TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00028-CV

Stacey R. Hammer, Appellant

v.

Richard Hammer, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT
NO. D-1-FM-17-005035, HONORABLE TIM SULAK, JUDGE PRESIDING

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

Stacey R. Hammer appeals from the trial court's order dismissing her petition for bill of review and awarding judgment for attorney's fees and costs to Richard Hammer.[1] In her petition for bill of review, Stacey sought to set aside the portion of the parties' divorce decree that incorporated their mediated settlement agreement and divided their property in accordance with that agreement. For the following reasons, we affirm the trial court's order.

Background

Requirements for Bill of Review Relief

To give context to the parties' dispute, we begin by briefly describing the requirements for bill of review relief. "A bill of review is an equitable proceeding brought by a party

[1] Because the parties have the same last name, we refer to them by their first names.

seeking to set aside a judgment that no longer can be challenged by a motion for new trial or by direct appeal." *Bevering v. Bevering ex rel. Bevering*, 401 S.W.3d 293, 296 (Tex. App.—San Antonio 2013, pet. denied) (citing *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004); *In re A.A.S.*, 367 S.W.3d 905, 908 (Tex. App.—Houston [14th Dist.] 2012, no pet.)); *see* Tex. R. Civ. P. 329b(f) (allowing trial court, after its plenary power has expired, to set aside judgment by "bill of review for sufficient cause, filed within the time allowed by law"). 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." *Transworld Fin. Servs. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). "The petitioner ordinarily must plead and prove: (1) a meritorious defense to the underlying claim; (2) which the petitioner was prevented from making by the fraud, accident, or wrongful act of his opponent or official mistake; and (3) unmixed with any fault or negligence of his own." *Bevering*, 401 S.W.3d at 296 (citing *Caldwell*, 154 S.W.3d at 96; *In re A.A.S.*, 367 S.W.3d at 908).

Relevant to this appeal, the petitioner must "allege, with particularity, sworn facts sufficient to constitute a [meritorious] defense and, as a pretrial matter, present prima facie proof to support the contention." *Id.* (citing *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979)); *Mosley v. Dallas Cty. Child Protective Servs. Unit of the Tex. Dep't of Protective & Regulatory Servs.*, 110 S.W.3d 658, 661 (Tex. App.—Dallas 2003, pet. denied). "[A] prima facie meritorious defense is made out when it is determined that the complainant's defense is not barred as a matter of law and that he will be entitled to judgment on retrial if no evidence to the contrary is offered." *Baker*, 582 S.W.2d at 408–09. "In cases involving bills of review to set aside divorce decrees

regarding division of property, courts have held that a meritorious claim is presented by proof that the petitioner 'would obtain a more favorable property division on retrial.'" *Elliott v. Elliott*, 21 S.W.3d 913, 919 (Tex. App.—Fort Worth 2000, pet. denied) (citation omitted).

Whether a petitioner has "made out" a prima facie meritorious defense is a question of law. *Baker*, 582 S.W.2d at 409; *Bevering*, 401 S.W.3d at 297; *Mosley*, 110 S.W.3d at 661. "Prima facie proof may be comprised of documents, answers to interrogatories, admissions, and affidavits on file along with such other evidence that the trial court may receive in its discretion." *Baker*, 582 S.W.2d at 409. For purposes of this pretrial, legal determination, "factual questions arising out of factual disputes are resolved in favor of the complainant." *Id.* "If the court determines that a prima facie meritorious defense has not been made out, the proceeding terminates and the trial court shall dismiss the case." *Baker*, 582 S.W.2d at 409; *see Bevering*, 401 S.W.3d at 297; *see also Elliott*, 21 S.W.3d at 917 (explaining that "preliminary showing is essential to assure the court that valuable resources will not be wasted by conducting a 'full-blown' trial on the merits" of bill of review). If the trial court determines that a prima facie meritorious defense has been shown, the court will then conduct a trial on the petition. *Baker*, 582 S.W.2d at 409; *see Bevering*, 401 S.W.3d at 297. With these requirements for bill of review relief in mind, we turn to the procedural background behind the parties' dispute.

Procedural Background

The trial court signed an agreed final divorce decree between the parties on August 15, 2013. The decree was also signed as to form by the parties' counsel and as to form and substance by the parties. In the decree, the trial court recited that the divorce was officially

pronounced and rendered in open court on November 2, 2012, and ministerially signed and ratified on August 15, 2013. The trial court approved and divided the parties' property in accordance with a mediated settlement agreement that the parties and their counsel signed in October 2012.

On August 15, 2017, Stacey, acting pro se, filed an original petition for bill of review and attached documents to her petition including a copy of the divorce decree and the mediated settlement agreement.[2] In her petition, she alleged "extrinsic fraud" and "economic duress" "leading to the inequitable division of the community assets." She sought to have the mediated settlement agreement set aside, the portion of the divorce decree that incorporated the mediated settlement agreement set aside and vacated, and the trial court "order a division of the estate of the parties in a manner that the Court deems just and right."

Richard answered, filed special exceptions, and filed a motion to dismiss pursuant to Texas Rule of Civil Procedure 91a, and the court's inherent authority under the bill of review pretrial procedure. He also sought dismissal of Stacey's petition and attorney's fees as sanctions

[2] The other documents attached to the petition were an unofficial copy of a document titled "Modification, Renewal and Extension of Real Estate Note and Lien," dated August 11, 2010; the first page of a "Deed of Trust"; a letter addressed to Richard dated September 26, 2013, providing notice of an intent to accelerate indebtedness evidenced by a note dated January 14, 2011; a document titled "Substitute Trustee's Deed," dated April 1, 2014; a document titled "Notice of Lis Pendens," signed by Stacey and dated February 12, 2015; a copy of a bank account statement for the period October 26, 2006, to November 24, 2006; two pages of a document titled "Adoption Agreement For the Pension Specialists, Ltd. Prototype Standardized Cash or Deferred Profit Sharing Plan" with an effective date of January 1, 2008; two pages of a document titled "Company Agreement of Youth Preservation Life Enhancement Partners, LLC," signed by Stacey; a "Settlement Statement" signed by Stacey on August 16, 2007; and an excerpt of the transcript of a hearing on March 28, 2012, concerning temporary orders in the parties' divorce proceeding, in which Richard's attorney agreed that Stacey would receive half of a bonus that Richard was to receive in April of that year.

pursuant to the trial court's inherent authority and Chapter 10 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001–.006. Richard further filed a motion for protective order from discovery that Stacey sought.

Stacey filed a response to Richard's motion to dismiss, a motion for discovery sanctions, a motion to compel discovery, and affidavits in support of her motions. Stacey argued that Rule 91a did not apply because her case was a family law case. *See* Tex. R. Civ. P. 91a.1. She also complained about Richard's failure to respond to her discovery requests, and she sought sanctions pursuant to Texas Rules of Civil Procedure 13 and 215 and section 10.002 of the Texas Civil Practice and Remedies Code and fees and costs pursuant to Rule 91a. *See* Tex. R. Civ. P. 91a.7 (requiring court to "award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action"). Attached to her filings were copies of emails that she sent, forwarded, or received that appear to concern her legal malpractice suit against the attorneys who represented her in the divorce proceeding and a copy of responses to a request for production that also appears to be from her legal malpractice case. In her affidavit in support of her response to the motion to dismiss, Stacey averred that, in September 2014, she "learned of the extent of the extrinsic fraud and embezzlement of funds and fraudulent conversion of assets in [the] divorce judgment" when she "acquired approximately 44,309 documents evidencing the extent of the extrinsic financial fraud, embezzlement, fraudulent concealment, and grand larceny" from discovery that she obtained in her legal malpractice suit.

The trial court held a hearing on the parties' pending motions on October 20, 2017. At the beginning of the proceeding, the trial court recited the pending motions, including Richard's

motion to dismiss and for sanctions, and asked the parties if they were ready to proceed on those matters.[3] Stacey responded "Yes, Your Honor." The trial court began with Richard's motion to dismiss, taking judicial notice of the contents of the case file and hearing arguments from the parties. Counsel for Richard argued to the court that Stacey had not established a prima facie meritorious defense and that it was her burden "to come to the Court with some sort of evidence establishing a prima facie meritorious defense." He also provided a copy of the *Bevering* case to Stacey and argued that it stood for the proposition that once Richard raised the lack of a meritorious defense, "the burden shift[ed] to [Stacey] to somehow present evidence to prove to the Court that there is, in fact, a meritorious defense."

After the court explained to Stacey that it was her "burden on the motion to dismiss, to establish what is required legally for proceeding on a bill of review" and told Stacey that he would hear from her as to evidence that she had to present, she stated that she "was not prepared to present evidence because [she] did not believe that [she] could," explaining that she had consulted with an attorney who advised her that the trial court could not hear evidence in determining a motion to dismiss under Rule 91a. The trial court then explained to her that Richard's motion was also based on the alternative ground of "the state of the law for bill of review, which requires a showing—prima facie showing of the elements required for a bill of review." Stacey then asked for a continuance "so that [she] could hire counsel for an evidentiary hearing," but the trial court denied her request "at this juncture, made orally after having called the case and after having received announcements of ready

[3] The other motions recited by the trial court at the beginning of the hearing included Richard's motion for protective order and Stacey's motion for a discovery control plan.

to proceed, and after having heard what [she had] presented." Stacey then submitted as an exhibit the copy of the "Responses to Request for Production" from her legal malpractice suit that she had previously filed with her response to Richard's motion to dismiss. After Stacey's exhibit was admitted, Richard's attorney testified to his incurred attorney's fees and submitted as an exhibit a letter from Stacey to Richard dated in September 2017 as support for Richard's position that Stacey's suit was brought for purposes of harassment.

In its order, the trial court granted Richard's motion to dismiss on the three grounds asserted in his motion to dismiss: (1) Texas Rule of Civil Procedure 91a; (2) the court's inherent authority under pretrial bill of review procedure; and (3) "as a sanction for her conduct in this case." The trial court found: (i) "based solely upon its review" of the original petition, that "all of the alleged causes of action asserted by [Stacey] in her pleading have no basis in law or fact"; (ii) "after receiving evidence," that she "has failed to make a prima facie showing of a meritorious defense"; and (iii) Stacey's "suit should be dismissed as a sanction for her conduct in this case." The trial court also granted a judgment for attorney's fees against Stacey in the amount of $5,788 plus contingent awards for additional attorney's fees in the event Stacey unsuccessfully appealed. The trial court awarded attorney's fees pursuant to Rule 91a, section 10.005 of the Texas Civil Practice and Remedies Code, and its inherent authority to do so. As support for its decision to award attorney's fees as sanctions, the trial court found: "the claims and/or legal contentions presented in [Stacey]'s Original Petition for Bill of Review were not warranted by existing law or by a non-frivolous argument for the extension or modification of existing law"; "that the allegations and/or factual contentions contained in [Stacey's petition] have no evidentiary support"; Stacey's "assertion of a

meritorious defense lacks any evidentiary support and is not likely to have support upon reasonable investigation or discovery"; and "the filing of [Stacey]'s bill of review was done for improper purposes, including to harass [Richard]."

Stacey requested findings of fact and conclusions of law but did not file a notice of past due findings of fact and conclusions of law, and the trial court did not enter separate findings or conclusions. *See* Tex. R. Civ. P. 296, 297. This appeal followed.[4]

Analysis

The trial court granted Richard's motion to dismiss on each of the separate grounds that he raised in the motion—Rule 91a, the court's inherent authority under the pretrial procedure that applies to bills of review, and as a sanction—and the trial court awarded attorney's fees and costs based on Rule 91a and as a sanction. Because each of the asserted grounds for dismissal and an award of attorney's fees and costs independently support affirming the applicable portion of the trial court's order, we limit our review to Stacey's fourth and sixth issues that address the trial court's dismissal of her petition under its inherent authority in the context of the pretrial procedure for bills of review and the part of her seventh issue that challenges the trial court's award of

[4] Stacey is represented by counsel on appeal. During the portions of the underlying proceeding that Stacey was acting pro se, we hold her to the same legal standards as parties represented by counsel. *See Stewart v. Texas Health & Human Servs. Comm'n*, No. 03-09-00226-CV, 2010 Tex. App. LEXIS 9787, at *5–6 & n. 1 (Tex. App.—Austin Dec. 9, 2010, no pet.) (mem. op.) ("[P]ro se appellants are held to the same standard as parties represented by counsel to avoid giving unrepresented parties an advantage over represented parties." (citing *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978))).

attorney's fees as a sanction.[5] *See* Tex. R. App. P. 47.1; *Poff v. Guzman*, 532 S.W.3d 867, 869 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (addressing only one of issues that challenged "each of the bases upon which the trial court dismissed suit" because it was dispositive of appeal); *see also Akhtar v. Leawood HOA, Inc.*, 525 S.W.3d 814, 820 (Tex. App.—Houston [14th Dist.] 2017, no pet.) ("[A]n appellant must challenge all independent grounds supporting the judgment or legal conclusion under attack." (citation omitted)); *Brager v. James*, No. 02-13-00130-CV, 2014 Tex. App. LEXIS 1689, at *5 (Tex. App.—Fort Worth Feb. 13, 2014, no pet.) (mem. op.) (explaining that dismissal will be affirmed on appeal if any theory advanced in motion supports dismissal); *Riley v. Cohen*, No. 03-08-00285-CV, 2009 Tex. App. LEXIS 1162, at *2 (Tex. App.—Austin Feb. 19, 2009, pet. denied) (mem. op.) (explaining that party must challenge each of alternative grounds supporting judgment); *Britton v. Texas Dep't of Crim. Justice*, 95 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2002, no pet.) ("Generally speaking, an appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment.").

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[5] Stacey brings seven issues on appeal. Stacey's first three issues challenge the trial court's dismissal of her petition pursuant to Rule 91a. *See* Tex. R. Civ. P. 91a. She argues that the trial court erred by applying Rule 91a to her petition for bill of review from a divorce case, that she timely filed her petition for bill of review within four years after the divorce decree was signed, and that she is entitled to an award of attorney's fees and costs because Richard was not entitled to relief under Rule 91a. *See* Tex. R. Civ. P. 91a.1 (excepting "case brought under the Family Code"), 91a.7 (requiring award of attorney's fees and costs to "prevailing party on the motion"); *Bergenholtz v. Eskenazi*, No. 05-14-00609-CV, 2015 Tex. App. LEXIS 7680, at *7–9 (Tex. App.—Dallas July 23, 2015, pet. denied) (mem. op.) (expressing no opinion on whether Rule 91a motion can be used to attack bill of review when underlying judgment is divorce decree and treating Rule 91a motion to dismiss as challenging whether substantive requirements for bill of review relief were met). In her fifth issue, Stacey argues that the trial court erred by granting Richard's motion on the ground that Stacey's petition was barred by the parties' mediated settlement agreement because she pled that it was "induced by duress and fraud." In her seventh issue, Stacey challenges the dismissal of her petition as a death penalty sanction in addition to challenging the award of attorney's fees to Richard.

Trial Court's Dismissal Based on Bill of Review Requirements

Stacey's fourth and sixth issues concern the trial court's dismissal of her petition based on the trial court's inherent authority to dismiss under the pretrial procedure that applies to bills of review. In her fourth issue, Stacey argues that the trial court erred by granting Richard's motion to dismiss on the ground that she failed to plead a meritorious defense or, alternatively, by not giving her the opportunity to amend her petition, and, in her sixth issue, Stacey argues that the trial court erred by not giving her the opportunity to take discovery and by converting a non-evidentiary hearing into a pretrial evidentiary hearing.

Stacey's fourth issue is based on her assertion that the trial court granted Richard's motion to dismiss based on her pleadings. To support her argument, Stacey characterizes Richard's motion to dismiss as limited to a challenge to her pleadings. The trial court, however, states in its order that it, "after receiving evidence, expressly finds that Petitioner has failed to make a prima facie showing of a meritorious defense" and, based on that finding, found that her petition should be dismissed. *See Baker*, 582 S.W.2d at 409; *Bevering*, 401 S.W.3d at 297. Thus, she has failed to assign error to one of the grounds supporting the trial court's dismissal and has waived the complaint she raises in her fourth issue on this basis. *See Riley*, 2009 Tex. App. LEXIS 1162, at *2 (explaining that complaint was waived because party did not challenge alternative ground supporting judgment); *see also Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) ("[T]he courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of review.").

Further, even if Stacey had not waived the complaint that she raises in her fourth issue, we would conclude that the trial court's dismissal is supported by Stacey's failure to present

"prima facie proof" of a meritorious defense. *See Bevering*, 401 S.W.3d at 296; *Mosley*, 110 S.W.3d at 661; *Elliott*, 21 S.W.3d at 919. Stacey's affidavits were directed to the timing of her discovery of the "extrinsic fraud" and her "severe financial distress" that allegedly lead her to sign the mediated settlement agreement. Stacey offered no testimony at the hearing. As to the document titled "Responses to Request for Production" that was admitted as an exhibit, it refers to "44,309" produced documents in her malpractice suit, but Stacey did not present documents from the production or otherwise present evidence that would support a finding that she "would obtain a more favorable property division on retrial." *See Elliott*, 21 S.W.3d at 919; *Presley v. McConnell-Presley*, No. 05-08-01019-CV, 2009 Tex. App. LEXIS 4051, at *10–11 (Tex. App.—Dallas June 8, 2009, no pet.) (mem. op.) (observing that petitioner did not introduce evidence at hearing to show meritorious defense and concluding that "trial court did not err when it 'rejected' . . . petition for bill of review because, as a matter of law, [petitioner] did not make out a prima facie meritorious defense"); *see also Mosley*, 110 S.W.3d at 661–62 (concluding that trial court properly dismissed bill of review and that hearing was directed to "prima facie showing of meritorious defense and not merely the sufficiency of the pleadings").[6] We overrule her fourth issue.

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[6] In her reply brief, Stacey focuses on factual assertions in her verified petition, and the documents attached to her petition to argue that she presented prima facie evidence that she would have obtained a more favorable division of assets on retrial. She asserts that her petition "contains 8 pages of facts regarding the improper division of numerous assets" and that these facts were supported by the exhibits attached to her petition. Her factual assertions, however, seek to enforce the divorce decree or are not relevant to the property division because they concern alleged wrongful conduct by Richard and third parties after the divorce or alleged imprudent investment decisions as to particular assets during the parties' marriage. For example, she complains in her pleadings about Richard's alleged failure to make required payments to her under the terms of the divorce decree and the alleged failure of Stacey's divorce attorneys to protect her assets during the pendency of the parties' divorce. She also complains about "high risk trades" that Richard and his financial broker

In her sixth issue, Stacey argues that the trial court erred by not giving her the opportunity to take discovery and by converting a non-evidentiary hearing into a pretrial evidentiary hearing without proper notice. As support for this issue, she similarly asserts that Richard's motion to dismiss was limited to a challenge to her pleadings and, therefore, that she did not have notice that she would have to present evidence. Stacey, however, did she raise this argument with the trial court. *See* Tex. R. App. P. 33.1(a) (generally requiring party to present "a timely request, objection, or motion," that states ground for complaint "with sufficient specificity," and obtain ruling to

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made concerning her separate funds in a 401k account and that her "attorneys failed to protect [her] 401K assets during the divorce proceeding." Concerning the "marital residence," Stacey asserts in her pleadings that Richard "ceased making payments" after the parties' divorce and without her knowledge, preventing her from "salvaging a net equity of $450,000 in the residence," and that the third-party lender failed to provide the required notice, "which led to a lawsuit for Wrongful Foreclosure and Trespass to Title filed by Petitioner." The documents attached to her petition similarly concern events after the divorce such as the referenced foreclosure or are not relevant to the trial court's determination of the values of the parties' assets and its property division that was based on the mediated settlement agreement that the parties signed in October 2012.

We also find distinguishable the cases that Stacey cites in her reply brief to support her position that she presented prima facie evidence that she would obtain a more favorable division of assets on retrial. *See Martin v. Martin*, 840 S.W.2d 586, 590–92 (Tex. App.—Tyler 1992, writ denied) (concluding that petitioner had demonstrated that she would obtain more favorable property division on retrial where evidence presented showed value of marital estate at time of divorce, property division, amount that stock in subchapter S corporation had been undervalued in property division, and community retained earnings in subchapter S corporation of $6,000,000, which "were approximately eight times the community liabilities" shown in inventory filed in connection with divorce); *Kessler v. Kessler*, 693 S.W.2d 522, 528 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.) (dismissing appeal because no final judgment had been rendered and expressing no opinion as to merits of issues raised); *DeCluitt v. DeCluitt*, 613 S.W.2d 777, 780 (Tex. App.—Waco 1981, writ dism'd) (concluding that there was evidence to support that petitioner "was totally deceived as to the amount of community property owned until [after the divorce judgment was rendered]; that she received a grossly inequitable and disproportionately small share of the community assets in the settlement agreement; [and] that the community assets had a value of at least $409,562 at the time of the divorce decree").

preserve complaint for appellate review); *Harris v. Moore*, 912 S.W.2d 860, 862 (Tex. App.—Austin 1995, no writ) ("A party must preserve error by objecting, moving, or requesting relief upon discovering that the court is conducting a more substantive bill-of-review inquiry than the party expected." (citing *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988))).[7]

At the beginning of the hearing, Stacey announced that she was ready to proceed on Richard's motion to dismiss, which included the ground that Stacey "has failed to make a prima facie showing of a meritorious defense." In the motion to dismiss, Richard stated: "In the alternative, [he] also seeks dismissal of [Stacey]'s suit on the basis of the Court's inherent authority as recognized in *Bevering v. Bevering*, 401 S.W.3d 293, 296 (Tex. App.—San Antonio 2013, pet. denied)," and asserted that a "petitioner must establish prima facie proof of a meritorious defense before the court can proceed with a trial on the merits," citing *In re L.N.M.*, 182 S.W.3d 470, 474 (Tex. App.—Dallas 2006, no pet.).

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[7] Stacey cites *Harris v. Moore*, 912 S.W.2d 860, 862 (Tex. App.—Austin 1995, no writ), as support for her position that the trial court improperly converted a non-evidentiary hearing into a pretrial evidentiary hearing. We find the facts of that case distinguishable. In that case, the trial court began the hearing as a hearing on a motion for temporary injunction and, at the close of the hearing, denied the injunction but also dismissed the bill of review, "prompted in part by [the respondent]'s oral motion for dismissal in his closing argument." *Id.* at 861. The petitioner also "preserved his complaint regarding the nature of the hearing by complaining at the hearing that he did not expect a decision on the merits, that the court's choice to make that decision prevented him from calling a witness, and that the witness's testimony would help him prove his case." *Id.* at 862. The petitioner "protested at the hearing that the court was not supposed to decide the merits at the injunction hearing." *Id.* at 863. The trial court also "gave no notice that the scope of the hearing had broadened until after ruling on the stated issue of the hearing, then squelched [the petitioner]'s attempts to respond to the change." *Id.* In contrast, Richard's motion to dismiss was the subject of the hearing, and the motion raised that Stacey had failed to make a prima facie showing of a meritorious defense as a ground supporting dismissal.

Consistent with his motion, Richard's counsel made clear in argument at the outset of the hearing that Richard sought dismissal on the alternative ground that Stacey had not established prima facie proof of a meritorious defense. When the trial court advised Stacey that it was her "burden on the motion to dismiss, to establish what is required legally for proceeding on a bill of review" and then told her that he would hear from her as to evidence, Stacey stated to the trial court that she was not prepared to present evidence because she had been advised by an attorney that evidence was not considered with a Rule 91a motion. The trial court then further explained her burden to make a "prima facie showing" on the alternative ground. In response, Stacey requested a continuance "so that [she] could hire counsel for an evidentiary hearing," but she did not raise the argument that she raises on appeal that Richard's motion to dismiss was limited to a challenge on the pleadings. Thus, she has waived this issue for our review. *See* Tex. R. App. P. 33.1(a); *Lemons*, 747 S.W.2d at 373 (concluding that petitioner "waived any right to another day in court by its failure to object" and did not preserve complaint that trial "was merely a hearing"); *see also Salvagno v. Salvagno*, No. 04-00-00663-CV, 2001 Tex. App. LEXIS 3864, at *3 (Tex. App.—San Antonio June 13, 2001, no pet.) (not designated for publication) (confining party to grounds of objection made in trial court).

Further, even if she had preserved this issue for our review, we would conclude that the trial court did not abuse its discretion in proceeding with the hearing after Stacey requested a continuance "so that [she] could hire counsel for an evidentiary hearing." *See General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding) (reviewing denial of motion for

continuance for abuse of discretion (citing *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)). The trial court explained its ruling denying her request for continuance as follows:

> Well, I am not going to grant a continuance at this juncture, made orally after having called the case and after having received announcements of ready to proceed, and after having heard what you have presented. So your oral motion for continuance is denied.

See Villegas, 711 S.W.2d at 626 ("Generally, when movants fail to comply with Tex. R. Civ. P. 251's requirement that the motion for continuance be 'supported by affidavit,' we presume that the trial court did not abuse its discretion in denying the motion."); *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984) ("In civil cases in which the absence of counsel has been urged as grounds for a continuance or new trial, courts have required a showing that the failure to be represented at trial was not due to the party's own fault or negligence."); *see also Reyna v. Reyna*, 738 S.W.2d 772, 775 (Tex. App.—Austin 1987, no writ) ("Generally, a motion for continuance must be filed before an unconditional announcement of 'ready' since such an announcement waives the right to seek subsequently a delay based upon any facts which are, or with proper diligence should have been, known at the time.").[8] We overrule Stacey's sixth issue.

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[8] We further observe that her request for a continuance did not comply with the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 251 (requiring motion for continuance to be supported by affidavit, consent of parties, or by operation of law), R. 253 (stating that generally "absence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court"); *Watson v. Monk*, No. 03-11-00124-CV, 2012 Tex. App. LEXIS 8632, at *6 n.3 (Tex. App.—Austin Oct. 10, 2012, no pet.) (mem. op.) (concluding that "oral motion for continuance . . . did not comply with the Texas Rules of Civil Procedure and did not preserve its denial for our review").

Award of Attorney's Fees as Sanction

As part of her seventh issue, Stacey challenges the award of attorney's fees as a sanction.[9] She contends that the trial court did not adequately describe her conduct that violated section 10.001 of the Texas Civil Practice and Remedies Code, explain the basis for the sanction imposed, or consider the relevant factors for determining an appropriate sanction. *See* Tex. Civ. Prac. & Rem. Code §§ 10.001 (describing requirements for signing pleadings and motions), 10.005 (requiring court to "describe in an order imposing a sanction under this chapter the conduct the court has determined violated Section 10.001 and explain the basis for the sanction imposed"); *Nath v. Texas Children's Hosp.*, 446 S.W.3d 355, 371–72 (Tex. 2014) (referencing nonexclusive list of factors for courts to consider when determining appropriate sanction (citing *Low v. Henry*, 221 S.W.3d 609, 620 n.5 (Tex. 2007))).

She, however, has failed to challenge Richard's alternative, independent ground supporting the sanction award of attorney's fees—the trial court's inherent authority to do so. Therefore, any alleged error by the trial court awarding attorney's fees under chapter 10 was rendered harmless, and she has waived her complaint as to the award of attorney's fees on appeal. *See Akhtar*, 525 S.W.3d at 820; *Riley*, 2009 Tex. App. LEXIS 1162, at *1–2 (concluding that trial court's alleged error awarding sanctions under Texas Rule of Civil Procedure 13 was rendered harmless by appellants' failure to challenge the "alternative ground that could support the judgment" based on Chapter 9 of the Texas Civil Practice and Remedies Code).

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[9] Because we have concluded that the trial court did not err in dismissing her petition on a separate, independent ground, we do not address this issue to the extent that Stacey challenges the trial court's dismissal of her petition as a death penalty sanction. *See* Tex. R. App. P. 47.1.

Further, even if she had not waived this issue for our review, we would conclude that the trial court's imposition of attorney's fees as a sanction pursuant to chapter 10 of the Texas Civil Practice and Remedies Code was not an abuse of discretion because "some evidence supports its decision." *See Nath*, 446 S.W.3d at 361 (citing *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 97 (Tex. 2009)); *see also Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004) (setting out test for abuse of discretion in context of ruling on motion for sanctions). Relevant to this appeal, "Chapter 10 allows sanctions for pleadings filed with an improper purpose or that lack legal or factual support." *Nath*, 446 S.W.3d at 362; *see* Tex. Civ. Prac. & Rem. Code § 10.001.

Richard presented evidence at the hearing concerning the amount and reasonableness of attorney's fees and costs that he had incurred in response to Stacey's petition for bill of review. *See* Tex. Civ. Prac. & Rem. Code § 10.004(c)(3) (authorizing sanction for "amount of reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney's fees"). The evidence at the hearing also included the letter that Stacey sent to Richard in September 2017, in which she stated to him: "you can make this litigation as simple or as difficult as you want to make it" and that they could resolve their disputes in the civil case "or as it pertains to the unauthorized and illegal trades executed in my 401(k), I will be forced to seek restitution through the criminal justice system if you refuse to an agreed upon settlement amount for reimbursement." At the hearing, Stacey did not deny that she sent the letter to Richard.

Further, the trial court took judicial notice of the case file, which included copies of the divorce decree and the parties' mediated settlement agreement that were signed by the parties and their respective counsel. Stacey's pleaded facts in her petition also complain about Richard's actions

after the divorce decree was entered, which she contends violated the parties' agreement, and she complains about actions taken by third parties. Those allegations and complaints do not seek to set aside the divorce decree but to enforce it or are not relevant.[10] And the parties represented and agreed in the October 2012 mediated settlement agreement that they "entered into the settlement freely and without duress after having consulted with professionals of his or her choice"; that "[t]his stipulation [was] signed voluntarily and with the advice and consent of counsel"; and that the agreement was not subject to revocation.

Based on our review of the record, we conclude that there is some evidence to support the trial court's finding in its order that the filing of Stacey's petition "was done for improper purposes, including to harass [Richard]." *See* Tex. Civ. Prac. & Rem. Code § 10.001(1); *Nath*, 446 S.W.3d at 361. We overrule Stacey's seventh issue to the extent that she challenges the award of attorney's fees as a sanction.

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[10] Examples of these types of allegations and complaints in her petition include: (1) Richard "has denied [Stacey] her 50% reimbursement of the loan to MGM Global which [she] was awarded in the decree"; (2) "[a]fter their divorce and unbeknownst to [her], [Richard] ceased making payments on the note" for her residence, that she did not receive proper notice of acceleration of the indebtedness on her residence, which led to a lawsuit for wrongful foreclosure and trespass of title by her; (3) Richard was "in criminal contempt of court for evading to pay monies owed to [her] as agreed in their divorce decree rendered on August 15, 2013, including but not limited to [Richard]'s severance monies from Clinical Pathology Associates"; and (4) Richard "failed and refused to ensure that [her] hospital bills were paid as ordered by the court, thus damaging [her] credit line."

Conclusion

Having overruled Stacey's dispositive issues, we affirm the trial court's order dismissing Stacey's suit and awarding judgment against her for attorney's fees and costs.[11]

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Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: September 18, 2018

[11] To the extent that Stacey raises new arguments in her reply brief, they are waived, and we do not consider them. *See McAlester Fuel Co. v. Smith Int'l, Inc.*, 257 S.W.3d 732, 737 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) ("An issue raised for the first time in a reply brief is ordinarily waived and need not be considered by this Court."); *Hutchison v. Pharris*, 158 S.W.3d 554, 564 (Tex. App.—Fort Worth 2005, no pet.) (same).