In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00332-CV

RICHARD JAMES JOHNSON, APPELLANT

V.

MICHAEL VENABLE, ET AL., APPELLEES

On Appeal from the 320th District Court
Potter County, Texas
Trial Court No. 101022-D, Honorable Don R. Emerson, Presiding

March 11, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Richard James Johnson appeals from a final summary judgment dismissing his claims with prejudice. Johnson, an inmate, had sued various named and unnamed employees of the prison in which he was incarcerated. They purportedly denied him various constitutional rights, stole property from him, and retaliated against him when he complained. The six issues urged here concern the trial court purportedly "abus[ing] its discretion" in granting the motion for summary judgment. We affirm.

Issue One

Johnson initially contends that the trial court "abused its discretion" by indicating that it "was incapable of rendering a legal opinion." Such indication purportedly was manifested when the trial court said at the summary judgment hearing that "[i]t doesn't make any difference what I believe" and "[i]t doesn't make any difference." The utterances were made in response to Johnson asking the court: "do you believe that solitary and ad/seg are the same thing? Because we have some correctional guards right here we can ask." Apparently, Johnson was prepared to have those guards testify at the hearing to address the topic if the trial court cared to hear them. We overrule the issue.

Johnson's argument is conclusory and unsupported by citation to legal authority. Simply put, he fails to explain why or how the utterances made in response to the question indicates an incapability to render a legal opinion. Nor does he explain how his question and its reply 1) pertained to any of the grounds uttered in the motion for summary judgment, 2) pertained to any relevant issue at the summary judgment proceeding, or 3) illustrated that his opponents were not entitled to summary judgment on the grounds alleged in their motion.

Per the Texas Rules of Appellate Procedure, an appellant's brief must contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). When such is not provided, the appellant presents nothing for review. *Sunnyside Feedyard, L.C. v. Metropolitan Life Ins. Co.,* 106 S.W.3d 169, 173 (Tex. App.—Amarillo 2003, no pet.). Due to Johnson's

failure to comply with Rule 38.1(i), he presented nothing for review with respect to his first issue.

Issues Two and Three

Through his next two issues, appellant contends that the trial court "abused its discretion" when it denied him opportunity to present live testimony of two "expert witnesses" at the summary judgment hearing. We overrule the issues since a trial court is barred from receiving live testimony at a hearing on a motion for summary judgment. TEX. R. CIV. P. 166a(c) (stating that "[n]o oral testimony shall be received at the hearing"); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 n.4 (Tex. 1992) (stating that "[l]ive testimony may be considered at a special appearance . . . and on objections to discovery requests, . . . but not at a summary judgment hearing . . . or venue hearing . . . ."); *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 561 (Tex. App.—Dallas 2003, pet. denied) (stating that a "motion for summary judgment is submitted on written evidence with oral testimony prohibited").

Issue Four

In his next issue, appellant complains about the trial court failing to comply with an opinion in a prior appeal. In that opinion we were addressing an appeal from a dismissal order entered under Chapter 14 of the Texas Civil Practice and Remedies Code. *Johnson v. Venable,* No. 07-13-00443-CV, 2014 Tex. App. LEXIS 13366 (Tex. App.—Amarillo December 12, 2014, no pet); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 14.003 (West 2002) (authorizing a trial court to dismiss a frivolous inmate lawsuit). The basis upon which the trial court then dismissed the suit implicated a factual determination and, therefore, created the need for a "factual hearing," in our view.

Johnson v. Venable, 2014 Tex. App. LEXIS 13366, at *4-5. None had been held, though. So, we concluded that the dismissal could not have been legitimately based upon the factual determination made by the trial court. Johnson interprets that holding as requiring the trial court to act upon the summary judgment motion here via an evidentiary hearing. Yet, Chapter 14 is not implicated here. Again, the trial court was entertaining a motion for summary judgment and live testimony cannot be received at such a proceeding. So, what we said in *Johnson* was and is of no import here, and we overrule the issue.

Remaining Issues

We are not quite sure of what Johnson complains of in his issues five and six. One topic seems to involve untimely notice of the summary judgment hearing. Allegedly, the notice first was served on another inmate with the last name of "Johnson" before appellant received it. Yet, it is clear that the Johnson at bar attended the summary judgment hearing and did not ask for a continuance or postponement of it due to untimely notice. By not asking for such relief below, he cannot complain at bar.[1] *Nguyen,* 108 S.W.3d at 560 (stating that "[i]f a party receives notice that is untimely, but sufficient to enable the party to attend the summary judgment hearing, the party must file a motion for continuance or raise the complaint of late notice in writing, supported by affidavit evidence, and raise the issue before the trial court during the summary judgment hearing.")

The other topic encompasses the substance of his claims against those who he sued. Yet, none of his arguments address the grounds upon which summary judgment

[1] Johnson alluded to "objections" in his brief but the record citations to which he referred dealt not with the purported untimeliness of the notice.

was sought. One of those grounds was immunity. Furthermore, the trial court did not specify upon which ground it relied in granting the motion and denying his claims. Thus, it was incumbent upon Johnson to address all the grounds and show why none were viable. *Shih v. Tamisiea*, 306 S.W.3d 939, 944-45 (Tex. App.—Dallas 2010, no pet.) Because he did not, he failed to carry his burden to show the presence of reversible error. Consequently, his remaining issues are overruled as well.

Accordingly, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice