



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-17-00021-CV

SYLVIA MARIE ORTIZ, APPELLANT

v.

PLANO INDEPENDENT SCHOOL DISTRICT, APPELLEE

**On Appeal from the 362nd District Court
Denton County, Texas
Trial Court No. 14-00804-362, Honorable Robert Bruce McFarling, Presiding**

December 13, 2017

MEMORANDUM OPINION

Before **QUINN, C.J., and CAMPBELL and PIRTLE, JJ.**

In this appeal of a case brought under the Texas Whistleblower Act,¹ appellant Sylvia Ortiz presents a narrow issue arguing the trial court abused its discretion by denying her motion to continue the hearing on a motion for summary judgment filed by

¹ The Texas Whistleblower Act is contained in Chapter 554 of the Texas Government Code. See TEX. GOV'T CODE ANN. §§ 554.001-010 (West 2012).

appellee Plano Independent School District. Finding the trial court did not abuse its discretion in denying Ortiz's motion for continuance, we will affirm the judgment.

Background

Ortiz, a former classroom teacher for the District, was terminated from her position effective September 19, 2013. She challenged the decision through statutory administrative review and appeal,² culminating in the Dallas Court of Appeals' 2016 decision upholding her termination.³

Meanwhile, on February 5, 2014, Ortiz filed her Whistleblower Act lawsuit. The trial court abated that case in July 2014 pending resolution of the statutory proceedings. The District filed a traditional motion for summary judgment on August 19, 2016, contending, *inter alia*, Ortiz's Whistleblower Act claim was precluded by the affirmative defense of collateral estoppel.

Ortiz's former counsel, Bryan D. Perkins, filed a motion to withdraw from the representation on October 7, 2016. The motion stated it was "based on good cause in that [Ortiz's] counsel is unable to timely and effectively communicate with [Ortiz] in a manner that is consistent with good attorney-client relations." The motion also stated a copy would be delivered to Ortiz at her last known address, that a hearing on the District's motion for summary judgment was scheduled for 11:00 a.m. on November 18, 2016, and that Ortiz's response to the summary judgment motion was due no later than November

² See generally TEX. EDUC. CODE ANN. Chapter 21, Subchapters F (Hearings Before Hearing Examiners) & G (Appeals to Commissioner of Education) (West 2012).

³ *Ortiz v. Comm'r of Educ.*, No. 05-14-01165-CV, 2016 Tex. App. LEXIS 2562 (Tex. App.—Dallas Mar. 10, 2016, pet. denied) (mem. op.).

11, 2016. The motion further contained a notice that it would be heard on October 21, 2016, at 11:00 a.m. and that Ortiz could object to Perkins' withdrawal.

By order signed October 21, 2016, the trial court permitted Perkins' withdrawal from his representation of Ortiz. A handwritten notice on the order stated that the District's motion for summary judgment would be heard on November 18, 2016, at 11:00 a.m. Ortiz did not file a response to the District's motion.

On November 15, 2016, new counsel for Ortiz appeared by filing a motion to continue the November 18 summary judgment hearing. The motion was not verified or accompanied by an affidavit. The District filed a response on November 17 opposing the requested continuance. Among other things, the response pointed out Ortiz's motion was not supported by affidavit. A notice in the clerk's record indicates the motion for continuance was set for hearing at the same time as the District's summary judgment motion.

There is no reporter's record of the hearing on the motion for continuance but it was denied by order signed November 18, 2016. By "final summary judgment," also signed on November 18, the trial court granted the District's motion for summary judgment without specifying a ground and rendered judgment that Ortiz take nothing by her lawsuit.

Analysis

A trial court may continue the hearing of a motion for summary judgment if by affidavit the nonmovant demonstrates she is unable to present facts necessary for opposition. TEX. R. CIV. P. 166a(g). A continuance shall not be granted except for "sufficient cause supported by affidavit, or by consent of the parties, or by operation of

law.”⁴ TEX. R. CIV. P. 251. We review a trial court’s ruling on a motion to continue a summary judgment hearing for an abuse of discretion. *D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs., L.P.*, 416 S.W.3d 217, 222 (Tex. App.—Fort Worth 2013, no pet.). We will not reverse a trial court’s order denying a motion for continuance absent that court’s clear abuse of discretion. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002). “When the ground for the continuance is the withdrawal of counsel, movants must show that the failure to be represented at trial was not due to their own fault or negligence.” *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986); *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984) (op. on reh’g).

In *Villegas*, the Texas Supreme Court held that when a motion for continuance is not sworn or supported by a proper affidavit, a reviewing court generally presumes the trial court did not abuse its discretion in denying the continuance. 711 S.W.2d at 626. It did not apply the general rule in that case, however, because it found it would be “unrealistic” to apply it to a lay movant whose attorney had been allowed to withdraw over the movant’s objection. *Id.* In *Villegas*, the trial court granted counsel’s motion to withdraw two days before trial. The now-pro se movant appeared for trial and voiced a request for time to retain an attorney, naming the attorney he sought to retain. *Id.* at 625-26. The trial court denied his request, and proceeded with the trial. The supreme court reversed, holding the trial court abused its discretion “because the evidence shows that Villegas was not negligent or at fault in causing his attorney’s withdrawal.” *Id.* at 626. It further found the trial court’s grant of the withdrawal motion two days before trial was too

⁴ Ortiz does not argue the District consented to the requested continuance or that a continuance was required by operation of law.

short a time for Villegas to find a new attorney and for the attorney to prepare for trial. *Id.* The court also cited the evidence Villegas's former attorney refused to turn over Villegas's file and paper, and held the former attorney "did not take reasonable steps to avoid foreseeable prejudice to the client." *Id.* at 627.

It is apparent the court in *Villegas* was working from a record containing evidence supporting its holding that the trial court abused its discretion; notably, evidence Villegas was not at fault in his attorney's withdrawal and had insufficient time to retain a new attorney, and that the attorney failed to take reasonable steps to avoid prejudice to his client. *Id.* at 626-27.

The record before us does not contain such evidence. We are not shown whether Ortiz was negligent or at fault in causing Perkins to withdraw. On this record, whether she objected to his withdrawal and, if so, the grounds for her objection, are unknown. We cannot know when Ortiz received notice of the District's motion for summary judgment, Perkins' intention to withdraw, or Perkins' withdrawal. Nor do we know when Ortiz undertook to locate replacement counsel and the steps she pursued to that end. In short, the record in this case, unlike that in *Villegas*, provides us no reason to disregard the general presumption that a trial court does not abuse its discretion by denying a motion for continuance that is unsworn and unsupported by an affidavit. 711 S.W.2d at 626; see *Clark v. Compass Bank*, No. 02-07-00050-CV, 2008 Tex. App. LEXIS 3783, at *4-9 (Tex. App.—Fort Worth May 22, 2008, no pet.) (mem. op.); *Poonjani v. Kamaluddin*, No. 02-14-00193-CV, 2015 Tex. App. LEXIS 5717, at *4 (Tex. App.—Fort Worth June 4, 2015, no pet.) (mem. op.) ("Applying rule 251, we have consistently held that a trial court does not

abuse its discretion by denying an oral, unsworn motion for continuance").⁵ No abuse of discretion is shown. Accordingly, Ortiz's issue on appeal is overruled and the judgment of the trial court is affirmed.

James T. Campbell
Justice

⁵ It has also been held that failure to support a motion for continuance with an affidavit preserves nothing for appellate review. See *Taherzadeh v. Ghaleh-Assadi*, 108 S.W.3d 927, 928 (Tex. App.—Dallas 2003, pet. denied) (finding oral motion for continuance presented without affidavit did not preserve claimed abuse of discretion by trial court in denying continuance because rule of civil procedure 251 requires an affidavit and error preservation under appellate rule 33.1(a)(1) requires motion comply with rules of civil procedure); *Ashton Grove L.C. v. Jackson Walker L.L.P.*, 366 S.W.3d 790, 800 (Tex. App.—Dallas 2012, no pet.) (same).