

Affirmed and Opinion filed December 21, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-01216-CV

GARY B. McALEAVEY, Appellant

V.

ANNA C. McALEAVEY, Appellee

**On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 98-38376**

O P I N I O N

Appellant Gary B. McAleavey appeals from the denial of his bill of review. Because the evidence shows he failed to exercise due diligence in pursuing available legal remedies, we affirm.

Background

On March 2, 1998, a default judgment was entered against appellant in cause No. 97-05667, *Anna C. McAleavey v. Gary B. McAleavey*, a suit to quiet title. On April 1, 1998, Gary McAleavey filed a motion for a new trial, which was heard by the trial court on May 1, 1998. In an affidavit supporting his bill of review, appellant avers that he failed to receive notice of the March 2, 1998, trial setting either

from appellee or from the court clerk and that had appellant known of the trial date, he and his attorney would have been present to defend the case. He also alleges that he has a meritorious defense to the underlying suit. At the hearing on the motion for a new trial, the trial judge apparently expressed his intention to grant the motion. Appellant states that the judge granted the motion orally. The court docket shows the court set the date for the new trial as June 22, 1998. The court apparently directed the parties to submit an order including an agreed amount of attorney's fees to be paid appellee. The parties agree that no written order was signed or filed. The new-trial motion was, therefore, overruled by operation of law on or about May 16. *See* TEX. R. CIV. P. 329b(c). On June 22, when both parties appeared in court, appellee told the court that no order granting a new trial had been signed and that the court no longer had plenary jurisdiction. On August 11, 1998, appellant filed a petition for bill of review. About a year later, on August 12, 1999, the trial court took evidence in connection with the bill and on September 15, 1999, signed findings of fact and conclusions of law and an order denying the bill.

Discussion

Appellant complains that the trial court erred in denying his bill of review on grounds that appellant failed to exercise due diligence by failing to perfect an appeal on or after June 22, 1998, in that the time for perfecting an appeal, even with a request for extension, had expired by that date. Appellant purports to take issue with conclusions of law Nos. 4 and 5. The court in conclusion of law No. 4 stated that appellant failed to exercise due diligence by not filing notice of appeal within forty-five days after his motion for new trial was overruled by operation of law as allowed by appellate rules 10.5(b) and 26.3. The court in conclusion No. 5 stated that on June 22, 1998, the judgment was still subject to appeal by virtue of a notice of appeal and an application of extension of time pursuant to rules 10.5(b) and 26.3.

Conclusions of law are of relatively little importance on appeal. We review conclusions of law de novo to determine whether they are correct. *See Zieben v. Platt*, 786 S.W.2d 797, 801-02 (Tex. App.—Houston [14th Dist.] 1990, no writ). If the controlling findings of fact will support a correct legal theory, we will not reverse a judgment because the trial court may have given the incorrect legal theory. *See Sears, Roebuck and Co v. Nichols*, 819 S.W.2d 900, 903 (Tex. App.—Houston [14th Dist.] 1991, writ denied). We thus construe appellant's point of error as a complaint that the trial court erred

in denying his bill of review and will determine as a matter of law whether the unchallenged findings of fact will support the court's order on any legal theory.

In order to be entitled to a new trial pursuant to bill of review, the bill of review plaintiff must demonstrate (1) a meritorious claim or defense to the underlying judgment, (2) that the bill of review plaintiff was prevented from asserting or making due to fraud, accident, or the wrongful act of the opposite party, or to official mistake, (3) unmixed with any fault or negligence of the plaintiff. *See Cortland v. Line Co., v. Israel*, 874 S.W.2d 178, 183 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The bill of review being an equitable proceeding, the plaintiff must allege and prove due diligence to avail himself of all adequate legal remedies against the former judgment. *See Hesser v. Hesser*, 842 S.W.2d 759, 765 (Tex. App.—Houston [14th Dist.] 1992, writ denied). A party who timely learns of a default judgment and fails to pursue his legal remedies diligently thereby allowing the judgment to become final is not entitled to relief pursuant to a bill of review. *See French v. Brown*, 424 S.W.2d 893 (Tex. 1967). To be entitled to relief pursuant to a bill of review, the party must show a good excuse for failure to exhaust adequate legal remedies. *See Griffith v. Conard*, 536 S.W.2d 658, 661 (Tex. Civ. App.—Corpus Christi 1976, no writ).

When a party seeks a new trial pursuant to bill of review, the party must make a prima facie showing that he has a meritorious defense to the underlying claim. *See Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979). The prima facie proof of the meritorious defense may comprise documents and affidavits on file along with such other evidence that the trial court may receive in its discretion. *See id.* at 409. If the bill of review plaintiff shows his meritorious defense, the trial court then will conduct a trial or hearings on the remaining issues regarding the bill of review. *See id.* The complainant must open and assume the burden of proving by a preponderance of the evidence that the judgment was rendered as the result of fraud, accident, or wrongful act of the opposite party or official mistake unmixed with any negligence on the complainant's part. *See id.*

Here, we do not need to determine whether the appellant proved all necessary elements for his bill of review, that is, that he had a meritorious defense to the underlying suit that he was prevented from making by the fraud, accident, or mistake of the opponent or by official error unmixed with any fault or

negligence of his own. The trial court still did not err in denying his requested relief.

The trial court in its findings of fact, generally unchallenged by appellant and supported by the reporter's record, found that on or about May 1, 1998, the trial court conducted a hearing on the motion for a new trial filed by appellant. At the conclusion of the hearing, the trial court indicated that it was inclined to grant the motion for new trial and directed counsel for both sides to determine a reasonable amount of attorney's fees to be paid by appellant to appellee. No agreement was reached concerning attorney's fees. The court did not sign a written order granting a new trial in cause No. 97-05667. Appellant's attorney at the bill of review hearing told the court he thought the judge had signed an order granting a new trial and that he did not think the judge was holding the order for a fee agreement. The trial court also found that when appellant learned on June 22, 1998, that the trial court no longer had plenary jurisdiction, appellant still was within the fifteen-day period during which he could have filed a motion to extend time to file a notice of appeal permitted by appellate rules 26.3 and 10.5(b). As discussed below, this finding, No. 13, is challenged by appellant and is not supported by the record. Nevertheless, the other unchallenged findings and other uncontroverted evidence in the record will support a conclusion that appellant failed to exercise due diligence in pursuing his legal remedies.

The case is similar to *Brown*, 424 S.W.2d 893. There, the bill of review plaintiff learned that a party had been granted summary judgment in the underlying suit. The bill of review plaintiff, alleging that he failed to respond to the summary judgment because he had not received notice of the motion, timely moved for a new trial. After the motion was overruled by operation of law, the bill of review plaintiff did not perfect an appeal. The Supreme Court held that the bill of review plaintiff was not entitled to relief because after his new-trial motion was overruled by operation of law, he did not seek to perfect an appeal. The court noted that there was no allegation that the bill of review plaintiff had been prevented from perfecting an appeal by the wrongful act of the opposite party or by official error.

Here the record shows that after learning of the default, appellant timely moved for a new trial on *Craddock*¹ grounds. After the trial judge told the parties to agree on attorney's fees, appellant knew that

¹ A party is entitled to a new trial after a default judgment if the party can demonstrate that his failure to answer was neither intentional nor the result of conscious indifference, that he had a meritorious

the parties subsequently failed to reach agreement and that the parties never submitted an agreed order. Appellant never then reurged the court to sign an order absent the attorney's fee agreement. Appellant never checked with the court clerk to determine whether an order had been signed before or after the running of the seventy-five day period. After appellant's motion for new trial was overruled by operation of law, appellant could have sought appellate review of the order's denial. This evidence will support a conclusion that appellant failed to exercise due diligence in pursuing his legal remedies. He was presumed to know of the seventy-five day period, *see Nguyen v. Kim*, 3 S.W.3d 146, 154 (Tex. App.—Houston [14th Dist.] 1999 no pet.) (stating ignorance or unawareness of statutory requirement does not excuse party from missing deadline), and could have taken steps to either get a signed order or appeal the denial of the order. Neither the court clerk nor the appellee was under obligation to remind appellant of the running of the seventy-five day period.

We agree with appellant that the trial court erred when it found that appellant could have filed an extension of time for filing notice of appeal pursuant to appellate rule 26.3. The original default judgment was signed March 2, 1998. Where an appellant files a motion for a new trial, the notice of appeal must be filed within ninety days after the judgment is signed. *See* TEX. R. APP. P. 26.1(a)(1). This period ended May 31, 1998. An appellate court may extend the time to file the notice of appeal if, within fifteen days after the deadline for filing the notice of appeal, the party files the notice of appeal in the trial court and files with us a motion for an extension of time. *See* TEX. R. APP. P. 26.3. Thus, the final day on which appellant could have filed a notice of appeal, even with a request for extension, was June 15, 1998. The court's erroneous finding is not controlling, however. Other uncontested and supported findings and uncontested evidence in the record will support a conclusion that appellant failed to exercise due diligence.

The trial court did not err in denying appellant request for relief pursuant a bill of review.

Conclusion

Having overruled appellant's point of error, we affirm the trial court's order.

defense, and that the granting of the motion would not cause the opponent harm or undue prejudice or cause undue delay. *See Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939).

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 21, 2000.

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

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