NUMBER 13-15-00017-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

ST. COSMAS CORPORATION, Appellant,

v.

CLAUDIA FLORES, Appellee.

On appeal from the 138th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Contreras, Benavides, and Longoria
Memorandum Opinion by Justice Contreras

Appellee Claudia Flores obtained a default judgment against appellant St. Cosmas Corporation (St. Cosmas) in a suit to quiet title to certain Brownsville real property. Following rendition of the default judgment, St. Cosmas answered the suit and filed a motion for new trial. The trial court judge then recused himself and another judge was assigned to hear the case. In this appeal, St. Cosmas contends by two issues that (1)

the assigned judge erred in denying its motion for new trial, and (2) the assigned judge was barred from hearing the case because St. Cosmas filed a timely objection to his assignment. *See* TEX. GOV'T CODE ANN. § 74.053(b) (West, Westlaw through 2015 R.S.). We reverse and remand.

I. BACKGROUND

Flores was married to Jorge Contla. On April 19, 2012, Contla executed a deed of trust granting St. Cosmas a lien against the subject property in order to secure a $100,000 second mortgage. In 2013, Flores and Contla were divorced, and the final divorce decree awarded Flores, among other things, one hundred percent of the subject property. The decree, dated December 11, 2013, stated that the award to Flores of the subject property was "subject to assumption of all liens and mortgages on the house," including, specifically, the first and second mortgages.

On August 19, 2014, Flores filed the instant suit seeking to quiet title to the subject property. In her petition, she alleged that she was wrongfully dispossessed of the property on August 6, 2013, when St. Cosmas "fraudulently conducted a foreclosure sale without giving [her] proper notice and without having a valid statutory lien" on the property. Flores contended that St. Cosmas's lien was invalid because the subject property is her homestead and she did not execute the April 19, 2012 deed of trust. Flores further sought to have the foreclosure sale declared void because St. Cosmas "did not exist as a legal entity" at the time of the sale.

On October 1, 2014, Flores moved for default judgment on her suit, alleging that St. Cosmas "failed to maintain a registered office and was served with citation by serving the Office of the Secretary of State and has failed to appear or file an answer within the

time allowed by law. . . ." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (West, Westlaw through 2015 R.S.) (providing for substitute service upon the secretary of state). The trial court granted the motion and rendered default judgment against St. Cosmas on October 14, 2014. The judgment awarded Flores the declarations she sought as well as $8,000 in attorney's fees.

Two days later, St. Cosmas filed an answer to Flores's suit generally denying her allegations and raising affirmative defenses. St. Cosmas then filed a motion for new trial on October 24, 2014, contending that its registered agent was never served with process. St. Cosmas states in its appellate brief that a hearing was held on November 18, 2014, at which the presiding judge, the Honorable Arturo Cisneros Nelson, "realized that [St. Cosmas's] sole shareholder, director and officer was someone that he had personal ties [to] and had represented prior to becoming a Judge."[1] Therefore, on his own motion, Judge Nelson recused himself and referred the case to the regional presiding judge, the Honorable Rolando Olvera. *See* TEX. R. CIV. P. 18a. Subsequently, St. Cosmas filed a supplemental motion for new trial contending in part that the default judgment is void because Judge Nelson was "constitutionally disqualified" from hearing the case.

Presiding Judge Olvera assigned the Honorable Menton Murray, Senior Judge, to the case. The order of assignment states that it was signed on December 1, 2014; however, the district court clerk's file stamp shows that the order was filed on December 3, 2014. St. Cosmas filed an objection to the appointment on December 10, 2014, in which it alleged that it received notice of the appointment on December 4, 2014, that the

[1] The record before this Court does not contain a transcript of any hearing on November 18, 2014. Nevertheless, the parties agree that there was a hearing on that date and they agree as to what transpired at that hearing. Further, a docket sheet appearing in the record states that, on November 18, 2014, "[b]oth sides appeared" and the "[c]ourt recused itself."

objection was therefore timely, and that removal of Judge Murray from the case was mandatory. *See* TEX. GOV'T CODE ANN. § 74.053(b), (c). After a hearing at which St. Cosmas's attorney did not appear, Judge Murray denied the motion for new trial.[2] This appeal followed.

II. DISCUSSION

By its second issue on appeal, St. Cosmas argues that Judge Murray was barred from hearing the case because it filed a timely objection to his appointment. We agree.

When a district judge recuses himself or herself from a case, the judge must enter a recusal order and request that the presiding judge of the administrative judicial region assign another judge to the case. TEX. GOV'T CODE ANN. § 24.002 (West, Westlaw through 2015 R.S.). In a civil case, if any party files a timely objection to the assignment, the assigned judge "shall not hear the case." *Id*. § 74.053(b); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996) ("When a party files a timely objection to an assigned judge under section 74.053 of the Texas Government Code, the assigned judge's disqualification is mandatory."). A party's objection to an assigned judge is timely if it is "filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier." TEX. GOV'T CODE ANN. § 74.053(c). Each party is generally entitled to only one such objection in a given case. *Id*. § 74.053(b).

The record before this Court shows that the regional presiding judge signed the assignment order on December 1, 2014, but the order was not filed with the trial court

[2] At the hearing, neither Judge Murray nor Flores's counsel addressed St. Cosmas's objection to the judge's assignment.

clerk until December 3, 2014. St. Cosmas filed its objection on December 10, 2014. In its objection, St. Cosmas asserted that it received notice of the assignment on December 4, 2014.[3] The objection included a sworn verification by St. Cosmas's counsel stating that the facts within the objection are within his personal knowledge and are true and correct. The record contains no contrary indication as to when St. Cosmas received actual notice of the assignment order.[4] On this record, we conclude that St. Cosmas received actual notice on December 4, 2014; therefore, its objection was timely and the assigned judge was disqualified from hearing the case. *See id*. § 74.053(b), (c); *Flores*, 932 S.W.2d at 501.

Flores argues that St. Cosmas waived this issue because its objection was "never presented" and was "never ruled upon." We disagree that the issue is waived. An assigned judge's disqualification is mandatory when a timely objection is filed to his or her appointment under section 74.053 of the government code. *Flores*, 932 S.W.2d at 501. And "disqualification of a judge is a jurisdictional issue that cannot be waived." *Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 624 (Tex. 2012).

St. Cosmas's second issue is sustained.[5]

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[3] The statute provides that notice of an assignment may be given by email. TEX. GOV'T CODE ANN. § 74.053(f) (West, Westlaw through 2015 R.S.). But the record before this Court does not contain any indication that such notice was made in this case.

[4] Flores urges us to consider the trial court's docket sheet, or "Register of Actions," as evidence that the assignment was made on December 1. But the only docket sheet that appears in the record makes no mention of when the appointment order was made or when it was actually received by St. Cosmas.

[5] In light of our conclusion, we need not address St. Cosmas's first issue, by which it argues that Judge Murray erred in denying its motion for new trial. *See* TEX. R. APP. P. 47.1. St. Cosmas contends specifically in that issue that the default judgment rendered by Judge Nelson was "void as a matter of law and should have been vacated" because Judge Nelson was disqualified from hearing the case. It cites case law establishing that a judge is disqualified from hearing a case under the Texas Constitution if he or she is "interested" in the case. *See, e.g., Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 624 (Tex. 2012) (citing TEX. CONST. art. V, § 11). We note, however, that although Judge Nelson apparently recused himself on the basis that he personally knew and once represented St. Cosmas's owner, there is no suggestion that he was "interested" in the case in a manner that would disqualify him and cause his prior

III. CONCLUSION

We reverse the assigned judge's order denying St. Cosmas's motion for new trial, and the cause is remanded to the trial court with instructions for the assigned judge to withdraw from the case and for further proceedings consistent with this opinion.

DORI CONTRERAS
Justice

Delivered and filed the
20th day of April, 2017.

orders to be rendered void. *See id.* ("A judge is "interested" in a case—and thus disqualified under Article V, Section 11—if an order or judgment in the case will directly 'affect him to his personal or pecuniary loss or gain.' . . . A disqualified judge has no power to act in the case."); *see also F.S. New Prods., Inc. v. Strong Indus., Inc.*, 129 S.W.3d 594, 604 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (noting that "[c]onstitutional disqualification and recusal are very different creatures").