Affirmed and Opinion filed October 12, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-01042-CV

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DAN THOMAS, Appellant

V.

LINDA PATTESON AND NANCY JOWERS, Appellees

On Appeal from the 12th District Court
Walker County, Texas
Trial Court Cause No. 19,564

O P I N I O N

Appellant, Dan Thomas, an inmate of the Texas Department of Criminal Justice-Institutional Division, appeals from a no-evidence summary judgment granted in favor of appellees, Linda Patteson[1] and Nancy Jowers. Because appellant has presented no evidence of actual injury, we affirm.

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[1] In both trial and appellate court records, appellee's name often is spelled "Patterson." *See, e.g.*, *Thomas v. Patterson*, [sic] No. 14-96-01515-CV, 1997 WL 703103 (Tex. App.—Houston [14th Dist.] Nov. 13, 1997, no pet.) (not designated for publication). We use "Patteson" because that spelling is used most often in typed or printed affidavits signed by appellee in the appellate record.

I. Background

This lawsuit arose out of actions taken, or not taken, in connection with a previous lawsuit. Originally, appellant sued the Texas Department of Criminal Justice-Institutional Division and others, including Patteson, in Harris County, alleging certain violations of 42 U.S.C. §1983. This Harris County suit, *Thomas v. Texas Department of Criminal Justice-Institutional Division, et al.*, No 9209431, in the 80th District Court, alleged that the defendants intentionally denied him mail delivery. He alleges that this failure led to the dismissal for want of prosecution of yet another lawsuit, a malpractice suit appellant brought against his attorney.[2] In the Harris County suit, No. 9209431, the defendants filed a motion for summary judgment, or alternatively a motion for dismissal. Appellant alleges, in the instant suit, that Patteson and Jowers, two department employees, conspired to prevent him from receiving the summary judgment/dismissal motion filed in the Harris County suit. He alleges that when the defendants in the Harris County suit moved for judgment or dismissal, the motion was mailed to his address at the Clements Unit in Amarillo. At the time, however, he was in Austin on a bench warrant. Appellant alleges in the instant suit that defendants Jowers and Patteson failed to forward his mail to him. He argues that because he did not receive the summary-judgment/dismissal motion, he was not able to respond. Because he did not respond, he argues, the Harris County trial court dismissed the suit. Although the appellate record before this court in the instant case does not demonstrate what happened to the Harris County suit, the parties here seem to agree that the suit was dismissed as frivolous. *See* TEX. R. APP. P. 38.1(f) (stating that court will accept as true facts stated in briefs unless another party contradicts them).

In the instant lawsuit, Patteson and Jowers originally filed special exceptions, asserting, among other things, that appellant failed to comply with section 14.004 of the Civil Practices and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 14.004 (Vernon Supp. 2000). Upon appellant's appeal, a panel of this court determined that because appellant complained of action occurring between July and October 1994 and because section 14.004 became effective June 8, 1995, the section did not apply. This court

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[2] *Thomas v. Mann*, No. 8125969, in the 234th District Court of Harris County.

reversed the judgment of the Walker County District Court and remanded the cause for further proceedings.

Upon remand to the trial court, Patteson and Jowers moved for summary judgment on grounds that appellant has shown no evidence (1) that he was actually harmed or prejudiced by a denial of access to court; (2) to overcome appellees' entitlement to official immunity; and (3) of a constitutional violation under 42 U.S.C. § 1983. The trial court having granted summary judgment, the cause is again before this court, this time on appeal of the summary judgment.

II. Discussion

Upon appeal, appellant raises two issues: (1) Whether the trial court erred in granting the no-evidence summary judgment and (2) whether application of the no-evidence summary judgment rule violates appellant's constitutional rights because the actions complained of occurred prior to the effective date of the rule.

After adequate time for discovery, a party without presenting summary judgment proof may move for summary judgment on the ground that there is no proof of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). The motion must state the elements as to which there is no proof. *See id.* The court must grant the motion unless the respondent produces summary judgment proof raising a genuine issue of material fact. *See id.* A defendant's no-evidence summary judgment motion shifts the burden to the plaintiff to raise a triable issue on each challenged element essential to the plaintiff's case. *See Esco Oil & Gas, Inc. v. Sooner Pipe & Supply Co.*, 962 S.W.2d 193, 197 n.3 (Tex. App.—Houston [1st Dist.] 1998, no pet.). We apply the same standard when we review a no-evidence summary judgment as we apply when reviewing a directed verdict. *See Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 432-33 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We review the proof in the light most favorable to the nonmovant, disregarding all contrary proof and inferences. *See id.*

If any of the theories advanced in the motion for summary judgment is meritorious, we will affirm the judgment. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996).

Prisoners have a constitutional right of access to courts. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977). For an inmate to mount a constitutional attack based on lack of access to courts, the inmate must demonstrate an actual injury arising from the alleged lack of access. *See Lewis v. Casey*, 518 U.S. 343, 352 (1995). The access-to-courts requirements envisioned by *Bounds* do not guarantee inmates the wherewithal to "transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Id.* at 355. The litigating tools required by *Bounds* are those that inmates need to attack their sentences, directly or collaterally, and to challenge conditions of confinement. *See id.*

Here, defendants moved for summary judgment on grounds that appellant had no proof of actual injury arising from this failure to receive the dismissal motion in the Harris County lawsuit. In his response below in the instant case, appellant complained merely of the lack of opportunity to respond to the dismissal motion in the Harris County suit. He does not demonstrate what actions, if any, he would have taken in response to the motion in the Harris County suit. Appellant's right of access to courts does not translate into a mere right to respond. He must in some way demonstrate what actual injury resulted from his failure to respond. He does not demonstrate how he would have defeated the dismissal motion. Without such a demonstration, we cannot determine whether appellant was harmed by the lack of opportunity to respond..

In fact, a party generally has thirty days from the date that it allegedly learned of the dismissal to seek a new trial. *See* TEX. R. CIV. P. 306a.4. Appellant failed to do so in the Harris County suit. We consider this failure to seek a new trial not as a failure to preserve a matter for appeal, but as part of appellant's general failure to demonstrate actual harm. Moreover, an inmate cannot prevail on a loss-of-access-to-courts claim, based on the failure to timely deliver court-related mail, where an inmate's underlying claim is frivolous. *See Ruiz v. U.S.*, 160 F.3d 273, 275 (5th Cir. 1998). Even if appellant were to have demonstrated that the Harris County suit should not have been dismissed as frivolous, the trial court still could have granted the defendants' summary judgment motion. Appellant fails to demonstrate how he would have effectively responded to the summary judgment motion. Furthermore, we note that the underlying lawsuit that prompted the Harris County suit was a malpractice suit against appellant's

attorney, not a suit challenging his conviction or the conditions of his confinement. *See Lewis*, 518 U.S. at 355.

We agree that appellant has presented no proof demonstrating actual injury and that the court below did not err in granting the no-evidence summary judgment in favor of defendants on this ground. This ground being sufficient to support the judgment, we need not consider the other grounds advanced below.

Appellant also complains that it is a violation of due-process rights to apply paragraph (i) of Rule 166a to the case where the suit was filed in August 1996 and paragraph (i) became effective September 1, 1997.

The general rule is that in the absence of an expressed intention to the contrary, *see National Sur. Corp. v. Anderson*, 809 S.W.2d 313, 316 (Tex. App.—Houston [1st Dist.] 1991, no writ), and where no vested right is impaired, *see Carney's Lumber Co. v. Lincoln Mortgage Investors*, 610 S.W.2d 838, 840 (Tex. Civ. App.—Tyler 1980, no writ), procedural rules are applied to pending litigation, and subsequent steps in the case are controlled by the new rule, *see Anderson*, 809 S.W.2d at 316.

Here, the state Supreme Court expressed no intention that paragraph (i) should not apply to pending litigation. Appellant neither cites nor do we find a vested right impaired by application of paragraph (i). Furthermore, appellant does not demonstrate how the application of paragraph (i) deprives him of any due process rights. Therefore, we determine that the application of paragraph (i) to pending litigation does not deprive appellant of any due process.

III. Conclusion

The court below having committed no error in granting summary judgment to appellees, we affirm the judgment.

PER CURIAM

Judgment rendered and Opinion filed October 12, 2000.

Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.

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