TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-02-00542-CV

Marcus A. Hart, Appellant

v.

The State of Texas; The City of San Antonio, Texas; and the Transit Authority of San Antonio, Texas, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT
NO. GV002599, HONORABLE CHARLES F. CAMPBELL, JR. , JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The State of Texas, the City of San Antonio, Texas, and the Transit Authority of San Antonio, Texas, (collectively, Athe State@) brought suit against appellant, Marcus A. Hart, seeking sales and use taxes. *See* Tex. Tax Code Ann. ' 111.010 (West 2001). When Hart=s trial counsel failed to appear at a summary judgment hearing, apparently believing that he had an oral agreement with the State to pass the hearing, the State obtained a default judgment. In this appeal, Hart contends in essence that the trial court=s actions denied him the opportunity to present his special appearance motion and that the notice he received of the reset hearing was legally insufficient. *See* Tex. R. Civ. P. 120a, 166a. The State responds that Hart waived any right to a special appearance hearing. The State also contends that, absent a Rule 11 Agreement, Hart cannot rely on a purported oral agreement with opposing counsel and that notice under these facts was sufficient. We will affirm.

BACKGROUND

The State brought suit against Hart in October 2000, seeking sales and use taxes for business Hart conducted in Texas from 1997 to 1999. Hart lived in Alabama at the time suit was filed. On March 20, 2001, Hart=s trial counsel filed both a motion to transfer venue and a special appearance. *See* Tex. R. Civ. P. 86, 120a. From April 4, 2001, through April 7, 2002, neither party filed pleadings or scheduled hearings. Because the parties were actually engaged in negotiations, they conducted no discovery during this period of time.

In early April 2002, the State filed a motion for summary judgment. *See* Tex. R. Civ. P. 166a. On April 5, 2002, the State mailed notice to Hart of a hearing set for May 2, 2002, on the State=s

motion and on Hart=s venue challenge. The parties agreed to reset this hearing, apparently because they were still attempting to draft an agreed order. No hearing date was set for Hart=s special appearance.

Hart=s trial counsel moved his law offices on May 1, 2002, and provided the U.S. Post Office in New Braunfels with a forwarding address. He also engaged a company to perform a bulk mailing notifying recipients of his new address. This bulk mailing was sent May 16, 2002.

On May 6, 2002, the State=s counsel left an answering machine message with Hart=s trial counsel indicating she intended to reset the summary judgment hearing. She reset the hearing for May 23, 2002. On May 7, 2002, the State attempted to serve Hart via certified mail with notice of the new hearing date. Instead of forwarding the notice to the new address, the U.S. Postal Service returned it to the State on May 14. On May 16, the State mailed the same notice a second time, but to the new address. Hart=s trial counsel received the second mailing on May 20, 2002.

Upon receiving the second mailing of notice, Hart=s trial counsel telephoned opposing counsel to notify her that he would be unable to attend the hearing because he was scheduled to appear in federal court in San Antonio on the same day. During the conversation, Hart=s trial counsel stated that he considered three days to be insufficient notice for this hearing. As a result of the conversation, Hart=s trial counsel apparently believed that the State had agreed to pass the hearing. Hart=s trial counsel believed that the May 23 hearing would not be necessary because the parties were evidently close to reaching an agreed judgment. By contrast, the State=s counsel insists that she never agreed to pass or reset the hearing. In any

event, the record contains no Rule 11 agreement signed by the parties regarding the passing of the May 23 hearing.[1]

On May 22, 2002, apparently believing an agreement had been reached with the State, Hart=s trial counsel faxed the locally approved docket call announcement form to the Travis County Court Administrator, announcing that the setting was Apassed by agreement.@ When the State=s counsel appeared at the courthouse for the hearing on May 23, she learned that the case had been removed from the docket. Apparently with the assistance of the court administrator, she obtained a hearing that day. State=s counsel did not attempt to contact Hart=s trial counsel to inform him that the case would proceed. As a result, the trial court entered a default judgment against Hart and denied Hart=s motion to transfer venue. On June 20,

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[1] Rule 11 provides:

> **AGREEMENTS TO BE IN WRITING**
>
> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

Tex. R. Civ. P. 11.

2002, Hart=s trial counsel filed a Motion for New Trial. This motion was never set for a hearing and was overruled by operation of law. *See* Tex. R. Civ. P. 329b(c).

On appeal, Hart contends that: (1) the trial court erred by disposing of the summary judgment and venue motions before addressing Hart=s special appearance challenging personal jurisdiction; and (2) the notice of the May 23, 2002, hearing was legally insufficient because it was untimely received and therefore prejudiced Hart=s rights.[2] The State responds that: (1) Hart waived his special appearance by failing to request a hearing; and (2) the notice was timely received.

DISCUSSION

Special Appearance

Hart argues that the trial court erred in overruling his motion to transfer venue and granting the State=s motion for summary judgment before disposing of his pending challenge to personal jurisdiction. Typically, a special appearance should be heard and determined before a motion to transfer venue or any other plea or pleadings. *See* Tex. R. Civ. P. 120a. However, it is the specially appearing defendant=s responsibility to request a hearing and secure a ruling on the preliminary question of personal jurisdiction. *Bruneio v. Bruneio*, 890 S.W.2d 150, 154 (Tex. App.**C**Corpus Christi 1994, no writ). The specially appearing defendant must not only request a hearing but must specifically call that request to the trial court=s

[2] In oral argument, Hart=s appellate counsel conceded his third issue. Therefore, we will address only the first two issues.

attention. *Id.* A defendant waives his special appearance by not timely pressing for a hearing. *Id.*; *Steve Tyrell Prods., Inc. v. Ray*, 674 S.W.2d 430, 436-37 (Tex. App.—Austin 1984, no writ).

Hart argues that, because the parties had been negotiating for more than a year following the State=s filing of the lawsuit, he was justified in not requesting a hearing on his special appearance. In general, a defendant need not request a hearing on his special appearance until other proceedings in the lawsuit make timely his objection to jurisdiction. However, from the time Hart received notice of the State=s motion for summary judgment in early April 2002, Hart *was on notice* that the State intended to proceed with the litigation. Once the State filed its motion for summary judgment, Hart had the burden to request a hearing on his special appearance or risk waiver. By failing to timely request a hearing, Hart waived his special appearance. We overrule Hart=s first issue.

Sufficiency of Notice

Hart contends that the State=s counsel failed to honor an alleged oral agreement to pass the May 23, 2002, hearing and that this breach of trust prejudiced Hart=s rights. Hart contends his trial counsel=s belief in an agreement with the State=s counsel was justified because of the ongoing nature of negotiations with the State and the State=s previous agreement to pass the original May 2 hearing. Hart also argues that the Travis County Local Rules encourage parties to resolve scheduling conflicts verbally and that, by submitting a docket call announcement form indicating Apassed by agreement,@ Hart=s trial counsel was indicating his belief of the parties= intentions according to Travis County local custom.

The State insists that at no time did it agree to pass or reschedule the May 23 hearing. Notwithstanding the sincerity of Hart=s trial counsel=s belief that the State=s counsel agreed to pass the May

23 hearing, the record contains no Rule 11 agreement signed by the parties regarding the setting of this hearing. Regardless of the equities of the situation, the State is entitled to insist on a Rule 11 agreement.[3]

Hart also argues that, regardless of any agreement to pass the May 23 hearing, the notice provided was legally insufficient. The movant for summary judgment is required to provide notice to the nonmovant at least twenty-one days before the time specified for hearing. *See* Tex. R. Civ. P. 166a(c). The twenty-one-day requirement in Rule 166a(c) gives the nonmovant sufficient time to prepare and file a response for the *original setting*. *See Brown v. Capital Bank, N.A.*, 703 S.W.2d 231, 233 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). No one disputes that Hart received sufficient notice of the original May 2, 2002, hearing.

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[3] We note that the Texas Lawyer=s Creed, the goals of which are aspirational, states:

> I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel=s intention to proceed.

Texas Lawyer=s Creed—A Mandate for Professionalism, III (11). *See Continental Carbon Co. v. Sea-Land Serv., Inc.*, 27 S.W.3d 184, 189 (Tex. App.—Dallas 2000, pet. denied) (Texas Lawyer=s Creed not binding law but is instead a recommended code of conduct).

The twenty-one-day notice requirement does not apply to a *resetting* of the hearing, provided the nonmovant received notice at least twenty-one days before the original hearing. *LeNotre v. Cohen*, 929 S.W.2d 723, 726 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Birdwell v. Texins Credit Union*, 843 S.W.2d 246, 250 (Tex. App.—Texarkana 1992, no writ). By rescheduling a hearing, the movant is actually giving the nonmovant additional time to respond. *Id.* Therefore, a party need only give *reasonable notice* that a hearing on a summary judgment has been rescheduled. *International Ins. Co. v. Herman G. West, Inc.*, 649 S.W.2d 824, 825 (Tex. App.—Fort Worth 1983, no writ).

Hart argues that the reasonable notice requirement mandates a *minimum* of seven days' notice before the hearing on the motion. He relies on Rule 166a(c)'s requirement that the nonmovant may file a response to a motion for summary judgment, with or without opposing affidavits, not later than seven days prior to the date of the hearing without leave of court. Tex. R. Civ. P. 166a(c). *See Herman G. West, Inc.*, 649 S.W.2d at 825; *LeNotre*, 979 S.W.2d at 726; *Skelton v. Comm'n for Lawyer Discipline*, 56 S.W.3d 687, 691 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Other courts have suggested that seven days' notice, while not stated as an absolute requirement under the rule, does constitute reasonable notice. *Birdwell*, 843 S.W.2d at 250; *Brown*, 703 S.W.2d at 233.

These cases stem from *International Insurance Co. v. Herman G. West, Inc.*, 649 S.W.2d 824 (Tex. App.—Fort Worth 1983, no writ). In that case, the parties were in court on a motion to set aside a partial summary judgment motion. *Id.* at 825-26. The trial court rescinded the partial summary judgment, then immediately heard and ruled upon a separate motion for summary judgment *instanter*. *Id.* at 826. While the nonmovant had notice of the *motion* for summary judgment, he had no notice of any

hearing on that motion because it was set *instanter*. *Id.* Our case is distinguishable: Hart received adequate notice of the May 2, 2002, hearing on the motion for summary judgment, yet failed to file any response or affidavits with the court. Given that Hart knew about *both* the motion for summary judgment *and* the original hearing *on that motion*, we are unpersuaded by Hart=s contention that the notice he received, when viewed in light of Hart=s failure to file a response and/or opposing affidavits when given the chance, was legally insufficient.

Our approach mirrors that taken in *Brown v. Capital Bank, N.A.*, 703 S.W.2d 231, 233 (Tex. App.**C**Houston [14th Dist.] 1985, writ ref'd n.r.e.). Brown received notice of two separate hearing dates on a motion for summary judgment, yet failed to file a response and/or opposing affidavits prior to either hearing. *Brown*, 703 S.W.2d at 233. The court held that three days was sufficient notice of the hearing because Brown, in fact, had notice of the motion for summary judgment more than seventy-five days prior to the final hearing. *Id.* The case at bar presents similar facts. The State mailed notice to Hart of the May 2, 2002, hearing on April 5, 2002. Hart was aware that any response or opposing affidavits would be due by April 25, 2002, but failed to submit *any* documents to the court. Subsequently, despite receiving notice of the reset hearing only three days in advance, Hart was on notice of the motion for summary judgment more than forty-five days before the ultimate hearing date and never filed any controverting documents.

Moreover, Hart does not contend that he was denied the opportunity to file a response or opposing affidavits to the motion for summary judgment. Instead, Hart argues that the short notice harmed him in two respects. First, the short notice prevented his trial counsel from requesting a continuance on the

basis that his special appearance was still pending. Second, the short notice prevented his trial counsel from introducing oral testimony at the hearing to support Hart=s jurisdictional challenge.

These challenges do not establish reversible error. As we have already held, it was Hart=s duty to request a hearing on his special appearance and specifically call that request to the trial court=s attention. By failing to timely request a hearing, Hart waived his special appearance and cannot blame this failure on inadequate notice of the summary judgment hearing. Additionally, Hart would not have been permitted to introduce oral testimony at the time of the summary judgment hearing. Tex. R. Civ. P. 166a(c); *see Martin v. Martin, Martin, & Richards*, 989 S.W.2d 357, 359 (Tex. 1998). Therefore, the two types of harm that Hart contends flow from inadequate notice simply do not present error. We overrule Hart=s second issue.

CONCLUSION

Because it was Hart=s duty to request a hearing on his special appearance and specifically call that request to the trial court=s attention, and because under these facts Hart did not receive insufficient notice of the reset summary judgment hearing, we overrule Hart=s two issues and affirm the trial court=s judgment.

Mack Kidd, Justice

Before Justices Kidd, Yeakel and Patterson

Affirmed

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