TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00028-CV

Grant Rawston Headifen, Appellant

v.

Vanessa Harker, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 261ST JUDICIAL DISTRICT
NO. D-1-GN-15-004159, HONORABLE DARLENE BYRNE, JUDGE PRESIDING

MEMORANDUM OPINION

Grant Rawston Headifen appeals the district court's judgment denying his petition for bill of review. Headifen contends that the trial court erred because he demonstrated that he had a meritorious ground of appeal, which he was prevented from presenting by official mistake, unmixed with fault or negligence on his part. Because we hold that Headifen failed to exercise due diligence in pursuing his available legal remedies, we will affirm the district court's judgment.

BACKGROUND[1]

Following a bench trial, Headifen and appellee Vanessa Harker were divorced on May 7, 2015, upon the trial court's signing of the final decree of divorce. In the decree, the trial

[1] Headifen and Harker each appear before us pro se and appeared pro se at various times in the proceedings below. We are bound to apply the same substantive and procedural standards to pro se litigants as we do with litigants represented by counsel to prevent affording pro se litigants an unfair advantage. *See Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184-85 (Tex. 1978).

court found that Harker had incurred more than $250,000 in attorneys' fees over the four-year divorce proceedings, and awarded Harker a judgment in the amount of $50,000 for attorneys' fees, to be paid on or before July 7, and another $10,000 in the event that Headifen filed an appeal, to be paid on the date the appeal was filed. Headifen timely filed a motion for new trial on June 8, 2015, which (according to his brief) objected to the award of attorneys' fees. Headifen also requested findings of fact and conclusions of law, which the trial court issued on June 23, 2015. With respect to factors considered in calculating the amount of the award of attorneys' fees, the findings included: (1) the fact that Headifen filed more than 27 pleadings in the divorce proceeding; (2) the evidence presented that Headifen told friends that he would "'run Harker out of money'" in the suit; (3) the high volume of emails Headifen sent to Harker's counsel, which counsel for Harker had to read and to which she had to respond; (4) the threatening tone of some of the emails from Headifen to counsel for Harker; and (5) the evidence presented of an overall pattern of harassing behavior by Headifen directed at prolonging the litigation and draining Harker's resources.

On June 30, 2015, while his motion for new trial was pending, Headifen filed a motion for recusal, claiming that the trial judge, Judge Orlinda Naranjo, demonstrated a clear bias against him, as indicated in her findings regarding attorneys' fees. Judge Naranjo, who had been specially assigned to the case, referred the motion for recusal to the regional presiding judge, who then referred the motion to Judge Dan Mills for a ruling. On July 21, at the expiration of 75 days following the entry of final judgment, Headifen's motion for new trial was overruled by operation of law. Headifen asserts in his brief that he attempted on July 30 to set his motion for new trial for hearing on the central docket, but he was told that because Judge Naranjo had been specially

assigned to the case, the hearing could not take place until the motion seeking her recusal was addressed. On August 12, Judge Mills heard and denied Headifen's motion for recusal. On August 24, at the hearing on Headifen's motion for new trial, Judge Naranjo entered an order striking Headifen's motion[2] because thirty days had elapsed since the motion was overruled by operation of law, so the court no longer had plenary power to rule on the motion. Headifen filed an appeal to this Court on August 28, 2015. We dismissed the appeal for want of jurisdiction because it was not timely filed. *See Headifen v. Harker*, No. 03-15-00552-CV, 2015 WL 7422962, at *1 (Tex. App.—Austin Nov. 17, 2015, no pet.) (mem. op.) ("The date that the motion for new trial is heard or decided has no bearing on the deadline for filing a notice of appeal.").

On September 21, 2015, Headifen filed a petition for bill of review. Headifen argued that Judge Naranjo made an official mistake in her referral of Headifen's motion to the presiding judge by stating in her referral letter that "there are no pending issues before [the court] at this time." This, Headifen claims, caused the presiding judge to not act promptly in setting the hearing on the motion for recusal, which caused the delay that ultimately resulted in Headifen's motion for new trial being stricken. The trial court denied Headifen's petition for bill of review. This appeal followed.

ANALYSIS

Headifen presents a single compound issue on appeal—the trial court erred in denying his petition for bill of review because he satisfied the requisite bill-of-review elements. Headifen

[2] This is the description used in Headifen's brief. The order is not in the record before us.

maintains that the trial judge's official mistake, unmixed with any fault or negligence on Headifen's part, prevented him from presenting his meritorious appeal.

A bill of review is an equitable proceeding to set aside a judgment that is no longer appealable or subject to a motion for new trial. *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979); *Schwartz v. Jefferson*, 520 S.W.2d 881, 889 (Tex. 1975). A bill of review is proper where a party has exercised due diligence to prosecute all adequate legal remedies against the judgment it seeks to set aside, and at the time the bill of review is filed, no such adequate legal remedy remains available because, through no fault of the petitioner, fraud, accident, or official mistake precluded presentation of a meritorious claim. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex.1999). To obtain relief by a bill of review, the petitioner must plead and prove to the trial court three elements: (1) a meritorious ground for appeal; (2) which he was prevented from making through fraud, accident, or a wrongful act of the opposing party or official mistake; (3) unmixed with any fault or negligence by the petitioner. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004); *Zeigler v. Zeigler*, No. 02-10-00146-CV, 2011 WL 2989003, at *2 (Tex. App.—Fort Worth July 11, 2011, no pet.) (mem. op.). The grounds upon which a bill of review can be obtained are narrow because the procedure conflicts with the fundamental policy that judgments must become final at some point. *Alexander v. Hagedorn*, 226 S.W.2d 996, 998 (Tex. 1950); *Crouch v. McGaw*, 138 S.W.2d 94, 96 (Tex. 1940) (noting that a bill of review requires "something more than injustice").

We review the grant or denial of a bill of review under an abuse-of-discretion standard, indulging every presumption in favor of the trial court's ruling. *Moore v. Brown*, 408 S.W.3d 423, 432 (Tex. App.—Austin 2013, pet. denied). The trial court abuses its discretion

if it rules in an unreasonable or arbitrary manner, or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985); *Morris v. O'Neal*, 464 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Where, as here, there are no findings of fact or conclusions of law in the record, we will "affirm the trial court's judgment on any legal theory supported by the evidence." *Narvaez v. Maldonado*, 127 S.W.3d 313, 319 (Tex. App.—Austin 2004, no pet.) (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam)).

As stated above, a bill-of-review petitioner must have exercised due diligence in pursuing all appropriate legal remedies against the former judgment. *See Wembley*, 11 S.W.3d at 927. If reasonable legal remedies were available and disregarded, relief by bill of review is generally unavailable. *See id.* The required due diligence is separate and distinct from the bill-of-review elements. *Perdue v. Patten Corp.*, 142 S.W.3d 596, 606 (Tex. App.—Austin 2004, no pet.). The petitioner's due diligence in pursuing available legal remedies is judged by the objective standard of what "prudent and careful men would ordinarily use in their own cases of equal importance." *See In re A.L.H.C.*, 49 S.W.3d 911, 916 (Tex. App.—Dallas 2001, pet. denied).

The Texas Supreme Court has established that where a defendant fails to avail himself of an appeal, he is not entitled to relief by bill of review. *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967). In *French*, a contract action was disposed of by summary judgment. Alleging he did not have notice of the motion for summary judgment or its hearing setting, petitioner filed a motion for new trial, which was subsequently overruled by operation of law. The court held that a bill of review was unavailable where the petitioner had timely filed a motion for new trial but failed

to appeal its denial by operation of law. *Id.* Similarly, in *Narvaez v. Maldonado*, the trial court entered a default decree of divorce that ordered Narvaez to pay child support. *Narvaez*, 127 S.W.3d at 316. Narvaez filed a motion for new trial that was subsequently overruled by operation of law. *Id.* Though evidence did not show whether the motion was timely, this Court held that Narvaez had not exercised due diligence in exhausting his legal remedies because he had not appealed the judgment after the motion was overruled by operation of law (if motion was timely filed) or pursued a restricted appeal (if not timely filed). *Id.* at 321. Similarly, in *Zeigler*, petitioner's motion for new trial had been granted on condition of petitioner's payment of attorneys' fees but was overruled by operation of law because the petitioner failed to pay the attorneys' fees. See *Zeigler*, 2011 WL 2989003, at *3. The Dallas Court of Appeals denied the petition for bill of review on the basis that the petitioner had failed to invoke his right to a new trial, allowing the judgment to become final. *Id.* at *1. We find these cases instructive here. "One with an available appeal who fails to pursue that remedy is not entitled to seek relief by way of a bill of review." *Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980).

A motion for new trial was not required for Headifen to preserve error for appeal under Rule 324. Tex. R. Civ. P. 324. Nonetheless, Headifen filed a timely motion for new trial on June 8, extending his appellate deadlines and the plenary power of the trial court. The deadline to file a notice of appeal was therefore August 5, 90 days after the May 7 judgment was signed.[3] *See* Tex. R. App. P. 26.1(a)(1). Headifen's motion for new trial is not in the record before us, but it is

[3] Headifen also could have sought an extension of this deadline under Texas Rule of Appellate Procedure 26.3, but he failed to do so.

undisputed that it was overruled by operation of law on July 21. Headifen could have filed his notice of appeal while his motion for new trial was pending or between July 21 and August 5. *See In re Norris*, 371 S.W.3d 546, 553 (Tex. App.—Austin 2012, orig. proceeding) ("nothing in the language of rule 25.1 suggests that an appeal cannot be perfected while a motion for new trial is pending, . . . and further, rule of civil procedure 329b[(e)] contemplates just such a scenario" (citation omitted)). Headifen did not perfect a timely appeal and the judgment became final.

The petition for bill of review and Headifen's briefing to this Court focus on the events surrounding Headifen's motion for new trial and motion for recusal, arguing that official mistake prevented him from obtaining a timely hearing on his motion for new trial, and this in turn somehow prevented him from filing a timely appeal. But nothing in the proceedings before the trial court following the May 7 judgment precluded Headifen from filing an appeal to this Court while his motion for new trial was pending. Neither Headifen's motion for new trial nor his motion for recusal affected his access to review by an appellate court. *See id.* Also, Headifen cites to no authority, and we have found none, that suggests his motion for recusal tolled the deadlines for resolution of the motion for new trial or for filing a notice of appeal. Neither Headifen's petition for bill of review nor his briefing to this Court offers explanation for his failure to timely pursue the legal remedy of a direct appeal. Due to Headifen's failure to exhaust all appropriate legal remedies, he is not entitled to the equitable relief provided by a bill of review. Thus, the trial court did not abuse its discretion by denying Headifen's petition for bill of review. *See Narvaez*, 127 S.W.3d at 321. We therefore overrule Headifen's sole issue.

CONCLUSION

Having overruled Headifen's single issue on appeal, we affirm the judgment of the trial court.

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Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: August 30, 2017