In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00032-CV

BYRON WALKER, APPELLANT

V.

SHERYL WALKER, APPELLEE

On Appeal from the 90th District Court
Young County, Texas
Trial Court No. 32591, Honorable Stephen E. Bristow, Presiding

August 3, 2016

MEMORANDUM OPINION

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

"I was born at night, but not last night." Though the person who first uttered those words is unknown, they seem appropriate here.

This is a continuing story about the existence of cattle awarded to Byron Walker as part of the community estate owned by Byron and Sheryl Walker when they divorced.[1] Byron said they did not exist. Sheryl said they did. After trial of that and

[1] Because the appeal was transferred to this court from the Second Court of Appeals, we apply the latter's precedent where available should no controlling precedent from a higher court exist. See TEX. R. App. P. 41.3.

other matters, the divorce court apparently agreed with Sheryl but awarded the livestock to Byron. The topic of the cattle's existence was then broached on appeal. There, Byron again argued that the animals did not exist and that the trial court erred in concluding otherwise. Like the trial court, the reviewing court also rejected the contention. It concluded that sufficient evidence appeared of record to support the factual determination. *Walker v. Walker*, No. 02-13-00229-CV, 2014 Tex. App. LEXIS 6425, at *4-6 (Tex. App.—Fort Worth June 12, 2014, pet. denied) (mem. op.). That evidence consisted, among other things, of Byron's own representation of owning $164,500 worth of livestock, and that representation appeared in a financial statement he executed three months before the divorce was tried. *Id.* Other evidence consisted of Sheryl's representation, in an inventory admitted at trial, that the community owned cattle also valued at $164,500. *Id*. Sheryl also testified that she had no knowledge of where that livestock was. *Id.* at *4. Apparently, Byron did not either, as pointed out by the reviewing court. He said he had sold the cattle through a feedlot in Kansas. *Id.* at *4-5. But, he could not remember the name of the feedlot or its location or the date of sale. *Id.* Nor did he have documentation of the sale. *Id.* And, despite having a lien on the animals, the Bank did not receive any proceeds for the supposed sale. *Id.* at *4. More importantly, all this evidence, according to the *Walker* panel, was before the trial court when it made the credibility choice to disbelieve Byron's version of events and reject his contention that the cattle did not exist. *Id.* at *6 (wherein the reviewing court deferred to the trial court's resolution of conflicting testimony and the inferences that reasonably could have been drawn from that evidence).

Having found no relief via his appeal, Byron renewed his attack upon the finding through a bill of review. It is the denial of the bill that spawned the appeal before us. In his petition starting that equitable proceeding, *see Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 164 (Tex. 2015) (identifying a bill of review as "an equitable proceeding"), Byron alleged Sheryl lied when she previously testified that the cattle existed and that she did not know what happened to them. So too did he posit that he could prove she lied. The proof, according to his allegations, came in the form of a note appearing in a document given their accountant while preparing their 2010 tax return. The document itemized transactions occurring in 2010, and on it Sheryl wrote: "[w]e also sold the company the last of our cows. I am not sure # or amount on that." So, Sheryl actually knew both that the cattle did not exist when the divorce was granted two years later but also what happened to them. This constituted fraud, which fraud was compounded by her failure to produce the accounting document in response to discovery requests propounded during their divorce. To that he also added allegations of threats she purportedly directed at him about ruining him if he refused to give her all the assets and keep all the debt. And, when all these circumstances were considered, Byron believed himself entitled to relief from the earlier finding regarding the cattle's existence and a new division of the community estate.[2]

The trial court rebuffed Byron's efforts at gaining a new division. It did so by granting the motion for summary judgment Sheryl filed. So too did it overrule his

[2]Though alleging that the accounting document was material and would have likely produced a different result at trial, Byron's petition did not address why or how it would outweigh or overcome the other evidence before the divorce court which the *Walker* panel found sufficient to support a disproportionate division of the community estate in favor of Sheryl. That evidence was rather bountiful and included such things as Byron's adultery and cruelty directed at Sheryl. *Walker v. Walker*, No. 02-13-00229-CV, 2014 Tex. App. LEXIS 6425, at *7-9 (Tex. App.—Fort Worth June 12, 2014, pet. denied) (mem. op.).

objections to various portions of the summary judgment evidence accompanying her motion. Included in the evidence he sought to exclude was the *Walker* opinion referenced above; it was irrelevant in Byron's view. Also denied him was effort to postpone the date on which the summary judgment was to be submitted for resolution. Byron wanted to conduct discovery developing the allegations of fraud and threat mentioned in his bill of review. The decisions to grant summary judgment, deny the continuance and overrule his objections to summary judgment evidence underlie the issues before us. We affirm.

The first issue we address is whether the trial court erred in overruling Byron's objection to the *Walker* opinion. Again, the opinion happened to be that which affirmed the divorce decree, overruled his complaints about the trial court finding that the marital estate owned cattle, and rejected his first effort to have the community estate divided anew. According to Byron, it was irrelevant. We cannot say that the trial court abused its discretion overruling the objection, and this is why. *See Hernandez v. State*, No. 02-15-00284-CR, 2016 Tex. App. LEXIS 6427, at *4-5 (Tex. App.—Fort Worth June 16, 2016, no pet. h.) (mem. op., not designated for publication) (noting the pertinent standard of review regarding decisions to admit or exclude evidence to be one of abused discretion).

A bill of review is not a favored remedy. *Billy B., Inc. v. Board of Trustees*, 717 S.W.2d 156, 158 (Tex. App.—Houston [1st Dist.] 1986, no writ). Thus, the grounds upon which it may be granted are narrow. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). Ordinarily, the person seeking it must plead and prove 1) a meritorious defense to the cause of action alleged to support the judgment, 2) which

defense the petitioner was prevented from making by the fraud, accident or wrongful act of his or her opponent, and 3) the petitioner was not negligent. *Id.* at 751-52; *Katy Venture, Ltd v. Cremona Bistro Corp.,* 469 S.W.3d at 164 (stating the same). Furthermore, when fraud is used as the basis to avoid a prior judgment, the fraud must be extrinsic, as opposed to intrinsic. *King Ranch,* 118 S.W.3d at 752. Intrinsic fraud pertains to the merits of the issues that were presented and were or should have been resolved in the former action. *Id*. They include such things "as fraudulent instruments, *perjured testimony*, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed." *Id.* (emphasis added). "Such fraud will not support a bill of review, because each party must guard against adverse findings on issues directly presented." *Id.* On the other hand, extrinsic fraud is that which denies a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. *Id.* These elements and the distinction between intrinsic and extrinsic fraud guide our analysis about whether the *Walker* opinion was relevant.

The *Walker* opinion does more than simply utter pronouncements of law. It also alludes to issues of law and fact that were previously raised by Byron, their identity to the issues he now raises, and the evidence underlying the trial court's decision to both award him the cattle and divide the community estate as it did. For instance, *Walker* illustrates that Byron previously questioned whether the community estate owned cattle or livestock. That same matter too lies at the heart of his bill of review. Additionally, evidence cited by Byron as illustrating that Sheryl lied (*e.g*. her testimony about not knowing what became of the livestock mentioned in Byron's financial statement) appears in the *Walker* opinion and indicates that the trial court may well have relied on it

in both concluding that the cattle were part of the community estate and awarding it to him. And, if the purported lies of Sheryl were relied upon by the trial court to reach its decision, that would affect whether the fraud was intrinsic or extrinsic. *See e.g. Id.* at 752 (stating that "any matter which was actually presented to and considered by the trial court in rendering the judgment" constitutes intrinsic fraud). Given these circumstances, the trial court could well have deemed the opinion relevant to the issues underlying the bill of review. *See* TEX. R. EVID. 401 (stating that evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action).

The second issue we address is whether the fraud involved is intrinsic or extrinsic. Sheryl posited in her motion for summary judgment that it was intrinsic. Byron argued that it was extrinsic or that a fact question existed as to which it was. We agree with Sheryl for the reasons that follow.

Byron complains of perjury allegedly committed by his ex-wife. It occurred during her testimony about not knowing what happened to the cattle and through her inventory which was admitted into evidence. *Walker v. Walker*, 2014 Tex. App. LEXIS 6425, at *5 (stating that the inventory was admitted into evidence). Yet, as said by our Supreme Court in *King Ranch*, "perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed," is intrinsic fraud, and a bill of review may not be granted based on intrinsic fraud. *King Ranch, Inc. v. Chapman, supra.* So, even if we accept as true the allegations in Byron's petition about Sheryl having lied, her supposed perjured testimony is not a ground for a meritorious bill of review.

As for threats purportedly uttered by Sheryl, we know of authority indicating that misrepresentation coupled with threats *that induce* an opposing party to forego the pursuit of rights may constitute extrinsic fraud. *See Rathmell v. Morrison*, 732 S.W.2d 6, 14 (Tex. App.—Houston [14th Dist.] 1987, no writ) (stating that "John did not have a right to prevent Mary Ann from having the companies appraised; and threatening to destroy the value of the companies if she insisted on an appraisal was not something he had a legal right to do. On the contrary, it was a wrongful act that, coupled with misrepresentation of the value of the companies, amounts to more than intrinsic fraud. If Mary Ann was induced by his threat to forego an appraisal and agreed to the property settlement agreement based on John's representations regarding the value of the companies, she was prevented from having a fair opportunity of presenting in the divorce trial evidence concerning the value of the companies"). Under that authority it is not enough that threats be made. They must also have an effect before they can be considered extrinsic fraud, as acknowledged in *Rathmell*. In other words, a threat having no effect lacks consequence. This may be because extrinsic fraud involves conduct resulting in the denial of an opportunity to fully litigate all rights and defenses that could have been asserted, *King Ranch*, 118 S.W.3d at 752, and threats having no impact lack such effect.

Here, Byron did not allege in his petition that the threats supposedly uttered by Sheryl somehow dissuaded him from pursuing any claim or defense. While he suggested he believed them, he nonetheless pursued a division of the marital estate, as exemplified in *Walker.* Indeed, the trial court awarded him the businesses that he wanted and from which he, as opposed to Sheryl, would profit. *Walker v. Walker*, 2014

Tex. App. LEXIS 6425, at *7-9. He obviously tried to induce the trial court to believe that he should not be awarded cattle because they did not exist. He obviously attacked the finding pertaining to that topic on appeal, along with the trial court's division of the community estate. Simply put, the record dispels any notion that Sheryl's threats induced him to forego any claim, right or defense.

So too do we note other evidence illustrating that he had little fear of or respect for Sheryl and whatever she may have said. That evidence consists of the physical and mental cruelties inflicted upon her and the threats levied against her and her family, all of which was also described in the *Walker* opinion.[3] It strains credulity to infer that one who can hold a loaded gun to his wife's head, strike her with a belt, hit her while pregnant, and threaten to kill her and her parents is suddenly intimidated by words coming from the victim of such cruelty.

Nor can we see how Sheryl's purported failure to produce a document delivered to the accountant working for her and Byron denied him the opportunity to contest the existence of the cattle. Again, the accounting document was given to the accountant the both used for preparation of their joint tax return. That was the very same accountant Byron designated as his expert witness at the divorce trial. And, it is that very accountant who informed him of the document, according to allegations contained in Byron's motion for continuance.[4] We further add the observation that the document Sheryl is somehow accused of hiding pertains to transactions occurring in 2010. How it

[3] One such instance consisted of his sending offensive text messages. *Walker v. Walker*, No. 02-13-00229-CV, 2014 Tex. App. LEXIS 6425, at *11-12 (Tex. App.—Fort Worth June 12, 2014, pet. denied) (mem. op.). A like text messages appeared in the record before us. It involves Byron directing heinous expletives towards a jurist entertaining one of Byron's legal proceedings, and stating that the jurist and another person "will no [sic] be alive when my land sells."

[4] In his motion to continue, Byron represented that ". . . Mr. Cusenbury [the accountant] first notified Byron about the existence of the withheld documents . . . ."

can be used to prove he no longer owned cattle used to secure promissory notes in 2011 or cattle mentioned in his 2012 financial statement executed immediately before the divorce trial went unexplained. We too are at a loss for a reasonable explanation illustrating how a document addressing transactions in 2010 proves or disproves the occurrence of transactions made in 2011 or thereafter.

Simply put, the purported misconduct cited in Byron's bill of review described nothing but intrinsic fraud, at best. More importantly, the averments about supposed perjured testimony by Sheryl, a hidden accounting document, pressuring children to forego testifying about what Sheryl may have known concerning the cattle, and the threats of financial ruin were alleged to show that the divorce court erred in finding that the cattle existed. If he could nullify that finding by proving they did not exist, then Byron believed he could obtain a redistribution of the marital estate. Yet, no one can escape the indisputable fact; that very issue needed to achieve the desired end (whether the cattle existed as part of the marital estate at the time of divorce) was not only tried by the divorce court but also reviewed on appeal. The cattle existed, according to the former, and that finding was affirmed by the latter. A bill of review may not be used as an additional remedy after one has made a timely but unsuccessful appeal on the very defense or claim or issue sought to be re-litigated. *See Rizk v. Mayad,* 603 S.W.2d 773, 776 (Tex. 1980) (stating that "[j]ust as a bill of review may not be used when one neglects to urge a motion for new trial or appeal when he has time to do so, a bill of review may not be used as an additional remedy after one has timely filed a motion to reinstate and a motion for new trial and has made a timely but unsuccessful appeal."); *Reynolds v. Reynolds*, No. 14-14-00080-CV, 2015 Tex. App.

LEXIS 7612, at *9 (Tex. App.—Houston [14th Dist.] July 23, 2015, no pet.) (mem. op.) (so holding and affirming the decision to deny the bill of review, despite the allegations of false and concealed evidence, because the petitioner sought to redistribute particular assets of the community estate when the manner of distributing those assets already had been litigated in the divorce). Thus, at least one ground mentioned in Sheryl's motion for summary judgment warranted summary judgment as a matter of law.

Finally, we address Byron's objection to the decision denying his motion for continuance. Through that motion, he sought time to discover or gather evidence of the supposed misconduct mentioned in his bill of review. Because proving such misconduct falls short of establishing anything other than intrinsic fraud and such fraud would not entitle him to relief, we cannot say that the trial court abused its discretion in denying opportunity to develop the irrelevant. *See Stivers v. State*, No. 02-14-00060-CR, 2016 Tex. App. LEXIS 4193, at *31 (Tex. App.—Fort Worth April 21, 2016, no pet.) (mem. op., not designated for publication) (noting that a trial court has the discretion to grant or deny a continuance).

Our decisions expressed herein relieve us from having to address the remaining issues proffered by Byron. The summary judgment is affirmed.

Brian Quinn
Chief Justice