TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00287-CV

Gary Mixon, Appellant

v.

Greg Nelson, as Principal of Madex Capital, L.L.C.; Nick DeFilippis, as Principal of Blue Star Capital Group, L.L.P.; Michael Morini; and Norman R. Zukis, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT
NO. D-1-GN-14-004368, HONORABLE GISELA D. TRIANA, JUDGE PRESIDING

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

Gary Mixon appeals the trial court's judgment denying his petition for bill of review filed after a no-answer default judgment was entered against him in favor of appellees Greg Nelson, as Principal of Madex Capital, L.L.C.; Nick DeFilippis, as Principal of Blue Star Capital Group, L.L.P.; Michael Morini; and Norman R. Zukis (Appellees). In two issues, Mixon contends that the trial court erred in (1) granting Appellees' no-evidence motion for summary judgment because he was not served with process and (2) awarding attorney's fees to Appellees. For the reasons that follow, we affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellees sued Mixon in June 2013, asserting claims that included violations of the Texas Securities Act and breach of contract. *See* Tex. Rev. Civ. Stat. art. 581-1–43. Appellees made

a number of unsuccessful attempts to serve Mixon at his home address at 35 Persimmon, Boerne, Texas. Subsequently, based on evidence that utilities were set up by Mixon's wife, Linda Komperda, at 116 Cave Circle, Boerne, Texas 78006, Appellees made several unsuccessful attempts to serve Mixon at 116 Cave Circle. In September 2013, Appellees filed a motion for substituted service at the 116 Cave Circle address. The trial court refused to order substituted without evidence that Mixon resided there. In October 2013, Appellees served Komperda with a subpoena for deposition. Komperda filed a motion to quash the subpoena. Appellees set the motion for hearing, and Komperda appeared and testified. Komperda testified that she and Mixon lived at the 116 Cave Circle address. Based on that testimony, the trial court granted Appellees' motion for substituted service and ordered "service of process by posting a true and correct copy of the citation and the attached petition on the front door of his residence, 116 Cave Circle, Boerne, Texas 78006." According to the Affidavit of Service filed in the trial court, the process server posted the citation and petition to the front door of the property at 116 Cave Circle the following day. In October 2014, Mixon filed his petition for bill of review alleging that he never received service of process in the underlying lawsuit. Appellees filed a no-evidence motion for summary judgment, alleging that Mixon had no evidence to support his assertion that he was not properly served. The trial court granted the motion and awarded Appellees $6,120.00 in attorney's fees and $300.49 in costs. This appeal followed.

APPLICABLE LAW AND STANDARD OF REVIEW

A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment that is no longer subject to challenge by a motion for new trial or appeal. *Katy*

Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 164 (Tex. 2015) (per curiam); *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam). Traditionally, a bill of review requires proof of three elements: (1) a meritorious defense to the underlying cause of action, (2) which the plaintiff was prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence by the movant. *Katy Venture*, 469 S.W.3d at 164; *Caldwell*, 154 S.W.3d at 96. However, a bill of review plaintiff claiming no service is relieved of the obligation to prove the first two elements because a judgment rendered without service is constitutionally infirm regardless of whether the plaintiff possesses a defense he was prevented from making. *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84–85 (1988); *Katy Venture*, 469 S.W.3d at 164; *Caldwell*, 154 S.W.3d at 96–97.

Nonetheless, a bill of review plaintiff alleging that he was not served is still required to prove the third bill of review element—that the judgment was rendered unmixed with any fault or negligence of his own. *Katy Venture*, 469 S.W.3d at 164; *Caldwell*, 154 S.W.3d at 97. This third element is conclusively established if the plaintiff can prove that he was never served with process. *Caldwell*, 154 S.W.3d at 97. "An individual who is not served with process cannot be at fault or negligent in allowing a default judgment to be entered." *Id.*

> In sum, when a plaintiff seeks a bill of review based solely on a claim of non-service, the bill of review procedure . . . must be slightly modified. When a plaintiff claims lack of service, the trial court should: (1) dispense with any pretrial inquiry into a meritorious defense, (2) hold a trial, at which the bill of review plaintiff assumes the burden of proving that the plaintiff was not served with process, thereby conclusively establishing a lack of fault or negligence in allowing a default judgment to be rendered, and (3) conditioned upon an affirmative finding that the plaintiff was not served, allow the parties to revert to their original status as plaintiff and defendant with the burden on the original plaintiff to prove his or her case.

Id. at 97–98 (internal citation omitted). We review a trial court's denial of a bill of review for an abuse of discretion. *Morris v. O'Neal*, 464 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

DISCUSSION

In his first issue, Mixon argues that the trial court erred in granting Appellees' no-evidence motion for summary judgment because he presented more than a scintilla of corroborated evidence that Appellees failed to effect proper service in the underlying lawsuit.[1] Mixon filed a response to Appellees' no-evidence motion for summary judgment[2] and attached evidence that included excerpts from his deposition in which he testified that he "did not receive the citation."[3] He also produced an affidavit in which he averred that he "did not receive service of citation in cause number D-1-GN-13-002098 [and did] not know what happened to the citation and petition that were purportedly attached to the front door of 116 Cave Circle."

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[1] The standard of review of a no-evidence summary judgment is well known, and we will not recite it here. *See* Tex. R. Civ. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581–82 (Tex. 2006); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003).

[2] Appellees filed a motion designated as a "No-Evidence Motion for Summary Judgment," cited Rule 166a(i) and the standard of review for a no-evidence motion for summary judgment, and argued that Mixon had no evidence to refute the process server's affidavit of service. Although Appellees also attached evidence to their motion, we treat the motion as a no-evidence motion and do not consider the attached evidence because it does not create a fact issue. *See Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004) ("[I]f a motion brought solely under [Rule 166a(i)] attaches evidence, that evidence should not be considered unless it creates a fact question, but such a motion should not be disregarded or treated as a [traditional] motion under [Rule 166a(a) or (b)].").

[3] Appellees deposed Mixon on the sole issue of his bill of review claims.

Rule 106 of the Texas Rules of Civil Procedure provides for substituted service in certain circumstances:

> (b) Upon motion supported by affidavit stating the location of the defendant's . . . usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted [by personal delivery or by certified mail] but has not been successful, the court may authorize service
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> (1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
>
> (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Tex. R. Civ. P. 106(b). Thus, substituted service is predicated on having a procedure that is "reasonably effective to give the defendant notice of the suit" but may not give actual notice. *See id.* R. 106(b)(2); *Williams v. Asset Acceptance LLC*, No. 03-11-00520-CV, 2012 Tex. App. LEXIS 5916, at *9 (Tex. App.—Austin July 20, 2012, no pet.) (mem. op). The Supreme Court of Texas has held that actual notice is not only unnecessary, but is in fact, contrary to Rule 106(b)'s underlying rationale:

> Under Rule 106(b), a court may authorize substituted service only after a plaintiff has unsuccessfully tried to effect personal service or service by certified mail, return receipt requested, as required by Rule 106(a). Tex. R. Civ. P. 106(b). A plaintiff may resort to substituted service only upon the failure of these methods which provide proof of actual notice. Thus, to require proof of actual notice upon substituted service would frustrate Rule 106(b)'s purpose of providing alternate methods for plaintiffs . . . . In fact, the rule itself contemplates other procedures which will not necessarily furnish evidence of actual notice. The rule allows service by leaving a copy of the citation and petition with someone over the age of sixteen at the defendant's place of abode as stated in the affidavit. Tex. R. Civ. P. 106(b)(1). This method of substituted service provides no evidence in the record of when

> defendant received actual notice, but rather only provides proof of when plaintiff actually left the copies with someone in compliance with the rule. Service by mail achieves a similar result because it allows a plaintiff to properly post a return of service which demonstrates that the plaintiff has precisely followed the court's order of service by means reasonably calculated to provide actual notice.

State Farm Fire & Cas. Co. v. Costley, 868 S.W.2d 298, 298–99 (Tex. 1993) (per curiam).

Based on Komperda's testimony that Mixon lived with her at 116 Cave Circle, the trial court determined that posting a copy of the citation and the attached petition on the front door of Mixon's residence at 116 Cave Circle would be reasonably effective to give Mixon notice and ordered substituted service by that method. It is undisputed that the process server's Affidavit of Service stated that substituted service was accomplished under Rule 106 by posting the citation and petition to the front door of the property at 116 Cave Circle. Therefore, Mixon's testimony and affidavit stating that he did not receive actual notice of the petition are of no legal consequence. The process server's affidavit is sufficient proof that substituted service on Mixon was completed in accordance with the trial court's order, and Mixon's denials that he received actual notice of the citation and petition are not evidence to the contrary and do not create a fact issue as to substituted service. *See id.*; *Perez v. Old W. Capital Co.*, 411 S.W.3d 66, 71–72 (Tex. App.—El Paso 2013, no pet.) (citing *Costley* and observing that actual notice is unnecessary and contrary to rationale of Rule 166(b)); *Williams*, 2012 Tex. App. LEXIS 5916, at *10–11 (holding that affidavit reflecting service by affixing to residence as specified in substituted service order was sufficient proof of service in accordance with order despite defendant's claims she did not receive actual notice of citation and petition); *Walker v. Brodhead*, 828 S.W.2d 278, 279–80, 283 (Tex. App.—Austin 1992, writ denied) (noting that lack of notice of underlying suit does not necessarily void judgment and

affirming trial court's summary judgment denying bill of review despite defendants' claim that they did not have actual notice of underlying suit).

Mixon also offered as evidence a declaration by his wife in which she stated that on the date on which the process server's affidavit states he posted the citation and petition to the front door at 116 Cave Circle, she "was present at our house located at 116 Cave Circle, Boerne, Texas [and a]t no point in time did [she] see a copy of Plaintiff's Original Petition and corresponding citation in Cause No. D-1-GN-13-002098 attached to the front door of the house." She also stated that at no point in time had she seen the petition or citation inside or outside the house and that she "did not know what happened to the citation and petition that were purportedly attached to the front door of the house."

These statements, however, are not evidence that the process server did not complete substituted service by posting the citation and petition to the front door at 116 Cave Circle. Komperda does not aver that she ever went to or looked at the front door and observed that the citation and petition were not affixed to the door. Nor does she state that she observed the front door all day and that no one came to the front door. Statements that she did not see the citation and petition and does not know what happened to them are not evidence that the process server did not post them on the door as stated in his affidavit. Viewing the evidence in the light most favorable to Mixon, we conclude that Mixon did not produce more than a scintilla of evidence that Appellees did not effect proper service and that the trial court did not err in granting Appellees' no-evidence motion for summary judgement. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). We overrule Mixon's first issue.

Having concluded that the trial court properly denied Mixon's bill of review, we turn to his second issue in which he argues that the trial court erred in awarding Appellees attorney's fees and costs in the bill of review proceeding. In Appellees' reply to Mixon's response to their motion for no-evidence summary judgment, Appellees sought recovery of fees and costs incurred in defending the bill of review. At the hearing on the motion, Appellees presented evidence of attorney's fees and costs, and the trial court allowed Mixon to submit a brief in opposition. After consideration of the brief, the trial court awarded Appellees $6,120.00 in attorney's fees and $300.49 in costs.

Mixon does not dispute that a party who successfully defends a bill of review may recover attorney's fees if attorney's fees are authorized in the underlying case. Nor does he dispute that attorney's fees were statutorily authorized in the underlying suit in this case, which included claims for violations of the Texas Securities Act and breach of contract. *See* Tex. Civ. Prac. & Rem. Code § 38.001 (providing for recovery of attorney's fees in action for breach of contract); Tex. Rev. Civ. Stat. art. 581-33(D)(7) (providing that under Securities Act, "[o]n rescission or as a part of damages, a buyer or seller may also recover reasonable attorney's fees if the court finds the recovery would be equitable under the circumstances"). However, Mixon urges an exception to the general rule and argues that there must be a substantive resolution of the underlying cause of action for the respondent to be entitled to attorney's fees based on that cause of action. Therefore, he contends, because his bill of review was based on lack of service and he did not have to prove a meritorious defense, Appellees did not have the burden to prove the alleged securities violations and breach of contract, and Appellees are not entitled to attorney's fees based on those claims.

We do not find this argument persuasive. Mixon relies on *Meece v. Moerbe*, 631 S.W.2d 729, 730 (Tex. 1982), and argues that the exception he urges is "the logical conclusion" to be drawn from *Meece*. However, he cites no authority to support this reading of *Meece*, and, in fact, it has been expressly rejected. In *Lowe v. Farm Credit Bank of Tex.*, Lowe argued that the Texas Supreme Court's holding in *Meece* limits awards of attorney's fees in bill of review proceedings to instances in which the respondent is required to prove the claim for which the statute authorizes the attorney's fees—the same argument Mixon makes here. *See* 2 S.W.3d 293, 299 (Tex. App.—San Antonio 1999, pet. denied). The San Antonio Court of Appeals disagreed, explaining that

> [t]he focus of the Supreme Court's holding [in *Meece*] is whether the statute authorizing the recovery of attorney's fees draws a distinction between an award of attorney's fees at trial and an award of attorney's fees on appeal. In the absence of such a distinction, attorney's fees are recoverable in a bill of review proceeding to the same extent as attorney's fees were recoverable at trial. [631 S.W.2d] at 730; *Bakali v. Bakali*, 830 S.W.2d 251, 257 (Tex. App.—Dallas 1992, no writ); *see also Rodriguez v. Holmstrom*, 627 S.W.2d 198, 202–03 (Tex. App.—Austin 1981, no writ) (construing bill of review as appeal for purposes of awarding attorney's fees).

Id.; *see Meece*, 531 S.W.2d at 730. Here, there is no such distinction in the statutes authorizing attorney's fees in the underlying suit. *See* Tex. Civ. Prac. & Rem. Code § 38.001; Tex. Rev. Civ. Stat. art. 581-33(D)(7).

A party who successfully defends a bill of review is entitled to recover attorney's fees if they are authorized in the underlying suit and would have been recoverable in a successful appeal. *See Meece*, 631 S.W.2d at 730; *John A. Broderick, Inc. v. Kaye Bassman Int'l Corp.*, 333 S.W.3d 895, 906 (Tex. App.—Dallas 2011, no pet.); *Dias v. Dias*, No. 13-12-00685-CV,

2014 Tex. App. LEXIS 12676, at *22 (Tex. App.—Corpus Christi Nov. 25, 2014, pet. denied) (mem. op.) (citing *State ex rel. Mattox v. Buentello*, 800 S.W.2d 320, 327 (Tex. App.—Corpus Christi 1990, no writ)); *Bakali*, 830 S.W.2d at 257. Appellees successfully defended Mixon's bill of review because the trial court denied all relief Mixon sought. *See Dorrough v. Cantwell*, No. 02-05-00208-CV, 2006 Tex. App. LEXIS 6356, at *14 (Tex. App.—Fort Worth July 20, 2006, pet. denied) (mem. op.). And Appellees would have been entitled to attorney's fees if Mixon had been able to pursue the usual course of appeal. *See Meece*, 631 S.W.2d at 730 (holding that where there was no limitation in statute authorizing attorney's fees that barred fees on appeal, Meece was entitled to attorney's fees in bill of review proceeding). Further, a bill of review is in the nature of an appeal for purposes of attorney's fees. *Rodriguez*, 627 S.W.2d at 202–03 (reversing judgment granting bill of review, rendering judgment that petitioner appellee take nothing, and awarding appellant attorney's fees). We conclude that the trial court did not abuse its discretion in awarding attorney's fees to Appellees. *See* Tex. Civ. Prac. & Rem. Code § 38.001; Tex. Rev. Civ. Stat. art. 581-33(D)(7); *Meece*, 631 S.W.2d at 730; *Dorrough*, 2006 Tex. App. LEXIS 6356, at *14; *Palomin v. Zarsky Lumber Co.*, 26 S.W.3d 690, 692, 696 (Tex. App.—Corpus Christi 2000, pet. denied) (affirming award of attorney's fees to respondent who successfully defended bill of review proceeding after no-answer default judgment in suit concerning credit amount for goods sold for which attorney's fees were recoverable). We overrule Mixon's second issue.

CONCLUSION

Having overruled Mixon's issues, we affirm the judgment of the trial court.

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Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

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