Dismissed and Opinion filed August 24, 2000.

In The

Fourteenth Court of Appeals

———————————

NO. 14-00-00142-CV

———————————

MAURICE MITCHELL, Appellant

V.

HOUSTON HOUSING & URBAN DEVELOPMENT and GARDEN CITY APARTMENT COMPLEX LTD., Appellees

---

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 94-20782

O P I N I O N

After appellant had been stabbed by a gang of youths at appellees' apartment complex in 1992, he filed this suit against appellees for negligence in failing to provide security guards. Appellant is presently an inmate incarcerated in the Texas Department of Criminal Justice–Institutional Division. This is an appeal from an order of dismissal for want of prosecution signed September 23, 1999. Appellant filed a motion to reinstate on October 15, 1999. The trial court did not hear appellant's motion to reinstate because it did not contain a proper certificate of conference, as required by the local rules. Appellant filed his notice of

appeal and an affidavit of indigence on November 22, 1999. On December 1 and 2, 1999, the Harris County District Clerk and Garden City Apartments, respectively, filed contests to appellant's affidavit of inability to pay costs, demanding strict proof of indigency as required by Rule 20(1)(g), citing procedural defects in appellant's affidavit and alleging that an appeal would be frivolous. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 13.002; TEX. R. APP. P. 20.1(g). The trial court held a hearing on the contests on December 6, 1999, and on the same day, the court signed an order sustaining the contests, finding an appeal would be frivolous..

On April 27, 2000, appellant filed a motion with this court requesting that we review the trial court's order sustaining the contest to his affidavit of indigence. Appellant's request was styled as a petition for writ of mandamus. The Texas Supreme Court has held that mandamus is no longer appropriate because there is an adequate remedy on appeal under the new Texas Rules of Appellate Procedure. *See In re Arroyo*, 988 S.W.2d 737, 738-39 (Tex. 1998). To the extent that appellant filed a petition for writ of mandamus to obtain the relief he requests, we denied the petition. An indigent party may obtain the record pertaining to the trial court's ruling sustaining the contest to his affidavit of indigence and challenge that ruling as part of his appeal, instead of by mandamus review as was done previously. *See id.* Therefore, in the interest of judicial economy, we treated appellant's petition for writ of mandamus a motion to review the denial of his indigent status in this appeal.

Accordingly, we granted appellant's motion to review the trial court's order sustaining the contests to his affidavit of indigency. On May 25, 2000, we ordered the clerk and court reporter of the trial court, under Texas Rules of Appellate Procedure 34.5(c)(1) and 34.6(d), respectively, to prepare and file the portions of the record necessary to review the order sustaining the contests to appellant's affidavit of indigence. The partial clerk's record was filed with the clerk of this court on or before June 1, 2000. On June 15, 2000, the official court reporter for the 113th District Court notified this court that there were no proceedings reported in this case. Upon review, the Court determined the clerk's record was incomplete and ordered a supplemental record, which was filed on July 25, 2000.

The Court has now reviewed the record of concerning the order sustaining the contests to appellant's affidavit of indigence, and makes the following findings.

Appellant argues that the trial court abused its discretion when it sustained the contests to his affidavit of indigence, finding his suit was frivolous. A trial judge's ruling under section 13.003 will only be disturbed on appeal if the trial court abuses its discretion. *See De La Vega v. Taco Cabana, Inc.*, 974 S.W.2d 152, 153 (Tex. App.–San Antonio 1998, no pet.). Appellee, Garden City Apartment Complex, filed a response to appellant's motion, in which it asserted appellant did not establish the trial court abused its discretion. To determine whether a pro se suit is frivolous, we are to consider whether the claim has an arguable basis in law or fact. *See Johnson v. Lynaugh*, 796 S.W.2d 705, 706 (Tex. 1990).

Texas Rule of Civil Procedure 165a controls the reinstatement procedure for cases dismissed for want of prosecution. *See Price v. Firestone Tire & Rubber Co.*, 700 S.W.2d 730 (Tex. App.–Dallas 1985, no writ). Rule 165a states:

> A motion to reinstate shall set forth the grounds therefore and be verified by the movant or his attorney. It shall be filed with the clerk within thirty (30) days after the order of dismissal is signed or within the period provided by Rule 306a. A copy of the motion to reinstate shall be served upon each attorney of record and each party not represented by an attorney whose address is shown on the docket or in the papers on file. The clerk shall deliver a copy of the motion to the judge, who shall set a hearing on the motion as soon as practicable. . . .

TEX. R. CIV. P. 165a.

Here, appellant's motion to reinstate was timely filed on October 18, 1999. It contained an unsworn declaration in lieu of verification. In the case of inmates incarcerated in prison or in a county jail, the affidavit requirements may be met by substantial compliance with TEX. CIV. PRAC. & REM. CODE ANN. §§ 132.001- 132.003; *Smith v. McCorkle*, 895 S.W.2d 692, 692 (Tex. 1995). Section 132.001 allows for unsworn declarations by inmates when "a written sworn declaration, verification, certification, oath, or affidavit is required by statute or required by a rule, order, or requirement adopted as provided by law." TEX. CIV. PRAC. & REM. CODE ANN.§ 132.001(a). The unsworn declaration must: (1) be in writing; and

(2) be subscribed by the person making the declaration as true under penalty of perjury. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 132.002. Appellant failed to substantially comply with the requirements for an unsworn declaration by failing to state the declarations were made "under penalty of perjury." It is an abuse of discretion to grant an unverified motion to reinstate. *See McConnell v. May*, 800 S.W.2d 194, 1914(Tex. 1990). Therefore, the trial court did not abuse its discretion in refusing to grant appellant a hearing.

Because appellant's motion to reinstate was not properly verified and did not contain a proper unsworn declaration, it did not extend the time to perfect the appeal. *See Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986). Appellant's notice of appeal was filed more than thirty days after the court's order dismissing the case for want of prosecution was signed. *See* TEX. R. APP. P. 26.1. This court does not have jurisdiction to hear this appeal.

On August 4, 2000, notification was transmitted to all parties of the Court's intent to dismiss the appeal for want of jurisdiction. *See* TEX. R. APP. P. 42.3(a). Appellant's response fails to demonstrate grounds for this court's jurisdiction..

Accordingly, we dismiss the appeal for want of jurisdiction.

PER CURIAM

Opinion and judgment filed August, 2000.
Panel consists of Chief Justice Murphy, Justices Hudson and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).