In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00107-CV

MOHAMMAD HANIF SHAKOOR, Appellant

V.

CLARKSVILLE OIL & GAS COMPANY, INC., Appellee

On Appeal from the 102nd Judicial District Court
Red River County, Texas
Trial Court No. CV01794

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

The dispute between Mohammad Hanif Shakoor, the owner of a convenience store, and Clarksville Oil and Gas Company, Inc. (Clarksville),[1] who supplied the store with gasoline for sale, had its genesis when Shakoor failed to pay Clarksville for fuels furnished by it. Clarksville brought suit in 2002, alleging a breach of contract for the purchase of the fuels and ultimately obtained substituted service of citation on Shakoor. After the substituted service was accomplished, Clarksville was awarded a default judgment October 28, 2002, for $145,487.43.

Some six years later, Shakoor filed an action in the nature of a bill of review, seeking to set aside the judgment against him. Shakoor alleged that he had been in Pakistan when the suit was filed and was unaware of the existence of the judgment taken against him and that he possessed a meritorious defense to Clarksville's claims in the underlying suit.[2] He also maintained that Clarksville had perpetrated extrinsic fraud in obtaining the substituted service of citation in the original suit.

After an adverse jury ruling, Shakoor has appealed, taking the position that there was legal and factual insufficiency to sustain the finding of the jury. We will affirm the trial court's judgment.

---

[1]Apparently, there are discrepancies as to the name. Appellee makes reference to itself as Clarksville Oil & Gas, Inc.; the judgment uses Clarksville Oil & Gas Co.; and the notice of appeal uses Clarksville Oil & Gas Company, Inc.

[2]As his meritorious defense, Shakoor alleged that he did not sign the fuel supply agreements made the subject of Clarksville's suit.

I. Standard of Review

By the time that Shakoor discovered the existence of the judgment against him, the plenary power of the trial court to grant a new trial had long since passed. TEX. R. CIV. P. 329b. An equitable bill of review is the only remedy available to set aside a final judgment after time for appeal is expired where the judgment is not void on its face. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 926–27 (Tex. 1999); *Thompson v. Ballard*, 149 S.W.3d 161, 164 (Tex. App.—Tyler 2004, no pet.). As a general rule, a petition for bill of review must be filed within four years of the date of the entry of the judgment which is in dispute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 2008); *Layton v. Nationsbanc Mortgage Co.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.). Had Shakoor filed his petition for bill of review within this four-year limitations period, he would only have the burden to prove the following: that he had a meritorious defense to the cause of action supporting Clarksville's judgment; that he was prevented from presenting that meritorious defense as a result of the fraud, accident, or wrongful act of the opposing party; and that it was unmixed with any fault or negligence of his own. *Layton*, 141 S.W.3d at 762 (citing *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex. 1998)). The sole exception to the four-year limitations period for successful pursuit of a bill of review is when the petitioner proves that he was prevented by extrinsic fraud from pursuing this remedy. *Id.* at 763.

Extrinsic fraud is fraud that occurs in the procurement of a judgment which denies a party the opportunity to fully litigate at trial. *Id.* (citing *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003); *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex. 1989)). Extrinsic fraud is "collateral fraud in the sense that it is not directly related to the matter actually tried, nor is it directly related to something that was actually or potentially in issue at trial." *Sotelo v. Scherr*, 242 S.W.3d 823, 827–28 (Tex. App.—El Paso 2007, no pet.). It requires a "wrongful act committed by the other party to the suit which has prevented the losing party either from knowing about his rights or defenses, or from having a fair opportunity of presenting them upon the trial." *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 1001 (1950); *Sotelo*, 242 S.W.3d at 827. The element of purposeful fraud is important in establishing extrinsic fraud. *See Alexander*, 226 S.W.2d at 1001–02.

In contrast, intrinsic fraud "in the procurement of a judgment is not ground, however, for vacating such judgment in an independent suit brought for that purpose." *Id.* at 1001. Intrinsic fraud includes "such matters as fraudulent instruments, perjured testimony, or any matter which was actually presented to and considered by the trial court in rendering the judgment assailed."[3] *Id.*; *Sotelo*, 242 S.W.3d at 828.

Shakoor's burden at trial in requesting a bill of review was heavy "because it is fundamentally important that judgments be accorded some finality." *Layton*, 141 S.W.3d at 763;

[3]Shakoor spends a considerable number of pages in his appellate brief claiming he did not sign the fuel supply agreements. These are intrinsic matters to the underlying breach of contract suit and will not be considered in addressing the jury's verdict on extrinsic fraud.

(citing *Alexander*, 226 S.W.2d at 998). Bills of review "requesting relief from an otherwise final judgment are scrutinized by the courts 'with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted.'" *Id.* Thus, in reviewing the grant or denial of a bill of review, we indulge every presumption in favor of the trial court's ruling and will not disturb it unless the trial court abused its discretion. *Id.* at 763–64 (citing *Narvaez v. Maldonado*, 127 S.W.3d 313, 319 (Tex. App.—Austin 2004, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, or without reference to guiding rules and principles. *Id.* at 764.

Trial to the jury led to a finding by it that Clarksville did not commit extrinsic fraud against Shakoor. In his motion for new trial (which he complains the trial court erred in denying), Shakoor argued that the jury's finding was based on insufficient evidence because: (1) Steve Brooks, Clarksville's account representative, knew that Shakoor was overseas; (2) Brooks's affidavit supporting substituted service failed to comply with Rule 106 of the Texas Rules of Civil Procedure; (3) the July 8, 2002, return of service was defective because it proved that Mohammed I. Chotani, not Shakoor, was served with citation; and (4) the certificate of last known address was false. A majority of these points serve as a challenge to the authority to issue the October 2002 default judgment, a matter we may only address if the jury's verdict on extrinsic fraud was insufficient.

In determining legal sufficiency, we analyze "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005); *see also Walker & Assoc. Surveying, Inc. v. Austin*, 301 S.W.3d 909, 916 n.4 (Tex. App.—Texarkana 2009, no pet.). We credit favorable evidence if a reasonable jury could, and disregard contrary evidence unless a reasonable jury could not. *Wilson*, 168 S.W.3d at 827. As long as the evidence falls within the zone of reasonable disagreement, we may not substitute our judgment for that of the jury. *Id.* at 822. In this case, the jury was the sole judge of witness credibility and the weight given to their testimony. *Id.* at 819. Although we consider the evidence in a light most favorable to the verdict, indulging every reasonable inference that supports it, we may not disregard evidence that allows only one inference. *Id.* at 822.

In our factual sufficiency review, we consider and weigh all the evidence, and will set aside the verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Walker*, 301 S.W.3d at 916 n.4 (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986)).

II. History of Attempted Service

Brooks began negotiating fuel supply contracts on behalf of Clarksville with Chotani and Shakoor in 1997. Chotani and Shakoor referred to each other often as brothers[4] and jointly owned approximately five gas stations or convenience stores. With respect to their 4102 South

[4]Although Shakoor referred to Chotani as his brother in front of the jury, he testified, along with Chotani's son, that Chotani was not his blood brother.

Main, Quitman, Super Stop gas station, the pair represented that either of them had authority to order fuel. In 1999, Shakoor purchased the store and rented it to Chotani. Thereafter, Brooks began having trouble collecting for fuel products supplied to the Clarksville store, made unsuccessful calls to Shakoor's cell phone, and attempted to locate his physical address.

During trial, Shakoor was asked if anyone from Clarksville inquired about his current address. Shakoor replied, "I believe they knew it. I have a store in Super Stop, Houston [sic]." He identified the address as "7821 Highway Six South, Houston, Texas." On November 28, 2001, Clarksville sent a demand letter by United States Post Office certified mail to the Houston address. The green certified mail receipt card was signed and returned to Clarksville's attorneys. A few days later, the attorneys received a letter from someone at the Houston Super Stop. They opened the mail to find their own demand letter in the original envelope containing a return to sender stamp and the written words "No longer" on the original envelope. Affixed to the envelope was a "yellow sticky" note stating, "To whom it may concern. I received this mail by accident. The postman asked for Mohammad so I signed for this, but I didn't look what Mohammad. [sic] I'm the wrong guy. Never heard of this guy."

Brooks went to Chotani for advice on how to contact Shakoor and was told that Shakoor was in Pakistan. Brooks did not know when Shakoor planned to return. Chotani did not have Shakoor's address in Pakistan, but Brooks believed Chotani could get in contact with Shakoor and believed Chotani and Shakoor to be brothers. Clarksville representative Wendell Reeder had

been given Shakoor's home address and physically visited Shakoor's residence at 14606 Jade Glen Court, Sugarland, Texas. Another demand letter was sent to this address and it was returned as refused in December 2001. Because the letter was refused, Clarksville believed it to be Shakoor's correct home address and filed a suit to enforce the fuel supply agreement contract in February 2002 utilizing this address. Shakoor testified that he lived on Jade Glen Court until 2001, and his wife may have still been at that address in late 2001.

An attempted March 2002 service at the Jade Glen Court address was unsuccessful. Brooks filed an affidavit in support of a motion for substituted service stating, "I am advised that efforts to serve the Defendant . . . have been unsuccessful. Mr. Shakoor has a brother, Mohammed I. Chotani, who is employed at '4102 South Main, Quitman, Texas 75783.' Mr. Shakoor and Mr. Chotani have a substantial number of shared business interests. I believe that serving Mr. Chotani will be reasonably effective to give Mr. Shakoor notice of this lawsuit." The motion for substituted service listed "the usual place of employment of the Defendant's Brother, Mohammed I. Chotani, is 4102 South Main, Quitman, Texas 75783" and requested the court to allow service upon Chotani at Chotani's place of business. Based on this information, an order for substituted service was issued authorizing service at Chotani's place of business. Citation of service was achieved on Chotani shortly thereafter. A few months later, default judgment was entered in Clarksville's favor and against Shakoor. Clarksville sent the county clerk notice of the default judgment and claimed Shakoor's last known address was "c/o

Mohammed Chotani 412 South Main, Quitman, Wood County, Texas 75783."[5] An abstract of judgment was filed in Fort Bend, Smith, Upshur, Wood, and Henderson Counties.

III. Evidence Was Sufficient for Jury to Find Clarksville Did Not Commit Extrinsic Fraud

Shakoor's first point of error complains that "the evidence conclusively proves . . . that [Clarksville] committed extrinsic fraud . . . ."[6] Specifically, that the statements in Brooks's affidavit that Chotani was Shakoor's brother and that notice to Chotani would be reasonably effective to provide Shakoor with notice of the suit was false because Chotani told Brooks he did not know Shakoor's address. The jury heard from Brooks that he had no desire to keep Shakoor from knowing about the lawsuit and that "[Clarksville] was trying to make him aware of it." Clarksville also produced a signed and notarized universal power of attorney, executed by Shakoor in 1997, whereby Shakoor designated Chotani his attorney in fact. There was no evidence presented demonstrating that Brooks made a knowing false statement regarding Chotani and Shakoor's relationship. He always believed until trial that the two were brothers. Due to their assumed relationship as brothers and their actual relationship as business partners, Brooks claimed he believed that Chotani had the ability to contact Shakoor. He was correct. Shakoor testified that he was receiving rent from Chotani for the Quitman store while he was in Pakistan and that

[5]No party has complained that the discrepancy in the address had any effect upon this judgment.

[6]Shakoor alleges that Brooks's affidavit in support of the motion for default judgment did not comply with the procedural requirements of Rule 106 of the Texas Rules of Civil Procedure. This allegation does not equal an allegation that the affidavit contained fraudulent statements. TEX. R. CIV. P. 106.

Chotani had called him on the telephone while he was in Pakistan. Although he claimed the lawsuit was never discussed in their conversations, Shakoor's own testimony provided the jury with confirmation that Chotani knew how to contact Shakoor and that they did, in fact, communicate.[7]

While "[f]raudulent failure to serve a defendant with personal service, in order to obtain a judgment against him without actual notice to him, has been held to be extrinsic fraud," the key fact in such cases was knowing wrongdoing committed by the party securing judgment. *Lambert v. Coachmen Indus. of Tex., Inc.*, 761 S.W.2d 82, 87 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (failure to send copy of motion for summary judgment to opposing counsel and securing judgment upon motion) (citing *Forney v. Jorrie*, 511 S.W.2d 379, 384–85 (Tex. Civ. App.—San Antonio 1974, writ ref'd n.r.e.) (failure to serve defendant despite knowledge of his whereabouts)). Considering the evidence in a light most favorable to the verdict, specifically of multiple attempts to make Shakoor aware of the suit, Shakoor's own testimony that Chotani knew how to get in contact with him in Pakistan, and the filing of the abstract of judgment in multiple counties, we find that a reasonable and fair-minded jury could reach the verdict that Clarksville did not commit a purposeful wrongful act preventing Shakoor from having a fair opportunity of presenting his defenses at trial. *See Wilson*, 168 S.W.3d 822, 827; *Alexander*, 226 S.W.2d at 1001. The jury may have also considered the fact that Shakoor returned to the United States in

[7]Also, Shakoor said his real brother, Abdul Wahied Hanif, was running the Houston gas station while he was away and would have called him if something needing his attention, such as a demand letter, was sent to the store.

2003 and might have been notified then. We find the evidence in this case legally sufficient to support the jury's verdict.

We now consider and weigh all the evidence in our factual sufficiency review. Shakoor testified that he had no knowledge of the lawsuit until 2008,[8] did not reside at the Jade Glen Court address in late 2001, and did not receive the letter sent to his Houston place of business. Even if the jury believed Shakoor's testimony, there is no testimony suggesting that Clarksville purposefully committed a wrongful act preventing Shakoor's notice of suit. Thus, we find the evidence is not so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Walker*, 301 S.W.3d at 916 n.4. The evidence was factually sufficient.

Since the evidence was both legally and factually sufficient to support the jury's verdict that Clarksville did not commit extrinsic fraud, Shakoor's petition for bill of review was barred by the statute of limitations. Therefore, we need not address Shakoor's remaining points of error. *See Marriage of Sayago*, No. 07-97-0356-CV, 1998 WL 278565 (Tex. App.—Amarillo June 2, 1998, no pet.) (not designated for publication) (declined to address service of process issues because bill of review barred by limitations).

We affirm the trial court's judgment.

Bailey C. Moseley
Justice

[8]Chotani passed away in March 2004.

Date Submitted:	July 6, 2010
Date Decided:	July 7, 2010