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Mejia v. Sawyer

Court of Appeals of Texas, Fifth District, Dallas

July 29, 2020, Opinion Filed

No. 05-19-00488-CV

Reporter

2020 Tex. App. LEXIS 5993 *; 2020 WL 4344916

ESPERANZA PARRENO MEJIA, Appellant v.
MICHAEL RYAN SAWYER, VICKIE MOSELEY, VINCE
RAY MOSELEY, AND AMERICAN HYDRAULIC
SERVICE CORPORATION, Appellees

Prior History: [*1] On Appeal from the 44th Judicial District Court, Dallas County, Texas. Trial Court Cause No. DC-19-01807.

[Esperanza Parreno Mejia v. Sawyer, 2019 Tex. Dist. LEXIS 30729 \(Tex. Dist. Ct., Apr. 4, 2019\)](#)

Core Terms

trial court, notice, bill of review, status conference, continuance, trial court's attention, motion to dismiss, fail to preserve, written motion, re-setting, complain, lawsuit, verbal, waived, trial court's order, want of prosecution, complaining party, notice of trial, specific ground, harmless error, lack of notice, provide notice, announce, objected, promptly, parties

Case Summary

Overview

HOLDINGS: [1]-In an appeal from a bill of review brought to set aside an order of dismissal of a personal injury lawsuit, appellant's complaint that the trial court's status conference order did not provide notice the trial court would consider dismissal of her bill of review failed because the explicit language of the order advised the parties the case was set for a status conference/dismissal hearing; [2]-Appellant failed to preserve her complaint that she did not receive a written motion to dismiss or notice the defense would move for a dismissal for review, under *Tex. R. App. P. 33.1*, by failing to promptly bring the issue to the trial court's attention because appellant's counsel neither objected to the verbal motion to dismiss nor asked for a

continuance.

Outcome

Order dismissing bill of review affirmed.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Hearings on Dismissal

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

[HN1](#) [↓] **Involuntary Dismissals, Hearings on Dismissal**

Under *Tex. R. App. P. 33.1*, in order to preserve a complaint for appellate review, the record must show that the complaining party made a timely request, objection, or motion in the trial court, stating the specific grounds for the ruling sought, unless the specific grounds were apparent from the context. It is also necessary for the complaining party to obtain a ruling on the request, objection or motion. *Tex. R. App. P. 33.1*. A party waives a complaint regarding insufficient notice if the party fails to preserve the complaint. To preserve the issue for review, a party must bring the lack of notice complaint to the trial court's attention at the hearing by objecting to the hearing going forward or moving for a continuance.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions

[HN2](#) [↓] **Appeals, Reviewability of Lower Court Decisions**

A party cannot lead a trial court into error and then complain about it later on appeal.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Governments > Courts > Court Records

[HN3](#) **Reviewability of Lower Court Decisions, Preservation for Review**

Error arising from failure of the court reporter to record the proceedings must be preserved by a timely objection.

Counsel: For Esperanza Parreno Mejia, Appellant: James Scott Perry, Jay C. English, Lead counsel, English Law Group, PLLC, Dallas TX.

For Michael Ryan Sawye, et al., Appellee: Clinton David Howie, Lead counsel, David G. Allen, Stacy & Conder, LLP, Dianne Jones-McVay, Susan L. Florence & Associates, Dallas TX.

Judges: Before Chief Justice Burns, Justice Molberg, and Justice Carlyle. Opinion by Justice Molberg.

Opinion

MEMORANDUM OPINION

Opinion by Justice Molberg

This is an appeal from a bill of review brought to set aside an order of dismissal of a personal injury lawsuit filed against appellees by appellant Esperanza Parreno Mejia. We affirm the trial court's order of dismissal.

Mejia filed her initial lawsuit on August 16, 2016, in the 193rd Judicial District Court, against appellees Michael Ryan Sawyer, Mickie Moseley, and Vince Ray Moseley. The trial originally was set for May 16, 2017. Trial was re-set for August 1, 2017, after the parties filed an agreed motion for continuance. Mejia non-suited the case on July 31, 2017.

On August 29, 2017, Mejia re-filed the same cause of action in the 44th Judicial District Court, adding American Hydraulic Service, Corp. as a defendant. She did not provide notice of her previously filed lawsuit. Sawyer and the Moseley defendants filed an original

answer and general denial on September 19, 2017. The case originally was scheduled for trial on April 16, 2018. After re-setting [*2] the trial for July 30, 2018, the trial court issued another notice of trial on August 6, 2018, re-setting the trial date again, for October 29, 2018. The August 6 notice of trial stated that failure by the plaintiff to announce or appear would result in the dismissal of the case for want of prosecution in accordance with *Texas Rule of Civil Procedure 165a*. TEX. R. CIV. P. 165a. Mejia failed to announce ready for the October 29, 2018 trial, and on October 26, 2018, the trial court issued an order dismissing the case without prejudice for want of prosecution.¹

Mejia filed the petition for bill of review on February 5, 2019.² On March 4, 2019, the trial court issued an order setting a "status conference/dismissal hearing" for 9 a.m. on March 29, 2019. Mejia appeared at the hearing, which was not recorded. At the hearing, the defense verbally moved for dismissal. No written motion to dismiss was filed. Mejia did not object to the verbal motion to dismiss or move for a continuance. On April 4, 2019, the trial court issued an order denying the bill of review and dismissing the case. Mejia did not file a motion for new trial.

On appeal, Mejia complains that she believed she was appearing for a status conference, and not a dismissal proceeding. [*3] According to Mejia, the trial court erred by dismissing her bill of review because she did not receive prior notice the trial court would entertain a motion to dismiss at the status conference and no written motion to dismiss was filed.

ANALYSIS

We first address Mejia's complaint the trial court's status conference order did not provide notice the trial court would consider dismissal of her bill of review. We disagree with Mejia. The explicit language of the order

¹ Rule 3.02.a. of the Local Rules of the Civil Courts of Dallas County requires counsel to announce ready for trial on the Thursday—but no later than 10:30 a.m. on the Friday—preceding the week of the trial setting. See Rule 3.02, Local Rules of the Civil Courts of Dallas County, Texas. Rule 3.02.b. states, "If Plaintiff does not make an announcement by 10:30 A.M. on Friday preceding the week in which the case is set for trial, the Court may dismiss the case for want of prosecution." *Id.*

² The defense timely filed an answer and general denial on March 22, 2019.

advised the parties the case was "set for a status conference/dismissal hearing" on March 29, 2019.

We next address Mejia's complaint she did not receive a written motion to dismiss or notice the defense would move for a dismissal at least twenty-one days prior to the hearing. See *TEX. R. CIV. P. 91a, 166a*. Appellees respond that Mejia failed to preserve this issue for review; any procedural deficiencies in the trial court's consideration of the dismissal was harmless error; and any alleged lack of notice of the dismissal hearing was harmless error. We agree that Mejia failed to preserve this issue for review by failing to promptly bring the issue to the trial court's attention.

[HN1](#) Under *Texas Rule of Appellate Procedure 33.1*, in order to preserve a complaint for appellate review, the record [*4] must show that the complaining party made a timely request, objection, or motion in the trial court, stating the specific grounds for the ruling sought, unless the specific grounds were apparent from the context. It is also necessary for the complaining party to obtain a ruling on the request, objection or motion. *TEX. R. APP. P. 33.1*. "A party waives a complaint regarding insufficient notice if the party fails to preserve the complaint." [Odam v. Tex. Credit Union, No. 05-16-00077-CV, 2017 Tex. App. LEXIS 8189, 2017 WL 3634274, at * 4 \(Tex. App.—Dallas Aug. 24, 2017, no pet.\)](#) (mem. op.) (quoting *In re K.C.*, No. 02-08-00023-CV, 2008 WL 418-335, at *1 (Tex. App.—Fort Worth Sept. 11, 2008, no pet.) (mem. op.)). To preserve the issue for review, a party must bring the lack of notice complaint to the trial court's attention at the hearing by objecting to the hearing going forward or moving for a continuance. [Envision Realty Group, LC v. Chuan Chen, No. 05-18-00613-CV, 2020 Tex. App. LEXIS 1959, 2020 WL 1060698, at *3 \(Tex. App.—Dallas Mar. 5, 2020, no pet.\)](#) (mem. op.) ("To preserve a complaint about lack of notice [for a *Rule 91a* motion to dismiss], a party must bring the lack of adequate notice to the trial court's attention at the hearing and object to the hearing going forward or move for a continuance."); see also *TEX. R. APP. P. 52(a)*.

Here, Mejia's counsel neither objected to the verbal motion to dismiss nor asked for a continuance. Mejia did not raise the issue of notice, and she may [*5] not complain about it for the first time on appeal. [HN2](#) "[A] party cannot lead a trial court into error and then complain about it later on appeal." [Union City Body Co., Inc. v. Ramirez, 911 S.W.2d 196, 202 \(Tex. App.—San Antonio 1995, no pet.\)](#) ("[A] complaint of inadequate notice under *rules 21* or *21a* is waived absent a timely

and specific objection . . . Even in a summary judgment context, an allegation that a party received less than the required notice under *Rule 166a* can be waived unless it is promptly brought to the attention of the trial court.")³

We resolve Mejia's sole issue against her. We affirm the trial court's order dismissing the bill of review.

/s/ Ken Molberg

KEN MOLBERG

JUSTICE

JUDGMENT

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** [*6] that appellees MICHAEL RYAN SAWYER, VICKIE MOSELEY, VINCE RAY MOSELEY, AND AMERICAN HYDRAULIC SERVICE CORPORATION recover their costs of this appeal from appellant ESPERANZA PARRENO MEJIA.

Judgment entered this 29th day of July, 2020.

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³ Any complaint by Mejia that a court reporter did not record the proceedings also is waived. [HN3](#) Error arising from failure of the court reporter to record the proceedings must be preserved by a timely objection. [Russell v. City of Dallas, No. 05-13-00061-CV, 2014 Tex. App. LEXIS 5339, 2014 WL 2090010, at *2 n.3 \(Tex. App.—Dallas May 16, 2014, pet. denied\) \(mem. op.\)](#); [Benjamin v. Benjamin, No. 01-10-01003-CV, 2013 Tex. App. LEXIS 10580, 2013 WL 4507848, at *2 \(Tex. App.—Houston \[1st Dist.\] Aug. 22, 2013, no pet.\)](#) (mem. op. on reh'g); [Rittenhouse v. Sabine Valley Ctr. Found., Inc., 161 S.W.3d 157, 162 \(Tex. App.—Texarkana 2005, no pet.\)](#). The appellate record does not reflect that Mejia requested the hearing to be recorded. Moreover, even if a court reporter was required to report the proceeding without Mejia's request, she was required to object to preserve the failure to record for appellate review. [Russell, 2014 Tex. App. LEXIS 5339, 2014 WL 2090010, at *2 n.3](#). Here, Mejia did not object to the lack of a court reporter to record the proceedings, and any such complaint is waived.