In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00375-CV

NORMAN CRITTENDON, Appellant

V.

J. DOE, ET AL, Appellees

On Appeal from the County Court at Law
Polk County, Texas
Trial Cause No. CV03358

MEMORANDUM OPINION[1]

In the suit underlying this appeal, the trial court declared Norman Crittendon to be a vexatious litigant and ordered him to deposit security. *See* Tex. Civ. Prac. & Rem. Code Ann. § 11.055(a) (West 2017). The trial court dismissed the case after Crittendon failed to make the deposit. The single issue Crittendon raises in this appeal maintains that the proper procedure for invoking Chapter 11 of the Civil

[1] Our opinion of July 20, 2017, which dismissed the appeal for want of prosecution, was withdrawn on August 16, 2017.

Practice and Remedies Code was not followed. *See generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 11.002–.104 (West 2017). We find no reversible error and affirm the trial court's judgment.

Filed on March 16, 2016, Crittendon's original petition alleged that J. Doe, C. Lee, and J. Raschke, while employed by the Texas Department of Criminal Justice, violated the Texas Theft Liability Act. *See generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 134.001–.005 (West 2011 & Supp. 2016). The petition alleged that in the course of Crittendon's transfer between two prison units, C. Lee received Crittendon's personal property, which included legal material and twelve books, and that J. Doe inventoried and confiscated the property as excessive. The legal materials were subsequently returned to Crittendon but the twelve books were not. Other than stating that Raschke was employed by the Department as a property officer, the factual recitations in Crittendon's pleadings do not mention Raschke. Crittendon alleged that on December 31, 2015, he received two responses to the grievances he had filed earlier in the year. One response stated that his books had been confiscated and that he had received paperwork on same on June 18, 2015, and the other stated that his books had been returned by Correctional Officer K. O'Brien on September 2, 2015. Crittendon alleged that he attempted to exhaust the grievance process by filing the required Step 2 grievances but was told he was too late.

Crittendon served Raschke by certified mail on April 13, 2016, but failed to perfect service on C. Lee. The unit's warden accepted service of the J. Doe citation, but no answer was filed.

On April 27, 2016, Jeremy Raschke filed a motion to dismiss the petition as frivolous pursuant to Chapter 14 of the Texas Civil Practice and Remedies Code. *See generally* Tex. Civ. Prac. & Rem. Code Ann. §§ 14.001–.014 (West 2017). The motion alleged Crittendon failed to exhaust his administrative remedies under section 501.008 of the Texas Government Code. *See generally* Tex. Gov't Code Ann. § 501.008 (West 2012). Additionally, Raschke alleged that Crittendon failed to file a copy of the final decision of the grievance system and that he filed an incomplete declaration of previous filings. Raschke argued Crittendon's claims lacked an arguable basis because he alleged tort claims that could have been brought against the Department, in that the acts were alleged to have been made by government employees in the performance of their duties, and for which there is no waiver of immunity.

On May 4, 2016, Raschke filed a motion to declare Crittendon a vexatious litigant. The motion alleged there was no reasonable probability that Crittendon would prevail in the litigation because he (1) failed to exhaust his administrative remedies; (2) failed to file a required affidavit stating the date he submitted and

received his grievances; (3) failed to properly describe his previous lawsuits; (4) failed to declare more than 50 previous *pro se* lawsuits to the Court; (5) filed a false declaration with the Court; (6) raised frivolous claims with no arguable basis in law; (7) raised claims that are subject to section 101.106 of the Texas Civil Practice and Remedies Code[2] and ultimately barred by sovereign immunity and (8) raised claims against Department employees that are barred by official immunity. Raschke further alleged that within the last seven years, Crittendon had commenced, prosecuted, or maintained at least five separate lawsuits or appeals that were finally determined adversely to him. Raschke attached copies of judgments and other documents from six cases in which Crittendon was the plaintiff and the non-prevailing party.

On July 5, 2016, Crittendon filed a motion in which he alleged that "The Plaintiff recently discovered that Defendant [Raschke] . . . had no direct relation with the misappropriation of the Plaintiff Property; and because of these facts, The Plaintiff move (sic) this Court to Delete said Defendant [Raschke] from this Action as being improperly Joined."

On July 19, 2016, the trial court held a hearing on the motion to declare Crittendon a vexatious litigant. Appearing by telephone, Crittendon argued that Raschke had no standing because Crittendon had filed a notice of non-suit as to

[2] *See generally* Tex. Civ. Prac. & Rem. Code Ann. Sec. 101.106 (West 2011).

Raschke. Crittendon explained that his declaration of previous filings was incomplete because he had not retained all of his papers from his previous suits. He asked the trial court to consider the descriptions of his cases contained in Raschke's filings, which he argued showed that his claims were not duplicated in his previous cases. Crittendon admitted he received a decision on his grievance, but he suggested that his failure to exhaust his administrative remedies was the fault of the grievance coordinator and argued that a Theft Liability Act violation was not grievable.

On July 22, 2016, the trial court signed an order declaring Crittendon a vexatious litigant, ordering him to furnish $12,500 by September 15, 2016 in order to proceed against the defendants in the case and prohibiting Crittendon from filing any new litigation in a Texas court without permission from a local administrative judge. Crittendon did not deposit security and the trial court dismissed the suit.

In his appeal brief, Crittendon argues that section 11.054 of the Civil Practice and Remedies Code allows a trial court to find a plaintiff a vexatious litigant only "if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation[.]" Tex. Civ. Prac. & Rem. Code Ann. § 11.054. He argues that the procedure for invoking section 11.054 was not invoked because J. Doe offered no evidence in the hearing and Raschke offered no evidence on behalf of J. Doe. He contends Raschke lacked standing to show that there is not a reasonable

probability that Crittendon would prevail in the suit because at the time of the hearing Raschke was no longer considered a defendant.

The trial court had the power to rule on pending motions while it retained plenary power over the suit. *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). Any attempt by Crittendon to non-suit his claims against Raschke occurred after Raschke sought affirmative relief from the trial court by filing a motion to declare Crittendon a vexatious litigant. Crittendon framed his motion as correction of a misjoinder under Rule 41, but it was in substance a non-suit, which is governed by Rule 162. *Compare* Tex. R. Civ. P. 41 *with* Tex. R. Civ. P. 162. Any dismissal pursuant to Rule 162 "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief[.]"Tex. R. Civ. P. 162. A dismissal under Rule 162 also has "no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." *Id.* Therefore, Crittendon's notice of non-suit had no effect on the trial court's authority to consider and rule on Raschke's motion to declare Crittendon a vexatious litigant, which Raschke filed before Crittendon attempted to non-suit his claims against Raschke. *See Garrett v. Macha*, No. 2-09-443-CV, 2010 WL 3432826, at *5 (Tex. App.—Fort Worth Aug. 31, 2010, no pet.) (mem. op.). Furthermore, the filing of a motion to declare the plaintiff a vexatious litigant stays all other proceedings in

the trial court until after the trial court rules on the motion, and the trial court is required to determine the motion. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 11.052–.053. Therefore, the trial court did not abuse its discretion by considering and ruling on Raschke's motion to declare Crittendon a vexatious litigant. *See, e.g., Drake v. Willing*, No. 03-14-00665-CV, 2015 WL 5515903 at *4 (Tex. App.—Austin Sept. 16, 2015, no pet.) (holding that "[e]ven challenges to the court's subject-matter jurisdiction over a plaintiff's claims may be left unresolved pending the vexatious-litigant determination").

We conclude that the trial court followed the procedure for declaring a plaintiff a vexatious litigant under Chapter 11 of the Civil Practice and Remedies Code. Crittendon does not argue in his appeal that the trial court's findings on the criteria for finding Crittendon a vexatious litigant are not supported by the record. *See* Tex. Civ. Prac. & Rem. Code Ann. § 11.054. We overrule the single issue brought on appeal and affirm the trial court's judgment.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on August 25, 2017
Opinion Delivered November 9, 2017

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