COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00348-CV

SALLY CARLSON AND TIMOTHY CARLSON — APPELLANTS

V.

GREG SCHELLHAMMER — APPELLEE

FROM THE 360TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 360-577726-15

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellants Sally Carlson and Timothy Carlson appeal from a judgment of garnishment in favor of Appellee Greg Schellhammer. In four issues, Appellants complain that the trial court erred by summarily dismissing their counterclaims, that the judgment underlying the judgment of garnishment is void and erroneous,

[1]*See* Tex. R. App. P. 47.4.

and that they were not served in accordance with rule of civil procedure 663a. We will affirm.

II. BACKGROUND

Timothy filed an original petition for divorce against Sally in February 2011.[2] In May 2011, Sally filed an original answer and a counter-petition for divorce against Timothy. In November 2011, Sally's counsel, Schellhammer, filed a motion to withdraw, contending that Sally had failed to pay him in accordance with their attorney-client agreement. In December 2011, Timothy filed a notice of nonsuit, and on the same day, an associate judge signed an agreed order granting the nonsuit. About a month later, in late January 2012, the trial court signed an order permitting Schellhammer to withdraw as counsel for Sally.

On April 25, 2012, the trial court signed an "Order Un-Closing Case," which stated that the divorce case between Appellants had been "closed" in error and ordered that it be restored to "open status." That same day, Schellhammer filed a petition in intervention in the divorce case, alleging that Appellants owed him for unpaid attorney's fees that had accrued during his representation of Sally. In late October 2012, the trial court granted Schellhammer summary judgment on his claim for attorney's fees and severed it from Appellants' divorce case.[3]

[2]The divorce action was assigned cause number 360-492159-11.

[3]The severed claim for fees was assigned cause number 360-525067-12.

Shortly thereafter, on November 12, 2012, the trial court signed a final summary judgment in the severed cause that awarded Schellhammer $6,078.38 against Appellants jointly and severally. There is nothing in the record to indicate that Appellants appealed the final summary judgment.[4] In March 2013, the trial court dismissed Appellants' divorce case for want of prosecution.

On June 15, 2015, Schellhammer filed an application for writ of garnishment, supported by a sworn affidavit, against Garnishee JPMorgan Chase & Company (Chase Bank). Schellhammer alleged in part that the trial court had rendered a final summary judgment on November 12, 2012, in favor of Schellhammer and against Appellants in the amount of $6,078.38; that Chase Bank either had effects belonging to Appellants or was indebted to them; and that Appellants did not possess property in Texas that was subject to execution and sufficient to satisfy the final summary judgment. The trial court clerk issued a writ of garnishment directed to Chase Bank the same day. On July 2, 2015, Chase Bank filed an answer in which it averred that it was indebted to Appellants in the amount of $1,719.35 as of the date that it was served with the writ and in the amount of $2,017.33 as of the date of its answer.

On July 3, 2015, Schellhammer faxed Appellants' attorney the application for writ of garnishment, Schellhammer's affidavit, and the writ of garnishment.

[4]In January 2013, Schellhammer recorded an abstract of judgment for the final summary judgment. A writ of execution issued in January 2013 for the amount contained in the final summary judgment but was returned nulla bona in April 2013.

On July 13, 2015, Appellants filed a plea in intervention in the garnishment action, seeking to dissolve the writ of garnishment and alleging counterclaims against Schellhammer for a declaratory judgment, for an equitable bill of review, and for violations of the Deceptive Trade Practices Act (DTPA). On July 14, 2015, Schellhammer re-faxed the same documents that he had faxed to Appellants' attorney on July 3, 2015.

On July 23, 2015, the trial court signed an order denying Appellants' plea in intervention, including their request to dissolve the writ of garnishment. On October 6, 2015, the trial court signed a judgment of garnishment ordering that Schellhammer recover from Chase Bank $1,417.33 from the funds that Chase Bank was holding pursuant to the writ of garnishment.[5]

III. VALIDITY OF UNDERLYING FINAL SUMMARY JUDGMENT

Appellants argue in their second and fourth issues that the trial court erred by rendering the judgment of garnishment because the underlying final summary judgment in favor of Schellhammer is void, both jurisdictionally and procedurally. Each of Appellants' arguments represents a collateral attack upon the final summary judgment. See *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012) ("A collateral attack seeks to avoid the binding effect of a judgment in order to obtain specific relief that the judgment currently impedes."). Two arguments are unpersuasive; the other two are improper.

[5]The judgment also awarded Chase Bank $600 for attorney's fees, costs, and expenses.

"It is well settled that a litigant may attack a void judgment directly or collaterally, but a voidable judgment may only be attacked directly." *Id.* at 271. A judgment is void—and may be collaterally attacked at any time—when "the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010); *see PNS Stores*, 379 S.W.3d at 272. All other errors make the judgment merely voidable and must be corrected only through a direct attack. *Reiss v. Reiss*, 118 S.W.3d 439, 443 (Tex. 2003); *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). "A direct attack—such as an appeal, a motion for new trial, or a bill of review—attempts to correct, amend, modify or vacate a judgment and must be brought within a definite time period after the judgment's rendition." *PNS Stores*, 379 S.W.3d at 271.

Appellants first contend that the trial court lacked jurisdiction to sign the November 2012 final summary judgment because its plenary power expired on January 30, 2012—thirty days after it signed the December 29, 2011 order granting Timothy's nonsuit. *See* Tex. R. Evid. 329b(d) (providing that trial court's plenary power expires thirty days after it signs final judgment).

The expiration date for a trial court's plenary power is calculated from the date the court enters a final order disposing of all the claims and parties. *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 95–97 (Tex. 2009). "A judgment dismissing all of a plaintiff's claims against a defendant, such as an order of

nonsuit, does not necessarily dispose of any cross-actions . . . unless specifically stated within the order. *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009). Thus, an order of dismissal pursuant to nonsuit is not a final, appealable order when the order does not "unequivocally express an intent to dispose of all claims and all parties." *Id.* at 841; *see Unifund CCR Partners*, 299 S.W.3d at 95–97.

In *Walter v. Teller*, we considered whether the trial court had jurisdiction to sign a sanctions order after it had granted a party's nonsuit months earlier. No. 02-12-00028-CV, 2013 WL 5966351, at *2 (Tex. App.—Fort Worth Nov. 7, 2013, no pet.) (mem. op. on reh'g). The dismissal order stated, "On May 24, 2011, the Court received the Notice of Nonsuit of [Party] and ORDERS this case dismissed without prejudice to [Party's] right to refile it. All costs incurred are taxed against [Party], for which let execution issue if not paid." *Id.* We held that the trial court's plenary power had not expired before it signed the sanctions order because the dismissal order—which "did not specifically reference [the motion for sanctions] or otherwise unequivocally express any intent to dispose of the motion"—was not a final order that disposed of the motion for sanctions. *Id.*

Here, Timothy filed his original petition for divorce against Sally in February 2011, and Sally filed a counter-petition for divorce in May 2011. Sally's counter-petition for divorce was pending when the trial court signed the order granting nonsuit on December 29, 2011. The order stated, "On December 29, 2011 the Court received the Notice of Nonsuit of Timothy Carlson and ORDERS this case dismissed without prejudice to Timothy Carlson's right to refile it. All costs

incurred are taxed against Timothy Carlson, for which let execution issue if not paid." Aside from the names of the parties, the language is identical to the dismissal order in *Walter*. The order granting nonsuit disposed of Timothy's petition and claims but did not specifically reference Sally's then-pending counter-petition for divorce or otherwise unequivocally express any intent to dispose of her counter-petition. Thus, the December 29, 2011 order granting nonsuit did not finally dispose of all claims and parties in the divorce action. *See Unifund CCR Partners*, 299 S.W.3d at 96–97; *Walter*, 2013 WL 5966351, at *2. The trial court's plenary power therefore did not expire thirty days later, and it retained jurisdiction to grant summary judgment for Schellhammer, to sever his claim from the divorce action, and to sign the underlying final summary judgment.[6] We overrule this part of Appellants' second issue.

In another part of their second issue, Appellants argue that the underlying final summary judgment is void because although the divorce action was dismissed, they "never received citation prior to issuance of the void [final summary] judgment." *See Sec. State Bank & Trust v. Bexar Cty.*, 397 S.W.3d 715, 723 (Tex. App.—San Antonio 2012, pet. denied) (explaining that to prevail on a collateral attack, record must demonstrate jurisdictional defect sufficient to

[6]The administrative closing and unclosing of the case had no effect upon the trial court's jurisdiction. *See Jackson v. Tex. Bd. of Pardons & Paroles*, No. 01-10-00800-CV, 2012 WL 3775975, at *1 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.) (mem. op.) (explaining that an administrative order closing a case is not a final judgment subject to direct appeal).

void judgment, such as when the record shows a complete lack of service that violates due process); *see also In re P. RJ E.*, No. 01-15-01110-CV, 2016 WL 3901911, at *2 (Tex. App.—Houston [1st Dist.] July 14, 2016, no pet.) (op. on reh'g) ("Personal jurisdiction over a defendant requires valid service of process."). As explained immediately above, Appellants' divorce action remained pending after Timothy nonsuited his petition. Consequently, Schellhammer was not required to serve Appellants with citation when he filed his petition in intervention for attorney's fees because Appellants were still parties in the pending divorce action. *See Baker v. Monsanto Co.*, 111 S.W.3d 158, 160 (Tex. 2003) (explaining that service of citation is necessary when an intervenor seeks affirmative relief against a defendant who has *not* appeared at the time the intervention was filed). We overrule this part of Appellants' second issue.

Appellants argue in the remainder of their second issue that the underlying final summary judgment is void because no motion was filed and no notice of a hearing was given to Appellants before the trial court signed the April 25, 2012 "Order Un-Closing Case." A defendant who has appeared in a case is entitled to notice of the trial setting as a matter of due process, *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390–91 (Tex. 1989), but lack of notice of a trial setting, although it might cause the judgment to be voidable, does not render the judgment void. *In re Lowery*, No. 05-14-01509-CV, 2014 WL 8060585, at *1 (Tex. App.—Dallas Dec. 18, 2014, orig. proceeding) (mem. op.). Notwithstanding that the "Order Un-Closing Case" had nothing to do with a trial

setting, Appellants' nonjurisdictional argument represents an improper collateral attack upon the final summary judgment, as does Appellants' fourth issue, which asserts that the final summary judgment was erroneously rendered against Appellants jointly and severally.[7] *See Reiss*, 118 S.W.3d at 443; *Browning*, 698 S.W.2d at 363. We overrule the remainder of Appellants' second issue and their fourth issue.

IV. COUNTERCLAIMS

In their first issue, Appellants argue that the trial court erred by dismissing their counterclaims "after just one hearing on dissolution of the writ of garnishment, without any filing of a dispositive motion or any trial," and without forty-five days' notice of trial.

Appellants raised their counterclaims in their plea in intervention, along with their request to dissolve the writ of garnishment. The declaratory judgment counterclaim alleged that the final summary judgment was void, and the bill of review and DTPA counterclaims requested equitable relief and were premised

[7]In addition to collaterally attacking the validity of the final summary judgment, Appellants also state that they met their burden of proof to prevail on a bill of review—a direct attack on the final summary judgment. However, Appellants put on no evidence to support their bill of review. *See Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (providing elements that bill-of-review plaintiff must plead *and prove*). Appellants claim that they were entitled to the modified burden that a bill-of-review plaintiff entertains when claiming lack of service or notice, *see Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 812 (Tex. 2012), but the modified burden was inapplicable here because Schellhammer was not required to serve Appellants with citation when he intervened and because the trial court's administrative "Un-Closing" of the case was in no way a dispositive trial setting.

upon the events surrounding the order granting Timothy's nonsuit, the trial court's "Order Un-Closing Case," and the final summary judgment. On July 14, 2015, Appellants obtained an "Order to Show Cause," which required Schellhammer and Chase Bank to appear before the trial court on July 22, 2015, and to show cause why Appellants' "request for equitable relief and to dissolve the writ of garnishment" should not be granted. Appellants obtained an identical order three days later, on July 17, 2015.

At the hearing on July 22, 2015, Appellants' counsel specifically asked the trial court to dissolve the writ of garnishment and to rule on their counterclaims seeking equitable relief. Appellants' arguments reflected the allegations that they had made in support of their counterclaims—the purported void final summary judgment and the lack of notice and a hearing involving the "Order Un-Closing Case." At the conclusion of the hearing, the trial court asked Appellants' counsel to submit a proposed order. The proposed order that counsel submitted the next day stated in relevant part that the "Court considered the request for equitable relief and to dissolve the writ of garnishment filed by Counter-Plaintiffs Sally Carlson and Timothy Carlson" and that "[a]fter considering [Appellants'] request, the response, the pleadings, and arguments of counsel, the Court GRANTS the requests."

It has long been recognized that a party cannot complain on appeal that the trial court took a specific action that the complaining party requested. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005). "Specifically, a litigant cannot ask something of the trial court and then complain on appeal the trial court gave it to him." *Daniels v. Pecan Valley Ranch, Inc.*, 831 S.W.2d 372, 382 (Tex. App.—San Antonio 1992, writ denied), *cert. denied*, 508 U.S. 965 (1993). Commonly referred to as the doctrine of invited error, or estoppel, the rule is grounded in justice and dictated by common sense. *Tittizer*, 171 S.W.3d at 861–62.

The orders to show cause, Appellants' counsel's arguments at the hearing on July 22, 2015, and the proposed order submitted by Appellants' counsel all clearly demonstrate that Appellants invited the trial court to consider not only their motion to dissolve the writ of garnishment but also their counterclaims.[8] Appellants cannot now complain on appeal that the trial court improperly considered their counterclaims at the July 22, 2015 hearing, instead of on final trial, when they repeatedly invited the trial court do so. *See id.*; *Sherman Acquisition, L.P. v. Raymond*, No. 04-05-00246-CV, 2006 WL 1004680, at *1 (Tex. App.—San Antonio Apr. 19, 2006, no pet.) (mem. op.) (holding that doctrine of invited error precluded appellant from complaining on appeal that trial

[8]Tellingly, Appellants even argue in their second issue that they proved up their bill-of-review counterclaim.

court had improperly dissolved writ of garnishment after stating at hearing that trial court could dismiss writ). We overrule Appellants' first issue.[9]

V. SERVICE OF WRIT OF GARNISHMENT

Without any supporting analysis, Appellants argue in their third issue that the trial court erred by granting the judgment of garnishment because "no citation was issued or served upon" them. Appellants direct us to no authority providing that like Chase Bank, the garnishee, they were entitled to service of citation. Instead, rule of civil procedure 663a, the governing authority, states, "The defendant shall be served in any manner prescribed for service of citation or as provided in Rule 21a with a copy of the writ of garnishment, the application, accompanying affidavits and orders of the court as soon as practicable following the service of the writ." Tex. R. Civ. P. 663a.

The record demonstrates that Chase Bank was served with the writ of garnishment on June 15, 2015. Approximately two weeks later, on July 3, 2015, Schellhammer faxed the documents required by rule 663a to Appellants' counsel, as authorized by rule 21a. *See* Tex. Rule Civ. P. 21a (permitting service by fax upon party's attorney). Schellhammer testified at the hearing on July 22, 2015,

[9]We also note that Schellhammer filed a motion to strike Appellant's plea in intervention. In the unlikely event that the trial court's order denying Appellants' plea in intervention could be construed as granting Schellhammer's motion to strike without considering Appellants' counterclaims, the trial court could have exercised its broad discretion to strike Appellants' plea in intervention. *See J. Fuentes Colleyville, L.P. v. A.S.*, No. 02-15-00354-CV, 2016 WL 4395782, at *3 (Tex. App.—Fort Worth Aug. 18, 2016, no pet.) (thoroughly explaining standards for striking petition in intervention).

that he waited until July 3, 2015, to serve Appellants because, although Appellants' counsel had contacted him on June 19, 2015, and June 30, 2015, about the writ of garnishment, Appellants' counsel did not confirm that he represented Appellants in the matter until July 3, 2015. Schellhammer faxed the documents to the same number that he had on file for Appellants' counsel.[10] When Appellants' counsel filed the petition in intervention on July 13, 2015, and denied proper service, Schellhammer re-faxed the documents to Appellants' counsel the next day, but this time to the number that was contained in Appellants' pleading. Appellants thus had an opportunity to challenge the writ of garnishment, and the trial court conducted a hearing thereon shortly thereafter. The trial court did not sign the judgment of garnishment until October 2015.

In light of these facts, we cannot conclude that the trial court erred or abused its discretion by concluding that Appellants were served in accordance with rule 663a. *See Requena v. Salomon Smith Barney, Inc.*, No. 01-00-00783-CV, 2002 WL 356696, at *4 (Tex. App.—Houston [1st Dist.] Mar. 7, 2002, no pet.) (holding that plaintiff in garnishment proceeding who did not serve debtor until fifteen days after learning that debtor was represented by counsel, which was also one day after the trial court began its hearing on motion to dissolve, did not serve judgment debtor "as soon as practicable"). We overrule Appellants' third issue.

[10]Appellants' counsel confirmed at the July 22, 2015 hearing that he received the documents.

VI. CONCLUSION

Having overruled all of Appellants' issues, we affirm the trial court's judgment of garnishment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: DAUPHINOT, MEIER, and GABRIEL, JJ.

DELIVERED: November 10, 2016

GABRIEL, J., concurs without opinion.