In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-17-00211-CV

RONALD GENE PARKER AND MELISSA DANE PARKER, APPELLANTS

V.

TRACY DYLAN CAIN, JR., APPELLEE

On Appeal from the 223rd District Court
Gray County, Texas
Trial Court No. 36,363, Honorable Phil N. Vanderpool, Presiding

October 15, 2018

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PARKER, JJ.

In this appeal, Ronald Gene Parker and Melissa Dane Parker (collectively, "Parker") contend that Administrative Regional Judge Kelly G. Moore abused his discretion in failing to recuse the Honorable Phil N. Vanderpool, and that Judge Vanderpool abused his discretion in denying a motion to reinstate Parker's lawsuit against Tracy Dylan Cain, Jr., which was dismissed for want of prosecution. We will affirm.

Factual and Procedural Background

On January 26, 2011, Parker filed an original petition against Cain contending that Cain was negligent in causing a collision with the rear end of Parker's vehicle. Parker further alleged that, as a result of Cain's negligence, Parker suffered personal injuries that required medical treatment and would require additional medical treatment in the future. Cain answered the lawsuit by a general denial filed on February 17, 2011. Cain's attorney requested a trial setting in a letter to the trial court on February 18, 2016. The trial court responded with a letter, dated February 23, 2016, stating that the trial court's review of the file revealed no activity on the case in the previous three and one-half years and that the matter "is eligible for dismissal for want of prosecution." The trial court enclosed a "Court's Notice of Intent to Dismiss for Want of Prosecution." The notice from the trial court indicated that, pursuant to Texas Rule of Civil Procedure 165a, the trial court intends to dismiss the case for want of prosecution at 9:30 a.m. on March 17, 2016. *See* TEX. R. CIV. P. 165a.[1] A dismissal hearing was scheduled for that date and time. Parker filed an amended motion to retain on March 15, 2016. On March 17, the judge dismissed the case with prejudice. On April 18, Parker filed a motion to reinstate. The trial court failed to hold a hearing on the motion. Parker appealed. This Court affirmed the portion of the trial court's judgment denying the motion to retain the case and reversed and remanded the case for a hearing on Parker's motion to reinstate.[2]

After remand, Parker filed a motion to recuse and a first amended motion to recuse or disqualify Judge Vanderpool. Judge Moore, Administrative Judge of the Ninth Region,

[1] Further reference to the Texas Rules of Civil Procedure will be by reference to "Rule ___."

[2] *Parker v. Cain*, 505 S.W.3d 119, 123 (Tex. App.—Amarillo 2016, no pet.).

heard the amended motion to recuse on February 22, 2017, and denied it on February 23, 2017.

Judge Vanderpool held a hearing on Parker's motion to reinstate and it was denied on April 6, 2017. Parker filed a motion for new trial on May 8, 2017, which was overruled by operation of law.

Denial of Recusal Motion

In their first issue, Parker contends that Judge Moore erred by denying the motion to recuse or disqualify the trial judge. We review the denial of a motion to recuse or disqualify for an abuse of discretion. Rule 18a(j)(A); *Vickery v. Vickery,* 999 S.W.2d 342, 349 (Tex. 1999) (op. on reh'g). An abuse of discretion exists when a court's decision is arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). The test for abuse of discretion is not whether in the opinion of the reviewing court the facts present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any guiding rules or principles. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995). The burden of proof rests on the litigant urging an abuse of discretion. *Manning v. North,* 82 S.W.3d 706, 709 (Tex. App.—Amarillo 2002, no pet.).

The grounds for recusal of a trial judge are set out in Rule 18b(b) of the Texas Rules of Civil Procedure. Rule 18b(b) provides, in relevant part, that a judge must recuse in any proceeding in which:

(1) the judge's impartiality might reasonably be questioned;

(2) the judge has a personal bias or prejudice concerning the subject matter or a party.

Rule 18b(b)(1), (2).

Where a party challenges the denial of a recusal motion based on alleged bias or impartiality, the party must show that the bias arose from an extrajudicial source and not from actions during the pendency of the trial court proceedings, unless the actions during proceedings indicate a high degree of favoritism or antagonism that renders fair judgment impossible. *See Ludlow v. DeBerry*, 959 S.W.2d 265, 271 (Tex. App.—Houston [14th Dist.] 1997, no writ) (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)). An extrajudicial source is defined as something the judge did or said apart from in-court rulings that calls attention to a prejudice against one of the parties in the case. *Liteky*, 510 U.S. at 555; *Grider v. Boston Co.* 773 S.W.2d 338, 346 (Tex. App.—Dallas 1989, writ denied). In determining whether recusal is required, "the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial." *Fuelberg v. State*, 410 S.W.3d 498, 509 (Tex. App.—Austin 2013, no pet.).

"[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion . . . ." *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001) (per curiam) (quoting *Liteky,* 510 U.S. at 555*).* "Bias by an adjudicator is not lightly established" and "judicial rulings almost never constitute a valid basis for a bias or partiality challenge." *In re City of Dallas*, 445 S.W.3d 456, 467 (Tex. App.—Dallas 2014, orig. proceeding). The remedy for incorrect or unfair rulings is to assign error by appeal or mandamus. *Id*.

Analysis

We begin by noting that recusal and disqualification are different. *In re L.S.*, No. 02-17-00132-CV, 2017 Tex. App. LEXIS 8963, at *47 (Tex. App.—Fort Worth Sept. 21, 2017, no pet.) (mem. op.) (citing *In re Union Pac. Res. Co*., 969 S.W.2d 427, 428 (Tex. 1998) (orig. proceeding)). Disqualification is the mandatory removal of a judge based on grounds set out in the Texas Constitution and is, in effect, jurisdictional in nature because it cannot be waived. *See* Tex. Const. art. V, § 11; *Horn v. Gibson*, 352 S.W.3d 511, 514 (Tex. App.—Fort Worth 2011, pet. denied); *see also* Rule 18b(a) (restating constitutional grounds for disqualification). Recusal, on the other hand, is governed by rule and may be waived if not raised in the trial court. *See* Rules 18a(b)(1), 18b(b)(1), (2); *Davis v. West*, 433 S.W.3d 101, 107-08 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

On February 22, 2017, Parker filed a first amended motion to recuse or disqualify Judge Vanderpool. The motion does not allege any constitutional or rule-based disqualifications as to the judge. Rather, the motion alleges that recusal is appropriate because "his Honor's abuse of discretion in this case and [five] other cases causes his impartiality to be reasonably questioned." The purported bias extends to instances where the judge has been "arbitrary and unreasonable involving cases in which the undersigned attorney represents one or more of the parties." In general, the actions of the trial judge about which Parker complains fall into the following categories:

(1) delay in scheduling hearings;

(2) failure to timely rule on dispositive motions;

(3) untimely decisions on cases under advisement; and

(4) adverse rulings in contested cases.

At the hearing on the motion to recuse, Judge Moore inquired of Parker's counsel:

> THE COURT: Are those the only five cases you ever had in front of the judge?
>
> MR. WARNER: No, sir.
>
> THE COURT: So you've won some cases in front of the judge?
>
> MR. WARNER: I've had some uncontested cases I didn't have a problem with.
>
> THE COURT: Okay.
>
> MR. WARNER: My recollection, your honor, is I did lose one –
>
> THE COURT: Okay, Okay.
>
> MR. WARNER: - - in the six years he's been here.
>
> THE COURT: Okay. Go ahead. And your contention is that Judge Vanderpool is ruling against your clients because of you?
>
> MR. WARNER: I believe that's the appearance, your honor, that it would appear to an ordinary, reasonable person.

The determination of whether recusal is necessary must be made on a case-by-case, fact-intensive basis. *Williams v. Viswanathan*, 65 S.W.3d 685, 688 (Tex. App.—Amarillo 2001, no pet.).

There is no evidence in the record of extrajudicial bias or deep-seated favoritism or antagonism by the trial judge. Parker's recusal motion and arguments at the recusal hearing do not allege any extrajudicial source of bias or impartiality, nor does it establish that the trial judge's actions during the proceedings demonstrated a high degree of favoritism or antagonism that renders fair judgment impossible. We cannot conclude that the trial court's rulings in non-related matters manifests a bias or antagonism toward Parker or Parker's counsel. Parker's counsel candidly admits that Judge Vanderpool "has

shown himself to be meticulous and capable" and cited instances, other than the five cases outlined in his motion to recuse, where he does not question his experience before the judge. Accordingly, we conclude that a reasonable person who is in possession of all the facts would not believe that Judge Vanderpool possesses antagonism toward Parker's counsel that renders fair judgment impossible. A party's remedy for unfair or wrong rulings is to assign error regarding those rulings. The complaints made by Parker are proper grounds for appeal, not recusal. *Sommers v*. *Concepcion*, 20 S.W.3d 27, 41 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Counsel for Parker also cites the first appeal to this Court as an example where the trial court abused its discretion and argues that the "continuous abuses of discretion shown in this case should not be permitted to continue" nor should the trial court "get a second chance to abuse his discretion" in the same case. As we have indicated, we *affirmed* the portion of the trial court's judgment denying the motion to retain the subject case on the trial court's docket as a proper exercise of the trial court's discretion but reversed, as an abuse of discretion, the trial court's failure to hold a hearing on the motion to reinstate the case. As Justice Scalia wrote in *Liteky*, "It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Liteky,* 510 U.S. at 551.

Accordingly, we conclude that Judge Moore did not abuse his discretion in denying Parker's motion to recuse Judge Vanderpool. We overrule the first issue.

Denial of Motion to Reinstate

In the first appeal of this case, this Court held that the trial court did not abuse its discretion in dismissing the case for want of prosecution and denying the motion to retain, but that the trial court was required to hold a hearing on the motion to reinstate. The trial court held a hearing on the motion to reinstate after remand and Parker's second appellate issue is whether the trial court abused its discretion in denying the motion to reinstate.

The standard of review for the trial court's denial of a motion to reinstate is abuse of discretion. *Enriquez v. Livingston*, 400 S.W.3d 610, 614 (Tex. App.—Austin 2013, pet. denied) (op. on reh'g) (citing *Smith v. Babcock & Wilcox Constr. Co*., 913 S.W.2d 467, 468 (Tex. 1995) (per curiam)). A trial court abuses its discretion if it acts without reference to any guiding rules and principles, or if its action is arbitrary or unreasonable under the circumstances of the particular case. *Manning*, 82 S.W.3d at 709.

A trial court's authority to dismiss a case for want of prosecution arises from two sources: (1) Rule 165a, and (2) the court's inherent power. *See In re Conner*, 458 S.W.3d 532, 534 (Tex. 2015) (orig. proceeding) (per curiam); *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999). The trial court can dismiss under Rule 165a in two circumstances: upon the "failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice," or when a case is "not disposed of within the time standards promulgated by the Supreme Court . . . ." Rule 165a(1),(2). Additionally, as recognized in subdivision four of the rule, the trial court has inherent power to dismiss a case for want of prosecution. *Villarreal*, 994 S.W. 2d at 630. ("[T]he

common law vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence."); *see also* Rule 165a(4).

Under Rule 165a, the court must dismiss unless good cause is shown for the case to be maintained. Rule 165a(1). The trial court should reinstate the case if it finds the party or the party's attorney's failure "was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." Rule 165a(3); *see Polk v. Sw. Crossing Homeowners Ass'n*, 165 S.W.3d 89, 96-97 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

In the case at bar, the trial court's order cites dismissal "pursuant to Rule 165a" and "no good cause for the case to be maintained on the docket was shown." Because Parker did not fail to appear for a trial or hearing, as provided in Rule 165a(1), the only other reason for a rule-based dismissal would be pursuant to subsection two, non-compliance with time standards. Rule 165a(2). Rule 165a(2) gives the court authority to place a suit on its dismissal docket when the suit is not disposed of within the time standards promulgated by the Texas Supreme Court. Rule 6.1 of the Judicial Rules of Administration requires judges to ensure, so far as reasonably possible, that civil jury cases are brought to trial or final disposition within eighteen months from appearance date. TEX. R. JUD. ADMIN. 6.1(a)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. F app. (West Supp. 2018). Here, Parker filed suit on January 26, 2011. Cain answered on February 17, 2011. Under the Rules of Judicial Administration, the disposition date for Parker's case was August 17, 2012. The hearing on the notice of intent to dismiss was

scheduled in March of 2016—well outside the applicable time frames referenced in Rule 165a(2).

At the hearing on the motion to reinstate, Parker provided a chronology of the activity of the case and presented testimony showing generally:

1. Trial counsel has problems with his voice if a trial lasts more than one or two days;
2. Trial counsel is approaching 80 years of age and lacks the stamina to try cases lasting more than two days;
3. Trial counsel estimates the case will take three to five days to try;
4. The various steps that trial counsel has taken to hire an associate or engage another attorney to assist in the trial of the case;
5. Trial counsel's and his staff's efforts in reviewing and cataloging approximately 1,500 pages of medical records;
6. A newly retained attorney could be prepared to go to trial within the 45-day period suggested by opposing counsel in the letter requesting a setting on the case;
7. The deposition of Melissa Parker was taken in December of 2011;
8. Melissa Parker experienced various health issues which would have made it difficult for her to participate in a trial, including vertigo, a broken shoulder sustained in a fall in March of 2013, a knee replacement surgery in October of 2013, and a triple bypass surgery in December of 2015; and
9. The inability of plaintiff's medical expert to testify due to health-related issues from September of 2014 until January of 2015.

Parker has the duty to prosecute the lawsuit to a conclusion with reasonable diligence. *In re Conner,* 458 S.W.3d at 534; *In re Callano,* No. 07-17-00435-CV, 2017 Tex. App. LEXIS 11753, at *1 (Tex. App.—Amarillo Dec. 18, 2017, pet. denied) (mem. op.). On these facts we cannot say the trial court acted in an arbitrary or unreasonable

manner in denying Parker's motion to reinstate the case. During the five years that this case was on the docket, Parker never requested a trial setting. Moreover, three and a half years elapsed without any activity being reflected in the clerk's file. These periods at least doubled the period of time outlined in the Rules of Judicial Administration for bringing a suit to trial. It was within the discretion of the trial judge to consider the testimony concerning the health issues of the witnesses and counsel, and counsel's inability to associate other attorneys and determine that the reasons given were not sufficient to continuously prevent Parker from pursuing the case. Further, Melissa Parker admitted she would have appeared for trial if counsel told her she needed to be in court. Parker's justifications for periods of delay explain only some of the inactivity and do not justify the five-year period that passed from the filing of the suit to its dismissal. Consequently, the trial court did not abuse its discretion when it denied Parker's motion to reinstate the case. Parker's second issue is overruled.

Conclusion

Having overruled both of Parker's issues, we affirm the denial of the motion to recuse and the motion to reinstate. Accordingly, the judgment of the trial court is affirmed.

Judy C. Parker
Justice