Washington to replead his claims, Washington filed an objection stating that he did "not intend on amending his pleadings[.]"

Nearly three years later, Simmons and Mason filed a motion to dismiss for want of prosecution. At that point, Mason had not amended his pleadings, as required by the trial court's order. The same month that Simmons and Mason asked the trial court to dismiss Washington's case, the trial court granted the motion without a hearing. Washington filed an objection, complaining the trial court and the opposing parties were at fault for any delay in failing to sign an order dismissing the case earlier than it did.

On appeal, Washington contends the trial court abused its discretion in dismissing the suit for want of prosecution because his inaction related to the trial court's failure to issue a final order dismissing the case or to set the case for trial.

The record reflects that Washington received adequate notice of the defendants' special exceptions. *See* Tex. R. Civ. P. 21 (directing that an application to the court for an order must be served on the opposing party not less than three days before the time specified for the hearing). Washington had notice of the date originally set for the hearing, but he had little to any prior notice of the rescheduled hearing, although he did participate in it. *See Magnuson v. Mullen*, 65 S.W.3d 815, 823-25 (Tex. App.—Fort Worth 2002, pet. denied). Washington filed an additional response after the hearing and before the trial court dismissed the case. The lack of more advance notice of the rescheduled hearing did not prevent Washington from responding to the special

exceptions, as that matter was properly resolved on the pleadings. *See* Tex. R. App. P. 44.1 (providing that error that neither caused an improper judgment nor prevented a party from presenting its case to the appellate court is harmless).

"Both the final order of dismissal and the interlocutory order granting special exceptions must be challenged in order for the merits of the order granting special exceptions to be reviewed." *Perry v. Cohen*, 272 S.W.3d 585, 588 (Tex. 2008). Under the circumstances present here, it appears that Washington chose to stand on the pleadings he filed, and he advised the trial court of his intent to stand on his existing pleadings. *See McCamey v. Kinnear*, 484 S.W.2d 150, 153 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.). Accordingly, to determine whether the trial court acted properly in dismissing his case for want of prosecution, we consider whether the trial court abused its discretion by sustaining the defendants' special exceptions. *Id.*

"The purpose of a special exception is to compel clarification of pleadings when the pleadings are not clear or sufficiently specific or fail to plead a cause of action." *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007). A petition must give each party fair notice of the facts upon which he would be liable and state the theory upon which the plaintiff seeks to hold that defendant liable. *See Ford v. Performance Aircraft Servs., Inc.*, 178 S.W.3d 330, 335-36 (Tex. App.—Fort Worth 2005, pet. denied). Simmons, one of the persons Washington served, was not identified in the pleading served on him. Washington's response, indicating that he intended to include Simmons as

a party is extremely vague about Washington's theory against Simmons, since the incidents giving rise to Washington's claims occurred before Simmons was employed on the unit where the incidents occurred. With respect to Washington's claims against Dr. Mason, his petitions either assert a claim for depriving Washington of his civil rights or a health care liability claim. Because Washington's pleadings fail to give Dr. Mason or Simmons fair notice, the trial court did not abuse its discretion by requiring Washington to further define his claims.

Because Washington chose to stand on his pleadings and refused to amend, we conclude the trial court did not abuse its discretion in dismissing the claims against Simmons and Mason. "If the trial court properly sustained the special exceptions and the plaintiff refuses or fails to amend, the trial court does not err in dismissing the cause of action." *Cole v. Hall*, 864 S.W.2d 563, 566 (Tex. App.—Dallas 1993, writ dism'd w.o.j.). The trial court ordered Washington to amend his pleadings by May 19, 2008. He did not. No further notice was required for the trial court to dismiss the case. *See Ford*, 178 S.W.3d at 336-37; *Cruz v. Morris*, 877 S.W.2d 45, 46-48 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Eichelberger v. Balette*, 841 S.W.2d 508, 510 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (holding that a trial court may dismiss a suit if a party fails to replead within the time granted to amend).

The trial court also did not err in dismissing any claims against parties who were never served. The trial court could not give Washington a trial on claims against

defendants that were not served. *See* Tex. R. Civ. P. 124. Nothing in the record shows that any of the other defendants Washington sued were served, nor does Washington assert in his brief that he obtained service on defendants who never answered. Based on Washington's failure to serve some of the defendants named in his petition, he effectively discontinued his suit as to them. *See Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex. 1962). We overrule Washington's issue and affirm the trial court's judgment.

AFFIRMED.

____
HOLLIS HORTON
Justice

Submitted on July 17, 2012
Opinion Delivered September 13, 2012
Before Gaultney, Kreger, and Horton, JJ.