Affirmed and Majority and Concurring Opinions filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00578-CV

LOU GILPIN, Appellant

V.

JOHN GILPIN, Appellee

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Cause No. 99-45665

M A J O R I T Y O P I N I O N

Lou Gilpin appeals from a summary judgment granted to her ex-husband, John Gilpin, dismissing her fourth petition for a bill of review. In one issue, appellant contends that the trial court erred in granting the summary judgment because appellee did not prove his affirmative defenses of res judicata and statute of limitations, and his motion for summary judgment failed to address appellant's claim of fraud. We affirm.

Background

In 1989, appellant filed her second suit against her ex-husband for failing to pay her

part of his contingency fees as provided in their agreed divorce in 1985. Appellant's first suit had been dismissed for want of prosecution under rule 165a, Texas Rules of Civil Procedure. Her 1989 suit was eventually dismissed for want of prosecution on August 1, 1993. Thereafter, appellant filed four petitions for bills of review claiming that her 1989 suit was improperly dismissed because she was never notified of the trial court's intent to dismiss or of the actual dismissal as required by rules 165a and 306a of the Texas Rules of Civil Procedure.

Appellant's second bill of review was dismissed without prejudice for want of prosecution on March 11, 1998. On April 3, 1998, a hearing was held on appellant's appeal of the associate judge's recommendation to dismiss her second bill of review. At that hearing, appellant contended that she was not at fault and alleged numerous "official mistakes" by the clerk and the trial court in failing to notify her of the trial court's dismissal of her case. After reviewing the extensive record and hearing counsels' arguments, the trial court denied appellant's appeal for reinstatement of her 1989 lawsuit, and affirmed the dismissal for want of prosecution (DWOP) of her second bill of review.

Appellant filed an untimely motion for new trial on May 4, 1998, which the trial court denied by written order dated June 2, 1998. The motion for new trial is not in this appellate record. Appellant appealed the dismissal of her bill of review to this court, and this court dismissed the appeal for want of jurisdiction. *See Gilpin v. Gilpin*, No. 14-98-00778-CV (Tex. App.—Houston [14th Dist.] October 8, 1998, no pet.)(not designated for publication). This court held that appellant's motion for new trial was untimely, her notice of appeal was due on or before April 13, 1998, but was not filed until June 26, 1998. Appellant did not file a petition for review with the supreme court.

Thereafter, appellant filed her third petition for bill of review complaining of the dismissals. That case was also dismissed for want of prosecution. Finally, appellant filed this fourth bill of review again alleging that her previous cases were improperly dismissed because she never received any of the required notices. Appellee filed a motion for

summary judgment alleging that appellant's fourth petition for a bill of review is barred by res judicata, limitations, and laches. The trial court granted the summary judgment without specifying the grounds upon which the ruling was made.

Standard of Review

The standard we follow when reviewing a summary judgment is well-rehearsed. Summary judgment is proper only when the movant establishes there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). To be entitled to summary judgment, a defendant must either (1) conclusively negate at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establish each element of an affirmative defense to each claim. *See American Tobacco Co., Inc. v. Grinnell,* 951 S.W.2d 420, 425 (Tex.1997). In deciding whether there exists a disputed fact issue precluding summary judgment, we treat evidence favorable to the nonmovant as true and indulge all reasonable inferences in the nonmovant's favor. *Id.*

A summary judgment may be affirmed on any of the movant's theories which has merit. *See Cincinnati Life Ins. Co. v. Cates,* 927 S.W.2d 623, 627 (Tex.1996). Appellate courts should consider all grounds for summary judgment the movant presented to the trial court when properly preserved for appeal and necessary to final disposition of the case. *Id.* When a summary judgment order does not specify the grounds upon which the ruling was made, the reviewing court will affirm the judgment if any one of the theories advanced in the motion are meritorious. *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993); *Hall v. Tomball Nursing Ctr., Inc.*, 926 S.W.2d 617, 619 (Tex.App.--Houston [14th Dist.] 1996, no writ).

Bill of Review

In her sole issue, appellant contends the trial court erred in granting the summary judgment because appellee failed to establish his affirmative defenses of res judicata and statute of limitations. She further contends that appellee never addressed her claim of fraud

in his motion for summary judgment.

A bill of review is an independent equitable action brought by a party to a former action seeking to set aside a judgment that is no longer appealable or subject to a motion for new trial. *Transworld Fin. Serv. Corp. v. Briscoe*, 722 S.W.2d 407 (Tex.1987); *Baker v. Goldsmith*, 582 S.W.2d 404, 407 (Tex.1979). Upon the expiration of the trial court's plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law. TEX. R. CIV. P. 329b(f). Although a bill of review is designed to prevent manifest injustice, *French v. Brown*, 424 S.W.2d 893, 895 (Tex.1967), the fact that an injustice occurred is not sufficient cause to justify relief by bill of review. *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (Tex.1950).

To invoke the equitable powers of the court, the traditional bill of review complainant must allege and present prima facie proof that (1) the prior judgment was rendered as the result of fraud, accident, or wrongful act of the opposite party or official mistake, (2) without any fault or negligence of her own, and (3) the existence of a meritorious defense to the cause of action alleged to support the judgment. *Baker*, 582 S.W.2d at 408. Generally, a complainant has the burden to prove these same elements at trial. *Id*. at 407 (stating that the bill of review plaintiff will, on occasion, be excused from showing wrongful conduct, fraud or accident of the opposite party).

With respect to the fraud requirement, only extrinsic fraud will support a bill of review. *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex.1989). In *Tice*, the Texas Supreme Court defined "extrinsic fraud" as "fraud which denied a party the opportunity to fully litigate upon the trial all the rights or defenses he was entitled to assert." *Id*. By contrast, the court defined as "intrinsic fraud" those issues which were presented and either were or should have been settled in the former action. *Id.*

Appellant alleges that "official mistake" of the clerk and the trial court in failing to notify her of the dismissal of her second bill of review, by order dated March 11, 1998,

"deprived her of an opportunity to appeal" her case. The Texas Supreme Court has held that "official mistake" is the type of mistake, made by an officer of the court, which, due to the defendant's reliance thereon, results in defendant's failure to answer or appear for trial. *Transworld,* 722 S.W.2d at 408.

Res Judicata

Appellee asserted that the trial court's ruling affirming the dismissal order of March 11, 1998, and refusing to grant appellant's petition for her second bill of review is res judicata. Except for minor changes in the wording, appellant's second petition for bill of review filed under cause number 97-35684 is identical to the petition for bill of review in this case.

Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. *Amstadt v. United States Brass Corp*., 919 S.W.2d 644, 652 (Tex.1996). To establish the application of res judicata, a party must show the following elements:

> (1) a prior final judgment on the merits by a court of competent jurisdiction;
>
> (2) identity of parties or those in privity with them; and
>
> (3) a second action based on the same claims as were raised or could have been raised in the first action.

Id.

There is no dispute that the second element (identity of parties) is met in this case. There is no dispute that the third element (same claims as were raised or could have been raised in the first action). The first element, final judgment on the merits, is disputed. Appellant asserts that res judicata does not apply as no court has heard the merits of appellant's case.

The dismissal order dated March 11, 1998, was "without prejudice," and was signed by the judge of the referring court, the Honorable Georgia Dempster. Generally, dismissals without prejudice are not an adjudication on the merits. *America's Favorite Chicken Co.*

v. Galvan, 897 S.W.2d 874, 877-879 (Tex. App.—San Antonio 1995, pet. denied). Dismissals with prejudice do constitute an adjudication on the merits. *Id.* Appellant appealed the associate judge's DWOP recommendation to the referring court, and a hearing on the merits was held on April 3, 1998. Appellant had the opportunity to present evidence in support of her case, and the trial court heard argument on the case. The trial court affirmed the recommendation of the associate judge, again denied appellant's request for reinstatement, and dismissed her second petition for bill of review.

Thereafter, appellant made an unsuccessful attempt to appeal, but this court dismissed the appeal for lack of jurisdiction. No petition for review was filed in the Texas Supreme Court. Therefore, the order of the trial court became a final adjudication for purposes of the application of res judicata. *See Ayre v. J.D. Bucky Allshouse, P.C.*, 942 S.W.2d 24, 28 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (except for purposes of determining appealability, a final adjudication generally occurs after the last appeal or when the appellate process terminates).

In a factually similar case, the supreme court held that a "judgment of dismissal which included the post-judgment attack upon its validity is res judicata." *See Rizk v. Mayad*, 603 S.W.2d 773, 775 (Tex. 1980). In *Rizk*, the trial court dismissed Mayad's conspiracy suit for want of prosecution under rule 165a, Texas Rules of Civil Procedure. *Id.* Mayad filed a motion to reinstate which was overruled. *Id.* Mayad then filed a motion for a new trial on the grounds that the district clerk had failed to send him a notice of either the trial court's intent to dismiss the suit or of the actual dismissal. *Id.* The trial court conducted an evidentiary hearing to determine the merits of Mayad's motion for new trial. *Id.* The trial court overruled Mayad's motion for new trial. Mayad appealed to the court of appeals, which affirmed the judgment of dismissal. *Id.* Thereafter, Mayad filed a bill of review seeking again to set aside the order of dismissal for the same reasons he asserted in his previous motion for new trial and appeal. *Id.* The trial court granted a summary judgment against Mayad because the validity of the dismissal order had already been finally litigated.

The supreme court held that the judgment of dismissal finally determined all of the issues concerning the district clerk's compliance with rules 165a and 306d (now, 306a). *Id.*

In this case, appellant had a hearing on the merits by the trial court on her defense of "official mistake." *See* TEX. FAM. CODE ANN. § 201.011-.015 (Vernon 1996). Whether appellant received proper notice of the court's intent to dismiss and actual dismissal was a matter that either was or should have been litigated at the hearing on her appeal from the associate judge's recommendations. In *Rizk*, the trial court conducted an evidentiary hearing on Mayad's motion for new trial contending he had not received the notices. *Rizk*, 603 S.W.2d at 775. In this case, the trial court conducted an evidentiary hearing on appellant's appeal from the associate judge's recommendations. Therefore, appellant had a hearing on the merits of her post-judgment attack on the dismissal of her second bill of review. That judgment of dismissal "finally determined all of the issues concerning the district clerk's compliance with rules 165a" and 306b. *Id.* Accordingly, we hold that the order dated March 11, 1998, dismissing appellant's second bill is res judicata.

Appellant further asserts that appellee's motion for summary judgment did not address her fraud claim. The only reference we find to any claim of fraud in these bills of review was in connection with appellant's plea of a meritorious defense. The only assertion in the bills of review was: "John Gilpin has perpetrated a great fraud" on Ms. Gilpin and the court. The pleadings then allege Mr. Gilpin withheld information on numerous contingency fee cases, which deprived her of her share of the marital estate. Whether appellant had somehow been defrauded was a matter that should have been litigated at the hearing on her appeal from the associate judge's recommendation of dismissal of the second bill of review. *Rizk*, 603 S.W.2d at 776. The judgment of dismissal of appellant's second bill of review claiming fraud was finally adjudicated and is res judicata. *Rizk*, 603 S.W.2d at 775. We hold that the trial court did not err in granting appellee's summary judgment on the grounds of res judicata.

Having found that appellee's motion for summary judgment has merit on his res

judicata defense, we find it unnecessary to address appellant's other complaints. Our holding that res judicata bars this action is dispositive. TEX. R. APP. P.47.1; *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d at 627. We overrule appellant's contentions in issue one that the trial court erred in granting summary judgment.

We affirm the judgment of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).

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C O N C U R R I N G O P I N I O N

I agree that the summary judgment should be affirmed. I write separately to note that appellee raised the affirmative defense of laches in his amended motion for summary judgment. Appellant failed to attack that basis for the summary judgment. *See State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 381 (Tex. 1993) (stating that when there are

multiple grounds for summary judgment and the order does not specify the ground on which the summary judgment was granted, the appealing party must negate all grounds on appeal).

Therefore, I would hold that the summary judgment should be affirmed on the affirmative defense of laches.

/s/ Wanda McKee Fowler
Justice

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