Opinion issued January 12, 2012.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00679-CV

STEPHEN P. GLOVER, Appellant

V.

ROBERT W. BERLETH, Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2008-39595

MEMORANDUM OPINION

Stephen Glover appeals the trial court's rendition of summary judgment in favor of Robert Berleth. Berleth sued Glover for rescission of a contract, seeking the return of payments Berleth made to Glover, and a declaratory judgment that

Glover had no rights under the contract. The trial court granted Berleth's motion for summary judgment, declaring the contract void, awarding damages of $23,784, attorney's fees of $2,000, and pre- and post-judgment interest. In four issues, Glover contends that the trial court erred by (1) holding a summary judgment hearing without affording Glover adequate notice, in violation of his right to due process and (2) rendering summary judgment based on inadmissible summary judgment evidence. We conclude that Glover was not afforded reasonable notice of the summary judgment hearing. Accordingly, we reverse and remand.

Background

In December 2005, Glover and Berleth entered into a two-page "Purchase and Exchange Agreement." The agreement stated that it was intended to accomplish "a trading of partial ownership" in Glover's and Berleth's independent businesses to "accomplish a diversification of business interests for both parties." Specifically, Berleth agreed to transfer to Glover a one-third interest in a real estate company and to pay Glover a down payment and ongoing monthly payments. For his part, Glover assigned to Berleth a one-third interest in a "joint venture agreement and supplemental agreement with Attorney Jules L. Laird, Jr.," including a right of ownership in one-third of all payments and sums due under those agreements. These payments and sums were "for expert services in bringing three massive land grant lawsuits to completion . . . ." At the time Glover entered

into the agreement with Berleth, Glover was an attorney licensed in Texas but was on probation with the Texas State Bar for misappropriating client funds. Glover surrendered his law license the following month and ultimately was imprisoned in the Texas Department of Criminal Justice's Stevenson Unit in Cuero, Texas, where he remained as of the time he brought this appeal.

Berleth brought this suit against Glover in 2008. Berleth alleged that the Purchase and Exchange Agreement was void or voidable because the consideration given by Glover—a share in payments made to Glover for "expert services"—was actually an illegal promise to share attorney's fees with a non-lawyer, Berleth. Berleth sought a declaration that Glover had no rights under the agreement and asked for rescission of the agreement, including return of $23,784 in payments he had made to Glover under the agreement. Berleth's suit also included a claim for $9,000 for disgorgement of attorney's fees that he alleged he paid to Glover.

In response, Glover filed a plea of privilege, plea in abatement, motion to transfer venue, motion to dismiss, answer and general denial, and various counterclaims. In his pleadings, Glover contended that the Purchase and Exchange Agreement is enforceable and that Berleth breached it in various ways. Glover sought damages and an accounting.

On May 4, 2009, Berleth filed a motion for summary judgment on his affirmative claims and Glover's counterclaims. On the same day, he served Glover

by certified mail with the motion and notice of oral hearing, which set the hearing date for June 12, 2009. The return receipt shows the motion for summary judgment and this initial notice of hearing were received by the TDCJ-Stevenson Unit on May 7, 2009, more than a month before the original hearing date.

On May 28, 2009, Berleth filed and served Glover by certified mail with another notice of hearing. This second notice indicated that the hearing on Berleth's motion for summary judgment had been postponed by a week and would take place on June 19, 2009. The return receipt shows this parcel was received by the TDCJ-Stevenson Unit on June 1, 2009.

On June 3, 2009, Berleth filed and served on Glover a third notice of oral hearing. This notice indicated that the hearing on Berleth's motion for summary judgment had been moved *forward* by eight days, to June 11, 2009. The return receipt shows this notice was received by TDCJ-Stevenson Unit on June 5, 2009, which was six days before the new June 11 hearing date.

Glover filed no response to Berleth's motion for summary judgment. The trial court granted the motion at the oral hearing on June 11, 2009. It awarded Berleth $23,784, in damages, plus attorney's fees and pre- and post-judgment interest, and rendered a take-nothing judgment on Glover's counterclaims. This appeal followed.

Berleth contends that this court lacks jurisdiction over Glover's appeal because Glover's notice of appeal was not timely filed. Specifically, Berleth points out that Glover's notice of appeal or other post-judgment motion extending appellate timetables was due to be filed on July 13 but, in fact, his motion for new trial was not file-stamped by the district clerk until July 14, 2009. Berleth pointed out that the appellate record contained no notice of appeal. The district court has since supplemented the record, and it now reflects that Glover's motion for new trial and notice of appeal were received by the district clerk simultaneously at 3:37 p.m. on July 14, 2009. We address our jurisdiction before turning to the merits of Glover's appeal.

Jurisdiction

A notice of appeal "must be filed within 30 days after the judgment is signed." TEX. R. APP. P. 26.1. Under the mailbox rule, a document is deemed timely filed if it is sent to the proper clerk by first-class mail in a properly addressed, stamped envelope on or before the last day for filing and is received not more than ten days beyond the filing deadline. TEX. R. APP. P. 9.2(b)(1); *Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007). Rule 9.2(b)(2) of the Texas Rules of Appellate Procedure, entitled "Proof of Mailing," identifies items that an appellate court will accept as conclusive proof of the date of mailing, and expressly permits that an appellate court may consider other proof. TEX. R. APP. P. 9.2(b)(2).

The rule makes clear that appellant bears the burden of providing some measure of proof that his notice of appeal was placed in the United States mail on or before the filing deadline. *Ramos*, 228 S.W.3d at 673.

Applying the rules to this case, Glover's notice of appeal was due 30 days after June 11, on July 11. *See* TEX. R. APP. P. 26.1. That was a Saturday, so the deadline for Glover to file his notice of appeal was extended to Monday, July 13, 2009. *See* TEX. R. APP. P. 4.1. The notice of appeal was file-stamped by the district clerk one day after that, on Tuesday, July 14, 2009.[1] Thus, under the mailbox rule, Glover's notice of appeal would have been timely filed if he had placed it in the outgoing prison mailbox on July 13. *Ramos*, 228 S.W.3d at 673; *Warner v. Glass*, 135 S.W.3d 681, 684 (Tex. 2004) (holding pro se inmate's civil petition placed in a properly addressed and stamped envelope is deemed filed at the moment prison authorities receive the document for mailing).

Although the record does not contain proof of the date of mailing that is considered conclusive under Rule 9.2, the affidavit and cover letter filed simultaneously with Glover's notice of appeal both are dated July 8, 2009. It is unclear when Glover placed his notice of appeal in the outgoing prison mailbox, or when prison officials placed it in the United States mail, but because they were

[1] The notice of appeal, motion for new trial, and affidavit all bear a timestamp noting they were filed with the district clerk at 3:37 p.m. on July 14, 2009. The affidavit states it was executed on July 8, and the cover letter enclosing these items is dated July 8. The cover letter, however, bears a filestamp of July 15, 2009.

received by the district clerk on July 14, it is logical to assume they were placed in the mail, as was required under the rules, on or before July 13, 2009.[2] *Ramos*, 228 S.W.3d at 673 (holding filing letter and certificates of service accompanying petitioners' notices of appeal constituted sufficient proof that inmate's notice of appeal were timely placed in outgoing prison mailbox and commenting that "it is logical to assume" that notices of appeal received by the clerk on one day were placed in the outgoing prison mail on the previous day, at the latest). We conclude that Glover's notice of appeal was timely filed and that we therefore have jurisdiction over his appeal. *See Ryland Enterprise, Inv. v. Witherspoon*, No. 11-0189, 2011 WL 6276127, at *1 (Tex. Dec. 16, 2011); *see also Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997) ("[A]ppellate courts should not dismiss an appeal for a procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal."); *Ramos*, 228 S.W.3d at 673.

Did Glover Get Adequate Notice of the Summary Judgment Hearing?

In his first issue, Glover contends that the trial court erred by rendering summary judgment because Glover had inadequate notice of Berleth's summary judgment hearing. In response, Berleth contends that Glover received adequate notice that his response was due seven days before the hearing, on June 5. Berleth

[2] According to Glover's verified motion for new trial, pro se legal mail is mailed one to two days after an inmate puts a filing in the outgoing legal mailbox.

also contends that Glover waived any late-notice complaint by failing to object or to seek leave to file a late response before the hearing.

Rule 166a requires service of the motion for summary judgment at least twenty-one days before the date specified for a hearing on the motion. Tex. R. Civ. P. 166a(c). Rule 21a extends the minimum notice by three days when the motion is served by mail, allowing a summary judgment motion to be heard as early as the twenty-first day after it is served, or the twenty-fourth day if it is served by mail. *Lewis v. Blake*, 876 S.W.2d 314, 315–16 (Tex. 1994). If the nonmovant received notice twenty-one days before the original hearing, the twenty-one day requirement from notice to hearing does not apply to a resetting of the hearing. *Lazare v. Murillo*, No. 01-05-00688-CV, 2006 WL 2773486, at *2 (Tex. App.—Houston [1st Dist.] Sept. 28, 2006, pet. denied) (citing *LeNotre v. Cohen*, 979 S.W.2d 723, 726 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)). Rather, a party need only give reasonable notice that a hearing on a summary judgment has been rescheduled. *Id*. "Reasonable notice means at least seven days before the hearing." *Id*.

Berleth correctly notes that Glover received adequate notice of the original summary judgment hearing, which was to take place on June 12, 2009. Berleth also correctly notes that, had the hearing date not been moved, Glover would have been required to file a response on or before June 5. But the hearing date was

moved and, once Glover received the second notice rescheduling the hearing to June 19, June 5 was no longer the deadline for him to file a response. Rather, once the hearing was rescheduled for June 19, Glover had until June 12—seven days before the rescheduled hearing—to file a response. But the hearing was rescheduled again—this time it was moved *forward* to June 11, which was one day *before* the original hearing date. And Glover's verified motion for new trial states that, due to delays occasioned by the TDCJ's legal mail procedures, he received the third notice of hearing on June 8, which was three days before the hearing. We conclude Glover did not receive reasonable notice of the June 11 hearing.[3] *Lazare*, 2006 WL 2773486 at *2 (citing *LeNotre*, 979 S.W.2d at 726) ("Reasonable notice means at least seven days before the hearing.").

Berleth contends that Glover waived any late-notice complaint by not raising the issue until his motion for new trial. In support, Berleth cites *Hatler v. Moore Wallace N. Am., Inc.*, No. 01-07-00181-CV, 2010 WL 375807 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010, no pet.) and *Long v. Yurrick*, 319 S.W.3d 944 (Tex. App.—Austin 2010, no pet.). Both are distinguishable. In *Hatler*, this court held that Hatler failed to preserve his late-notice complaint where he raised the issue for the first time in his motion for new trial. 2010 WL 375807 at *2. Hatler

[3] The return receipt on the third notice of hearing shows it was received by TDCJ on June 5, or six days before the hearing. Even if June 5, as opposed to June 8, were the date on which Glover was deemed to have received notice of the hearing, Glover still would have received less than the minimum seven days required.

received 21 days' notice of the hearing, but waited until he filed a motion for new trial to complain that he should have received an extra three days' notice. A panel of this court found that Hatler failed to preserve the complaint because he had "ample time" to raise it or file a motion for continuance before the trial court granted the motion, but failed to do either. *Id.* The principle we articulated is that if a nonmovant receives notice that is untimely *but sufficient to enable him to attend the summary judgment hearing*, he must file a motion for continuance or raise the late-notice complaint in writing, supported by affidavit evidence. *Id.* We also stated the nonmovant who has sufficient notice to enable him to attend the hearing should raise the issue before the trial court at the hearing and may not preserve a complaint that he received late notice in a post-trial motion. *Id. Hatler* does not compel the conclusion Glover failed to preserve his late-notice complaint because Glover, unlike Hatler, did not have sufficient notice to enable him to attend or file an objection or motion for continuance before the hearing.

Long v. Yurrick is inapplicable for the same reason. In that case, the trial court set a hearing date and faxed a notice of hearing to Long's attorney, which provided exactly 21 days' notice of the hearing date. 319 S.W.3d at 946. The hearing was never rescheduled, but, on the day before the hearing date, the movant notified the court that the Long had failed to respond to the no-evidence motion, and that the court was therefore required by Rule 166a(i) to grant the motion. *Id.*

The trial court granted the motion on that day. *Id*. at 947. On appeal, the Austin Court of Appeals concluded that Long was not deprived of notice and an opportunity to respond, and that any injury to Long resulted not from the lack of an opportunity to respond but from a calculated decision not to respond in view of the fact that he deemed a response unnecessary because the trial was set to begin on the same day as the summary judgment hearing, but at an earlier hour. *Id*. at 948. By contrast, the record in this case demonstrates that Glover intended to file a response but was deprived of a reasonable opportunity to do so because of the week-long postponement of the hearing, which led him to believe he had until June 12 to file a response, followed by Berleth's decision to move the hearing date to a date *earlier* than the date on which the hearing initially was set. The record demonstrates Glover had less than three days' notice of the June 11 hearing date and that he was unable, under those circumstances, to lodge an objection or seek a continuance before the hearing. We therefore conclude that Glover did not waive the late-notice issue by raising it for the first time in his motion for new trial.

We sustain Glover's first issue. Because we sustain this issue, we need not address Glover's remaining issues in which he asserts alternative grounds to reverse and remand this cause.

Conclusion

We reverse the judgment of the trial court and remand this cause.

Rebeca Huddle
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.