NO. 12-21-00140-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

LAKEYSHA BROOKS, APPELLANT	***§***	***APPEAL FROM THE***
V.	***§***	***COUNTY COURT AT LAW NO. 3***
AUSTIN BANK, TEXAS N.A., APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

LaKeysha Brooks appeals the trial court's summary judgment rendered in favor of Appellee Austin Bank, Texas N.A. in a bill of review, which followed the trial court's rendition of a default judgment against her in Austin Bank's favor in a probate proceeding. In three issues, she contends that the trial court erred in rendering summary judgment against her on her bill of review. We affirm.

BACKGROUND

Frazier David Brooks died intestate. LaKeysha Brooks (Brooks) was the designated pay-on-death beneficiary of multiple accounts David held at Austin Bank. Following David's death, Austin Bank transferred $184,306.08 to Brooks from David's accounts. Subsequently, the Administrator of David's estate determined that David had not signed the agreements containing the pay-on-death designations and filed suit against Austin Bank on the estate's behalf to recover the funds transferred to Brooks. Austin Bank resolved the matter with the Administrator and, in turn, filed a misstyled third-party claim in the probate proceedings against Brooks to recover the funds.

Austin Bank attempted to serve Brooks at her home in Georgia. However, due to restricted access at her residence, it was unable to achieve personal service and obtained

permission from the trial court to do so by means of substituted service. Thereafter, Austin Bank successfully served Brooks by a manner of substituted service authorized by the trial court. Subsequently, upon notice to Brooks through her attorney, a hearing was held on Austin Bank's motion for default judgment. Ultimately, the trial court rendered a default judgment for Austin Bank on October 28, 2019, and the court clerk sent notice of the default judgment via email to Brooks's attorney of record.[1] Brooks did not appeal the default judgment.

On July 23, 2020, Brooks filed a bill of review in the trial court from which the probate proceeding arose. There, she challenged the default judgment, complaining, among other things, that she was not given proper notice of its rendition, which denied her due process. Austin Bank answered and filed a motion for summary judgment, to which Brooks responded. The trial court denied Austin Bank's motion. Thereafter, Austin Bank filed a motion to reconsider, which the trial court granted. This appeal followed.

SUMMARY JUDGMENT

In her first, second, and third issues, Brooks argues that the trial court erred in granting summary judgment in favor of Austin Bank, which, in turn resulted in the denial of her bill of review.

Standard of Review

Although bills of review ordinarily are reviewed for abuse of discretion, because the trial court granted summary judgment in this case, the proper standard of review is the summary judgment standard. ***Bowers v. Bowers***, 510 S.W.3d 571, 576 (Tex. App.–El Paso 2016, no pet.); ***Clarendon Nat'l Ins. Co. v. Thompson***, 199 S.W.3d 482, 487 (Tex. App.–Houston [1st Dist.] 2006, no pet.).

The movant for traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); ***Nixon v. Mr. Prop. Mgmt. Co.***, 690 S.W.2d 546, 548 (Tex. 1985). A defendant who conclusively negates at least one essential element of the nonmovant's cause of action is entitled to summary judgment as to that cause of action. *See* ***Randall's Food Mkts., Inc. v. Johnson***, 891 S.W.2d 640, 644 (Tex. 1995). Likewise, a defendant who conclusively establishes

[1] The record reflects that Brooks's attorney also had been appointed as her resident agent for service of process.

each element of an affirmative defense is entitled to summary judgment. ***Id.*** Once the movant establishes a right to summary judgment, the nonmovant has the burden to respond to the motion and present to the trial court any issues that would preclude summary judgment. *See* ***City of Houston v. Clear Creek Basin Auth.***, 589 S.W.2d 671, 678–79 (Tex. 1979). The only question is whether an issue of material fact is presented. *See* TEX. R. CIV. P. 166a(c).

When reviewing summary judgments, we perform a de novo review of the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *See* ***Sudan v. Sudan***, 199 S.W.3d 291, 292 (Tex. 2006); ***KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.***, 988 S.W.2d 746, 748 (Tex. 1999). We are not required to ascertain the credibility of affiants or to determine the weight of evidence in the affidavits, depositions, exhibits, and other summary judgment proof. *See* ***Gulbenkian v. Penn***, 252 S.W.2d 929, 932 (Tex. 1952); ***Palestine Herald-Press Co. v. Zimmer***, 257 S.W.3d 504, 508 (Tex. App.–Tyler 2008, pet. denied).

Further, all theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. *See* TEX. R. CIV. P. 166a(c). If the trial court's order granting summary judgment does not specify the grounds relied on for its ruling, we will affirm it if any of the theories advanced are meritorious. ***State Farm Fire & Cas. Co. v. S.S.***, 858 S.W.2d 374, 380 (Tex. 1993).

Governing Law

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. ***Caldwell v. Barnes***, 154 S.W.3d 93, 96 (Tex. 2004); ***Baker v. Goldsmith***, 582 S.W.2d 404, 406 (Tex. 1979). Bill of review plaintiffs ordinarily must plead and prove (1) a meritorious defense to the underlying cause of action, (2) which the plaintiffs were prevented from making by the fraud, accident or wrongful act of the opposing party or official mistake, (3) unmixed with any fault or negligence on their own part. ***Caldwell***, 144 S.W.3d at 96.

But when a bill-of-review plaintiff claims a due process violation for no service of process or notice of a default judgment, it is relieved of proving the first two elements and only must prove that its own fault or negligence did not contribute to cause the lack of service or notice. *See* ***Katy Venture, Ltd. v. Cremona Bistro Corp.***, 469 S.W.3d 160, 163 (Tex. 2015). Thus, because Brooks asserts a due process violation based on the clerk's alleged failure to give

proper notice of the default judgment under Rule 239a, the law required that she raise a genuine issue of material fact only with respect to her lack of fault or negligence in failing to receive notice of the default judgment to survive Austin Bank's motion for summary judgment. *See* ***id.*** at 163–64 (citing ***Amedisys, Inc. v. Kingwood Home Health Care, LLC***, 437 S.W.3d 507, 511 (Tex. 2014) (holding that a bill-of-review plaintiff was required only to establish its own lack of negligence when it asserted that it received no notice of the default judgment)).

Discussion

The underlying probate proceeding is governed by the Texas Estates Code. *See* TEX. ESTATES CODE ANN. § 21.006 (West 2020). Here, the record reflects that Austin Bank served Brooks by a method of substituted service approved by the trial court. *See* TEX. R. CIV. P. 106(b). Brooks does not challenge Austin Bank's method of substituted service in her appeal. Rather, she argues that she was denied due process because the trial court clerk did not mail the notice of default judgment to her in compliance with Texas Rule of Civil Procedure 239a but instead emailed a copy of the default judgment to her attorney of record. Austin Bank argues that such manner of notice is satisfactory under Texas Estates Code, Section 51.055. We agree.

Section 239a requires that written notice of a final default judgment be sent to the defaulting defendant by the clerk at her last known address as certified by the plaintiff. *See* TEX. R. CIV. P. 239a.[2] However, Section 51.055 states as follows:

> If a party is represented by an attorney of record in a probate proceeding, each citation or notice required to be served on the party in that proceeding shall be served instead on that attorney. A notice under this subsection may be served by delivery to the attorney in person or by registered or certified mail.

TEX. ESTATES CODE ANN. §51.055 (West 2020). Because Rule 239a requires that notice be sent to the defendant while Section 51.055 mandates that notices in probate proceedings be sent to a party's attorney of record, the two sections are in conflict. But when a rule of procedure conflicts with a statute, the statute prevails. *See* ***Guardianship of Fairley***, No. 20-0328, 2022 WL 627776, at *9 (Tex. Mar. 4, 2022); ***Johnstone v. State***, 22 S.W.3d 408, 409 (Tex. 2000).

[2] At or immediately prior to the time a final default judgment is rendered, the party taking the same or his attorney shall certify to the clerk in writing the last known mailing address of the party against whom the judgment is taken, and immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate. *See* TEX. R. CIV. P. 239a. The notice shall state the number and style of the case, the court in which the case is pending, the names of the parties in whose favor and against whom the judgment was rendered, and the date of the signing of the judgment. *See* ***id.***

Here, the summary judgment record reflects that the trial court clerk sent a copy of the default judgment via email to Brooks's attorney of record.[3] The summary judgment record contains the affidavit of Shanae Howell, a Deputy Clerk with the Smith County Clerk's Office - Probate Department. In her affidavit, Howell states that on the same date the default judgment was signed, she emailed a copy of the default judgment to Brooks's attorney of record. Based on our review of the record, the default judgment itself contains all the information required to be included in a Rule 239a notice. *See* TEX. R. CIV. P. 239a.

In sum, the summary judgment record indicates that the clerk emailed Brooks's attorney of record proper notice of the default judgment. Brooks has not argued that her attorney did not, in fact, receive such notice. *See, e.g.*, ***Abuzaid v. Anani, LLC***, No. 05-16-00667-CV, 2017 WL 5590194, at *3–4 (Tex. App.–Dallas 2017, no pet.) (mem. op.). A bill of review plaintiff cannot excuse herself from fault or negligence because of the alleged negligence or oversight of her attorney. *See* ***Mackay v. Charles W. Sexton Co.***, 469 S.W.2d 441, 444 (Tex. Civ. App.–Dallas 1971, no writ). Thus, because Austin Bank presented evidence that Brooks was served with process and that her attorney of record was given both notice of the hearing on its motion for default judgment as well as notice of the judgment itself, it demonstrated that it was entitled to judgment as a matter of law. At that point, the burden shifted to Brooks to bring forth summary judgment evidence raising a genuine issue of material fact that her failure to appear or to exhaust all adequate legal remedies was not a result of her own fault or negligence. *See* ***id.*** (bill in equity may not be substituted for appeal); *see also* ***Caldwell***, 144 S.W.3d at 96. Because she failed to do so, we hold that the trial did not err in rendering summary judgment for Austin Bank on Brooks's bill of review. Brooks's first, second, and third issues are overruled.

DISPOSITION

Having overruled Brooks's first, second, and third issues, we ***affirm*** the trial court's judgment.

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[3] Brooks does not contend that notice via email is improper under Section 51.050. Nonetheless, we note that Section 51.050 states that "notice . . . may be served by delivery to the attorney in person or by registered or certified mail." *See* TEX. ESTATES CODE ANN. 51.050 (West 2020). Because Section 51.050 does not use mandatory language regarding how notice may be served on a party's attorney of record, we conclude that it is not in conflict with Texas Rule of Civil Procedure 21a, which permits service of notice of documents not filed electronically via email. *See* TEX. R. CIV. P. 21a(a)(2); *see also* TEX. R. CIV. P. 21(f)(10) (clerk may send notices, orders, or other communications about the case to the party electronically).

JAMES T. WORTHEN
Chief Justice

Opinion delivered May 11, 2022.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MAY 11, 2022

NO. 12-21-00140-CV

LAKEYSHA BROOKS,
Appellant
V.
AUSTIN BANK, TEXAS N.A.,
Appellee

Appeal from the County Court at Law No. 3
of Smith County, Texas (Tr.Ct.No. 44700p)

THIS CAUSE came to be heard on the appellate record and brief(s) filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, all costs of this appeal are assessed against the Appellant, **LAKEYSHA BROOKS**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.