

Affirmed and Opinion filed September 20, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00184-CV

SHEIKH M. RAFIQ, Appellant

V.

CONAM MANAGEMENT CORPORATION, Appellee

**On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 99-10677**

OPINION

The appellant, Sheikh M. Rafiq, appeals from the granting of summary judgment in favor of the appellee, ConAm Management Corporation. We affirm.

From 1992 to 1997, Sheikh M. Rafiq was a tenant at The Columns Apartments in Harris County, Texas, an apartment complex managed by ConAm Management Corporation. During this tenancy, disputes arose between Rafiq and The Columns Apartments which ultimately resulted in a forcible detainer and eviction judgment against Rafiq.

In February of 1999, Rafiq filed suit *pro se* against ConAm, alleging that in January

of 1999 he received a copy of his credit report reflecting an unpaid indebtedness owed to ConAm of \$2542.00. He contended that this was defamatory, as the county court at law had ordered him to vacate the apartment but had not ordered him to pay \$2542.00. According to Rafiq, this incorrect credit report information caused him substantial damages. His original petition also complained of negligence and gross negligence, and of maintenance and security problems such as auto vandalism, interruption of utilities, inadequate heating, carpet and paint problems, and water leakage during his tenancy at the complex. His petition, however, also alleged that in June of 1997, third parties had informed him that his lease application at another apartment complex was denied because “ConAm and owners of The Columns Apartments have damaged your credit rating.”

Rafiq later amended his petition in response to ConAm’s special exceptions as granted by the trial court. His first amended petition restated the prior maintenance and security problems and reaffirmed the 1997 credit damage allegations, but omitted negligence, fraud or breach of trust claims and any references to the 1999 credit report.

ConAm moved for summary judgment against Rafiq on the basis of expiration of the one-year statute of limitations on his credit defamation claim and of no evidence to support the maintenance claims. ConAm further alleged that all other causes of action raised in the appellant’s original petition but not repleaded in the amended petition had been waived by failure to replead. In response, Rafiq argued that he had never heard of a one-year statute of limitations, that he did not officially discover the credit defamation *in writing* until 1999, and that summary judgment was improper as the trial court had already set the case for a jury trial. The trial court granted summary judgment.

Special Exceptions and Extensions of Time

In his first point of error, appellant complains that the district court abused its discretion in granting ConAm’s special exceptions and in not allowing him additional time to find an attorney. Rafiq fails to cite any authority establishing this as an abuse of

discretion or as reversible error. TEX. R. APP. P. 38.1. We note that TEX. R. CIV. P. 251 requires that a motion for continuance be supported by affidavit. Rafiq's motion did not comply with this requirement. When a movant fails to comply with the affidavit requirement, we presume on appeal that the trial court did not abuse its discretion in denying the motion. *Southwest Country Enterprises, Inc. v Lucky Lady Oil Company*, 991 S.W.2d 490, 493 (Tex. App. – Fort Worth 1999, pet. denied). It is also well settled that if the trial court sustains special exceptions to a petition, the pleader has the option of amending to meet the exceptions or of refusing to amend and testing the validity of the ruling on appeal following dismissal of the petition. *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 272 (Tex.App – Houston [14th Dist.] 1999, no pet.). As appellant elected to amend his petition, nothing is presented for our review, and the first point of error is overruled.

By his second point of error, Rafiq argues that the trial court abused its discretion in denying him an extension of time to file his amended petition in compliance with the special exceptions. As with his first point of error, the appellant fails to present argument or authorities as required under TEX. R. APP. P. 38.1. Rafiq has not demonstrated any abuse of discretion or reversible error by the trial court, particularly in light of the fact that he did file an amended petition. The second point of error is overruled.

Request for Disclosure

Under the third point of error, Rafiq complains that the trial court abused its discretion in granting ConAm's objection to his request for disclosure. With the exception of a general reference to TEX. R. CIV. P. 194.2, the appellant again fails to present any authority in support of his argument. We note that Rafiq's request for disclosure sought specific information regarding The Columns Apartments, which information was provided to the appellant by the appellee through other discovery responses. No error is shown, and the third point of error is overruled.

Motion to Recuse

In his fourth point of error, Rafiq complains that the trial judge abused his discretion in refusing to recuse himself pursuant to Rafiq's motion for recusal. Under TEX. R. CIV. P. Rule 18a, a motion seeking recusal is to be filed directly with the district judge whose recusal is being sought. The district judge must then either recuse himself, or decline to recuse himself and forward the motion to the presiding judge of the administrative judicial district for further action. Here, the appellant filed the motion directly with the administrative judge, who denied the motion due to the appellant's failure to first present the motion for ruling by the district judge. The procedural requirements set out under Rule 18a are mandatory, and a party who fails to comply with the rule waives his right to complain of a judge's failure to recuse himself. *Vickery v. Texas Carpet Co., Inc.*, 792 S.W.2d 759, 763 (Tex. App.—Houston [14th Dist.] 1990, writ denied). As the appellant failed to follow Rule 18a, no error is shown and his fourth point of error is overruled.

Summary Judgment

Under his fifth point of error, Rafiq multifariously complains that the trial court abused its discretion (i) in denying the appellant his right to trial by jury, (ii) in overruling the appellant's hearsay objections to his own pleadings, and (iii) in granting summary judgment. As to the last two of these arguments, we note that ConAm's motion for summary judgment raised the affirmative defense of limitations based on the allegation in Rafiq's petition that he was informed by third parties in 1997 that ConAm had damaged his credit rating. Rafiq argues that limitations did not commence on his credit defamation action until he received the written credit report in 1999, and that the 1997 oral statements by third parties constituted inadmissible "hearsay."

The appellant does not cite any authority in support of his first argument that summary judgment is improper if a jury trial has been requested and set on a scheduling order. Indeed, it is the purpose of a summary judgment to avoid just such a trial. Secondly,

Rafiq's admission in his pleadings of when he learned of the alleged defamation is not hearsay, as it is admissible on the issue of notice rather than for the truth of the matter asserted. *See City of Austin v. Houston Lighting & Power Company*, 844 S.W.2d 773, 791 (Tex. App.—Dallas 1992, writ denied).

In the third and last portion of his fifth point of error, the appellant alleges error by the trial court in granting summary judgment. Once ConAm pointed out appellant's admission in 1997 of notice of the adverse credit report, the burden shifted to appellant to affirmatively plead and prove the discovery rule. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118 (Tex. 2001). Also, ConAm's no-evidence motion for summary judgment required appellant to produce evidence in support of his claims. TEX. R. CIV. P. 166a(i).

The appellant's response in opposition to ConAm's motion for summary judgment failed to raise the discovery rule as to limitations, failed to negate the expiration of limitations as a matter of law, and failed to raise a genuine issue of material fact as to any other cause of action. The trial court did not err in granting summary judgment. The fifth point of error is overruled.

By his sixth and final point of error, Rafiq alleges that opposing counsel acted in bad faith and applied a "double standard" throughout the case. This complaint does not raise error reviewable by this Court on appeal and is overruled.

The judgment below is affirmed.

/s/ Scott Brister
 Chief Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Chief Justice Brister, and Justices Fowler and Seymore.

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