

Affirmed and Corrected Opinion filed August 3, 2000.



In The

## Fourteenth Court of Appeals

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NO. 14-98-01055-CV

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**T.W. MONTGOMERY, Appellant**

**V.**

**BETCO SCAFFOLD, Appellee**

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**On Appeal from the County Civil Court at Law No. 4  
Harris County, Texas  
Trial Court Cause No. 698,900**

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### **C O R R E C T E D   O P I N I O N**

The opinion issued in the above-referenced case on July 27, 2000, is withdrawn and this corrected opinion is submitted in its place.

Appellant, T.W. Montgomery, seeks to set aside a default judgment by bill of review. The trial court granted summary judgment in favor of the appellee, Betco Scaffold, and dismissed Montgomery's petition for bill of review. In one point of error, Montgomery complains that the trial court erred in granting Betco's motion for summary judgment and dismissing his petition. We affirm.

## **Background and Procedural History**

In May of 1997, Betco Scaffold, Inc. filed suit against Southwestern Abatement, Inc. and T.W. Montgomery, in Harris County Court of Law No. 4, alleging claims for breach of an equipment lease. On September 24, 1997, the trial court entered a default judgment against the defendants in the principal sum of \$5,572.82, plus attorneys' fees, costs, and interest, noting that, although duly served with citation, no answer had been made. Because neither party filed a motion for new trial, that default judgment became final thirty days from that date. *See* TEX. R. CIV. P. 329b. Following this default, Betco initiated post-judgment discovery proceedings in an effort to satisfy the award. In an order dated January 5, 1998, the trial court ordered Montgomery to appear on February 25, 1998, for a hearing on Betco's motion for a bill of discovery under Rule 621a of the Texas Rules of Civil Procedure, and Montgomery was served with a *subpoena duces tecum* for that proceeding. The post-judgment bill of discovery hearing was ultimately held on March 26, 1998, where Montgomery appeared with counsel.

In an effort to set aside the default judgment against him, Montgomery filed an "Original Petition for a Bill of Review" on April 21, 1998. Montgomery alleged that his failure to assert a meritorious defense to Betco's lawsuit was not his fault and insisted, without elaborating, that he was entitled to an equitable bill of review because neither a motion for new trial nor restricted appeal were available. Betco filed a motion for summary judgment in the bill of review proceeding, arguing that Montgomery was not entitled to equitable relief because he had failed to exhaust all adequate remedies at law. Betco's motion for summary judgment was set for a hearing on June 4, 1998. Montgomery did not appear at the hearing, nor did he file a response to Betco's motion. On June 4, 1998, the trial court granted Betco's motion for summary judgment, and denied Montgomery's request for a bill of review. Montgomery promptly filed a motion for new trial, which was denied on August 18, 1998. This appeal followed.

In his sole point of error, Montgomery asks this court to determine whether he was entitled to seek a bill of review or whether such relief was barred because an adequate remedy at law remained. By way of reply, Betco contends that the trial court properly dismissed Montgomery's petition for a bill of review because other legal remedies were available to him, but were ignored.

## **Bills of Review**

A bill of review is an independent action to set aside a judgment that is no longer appealable or subject to challenge by a motion for new trial. *See Wembley Investment Co. v. Herrera*, 11 S.W.3d 924, 926-27 (Tex. 1999) (citing *Caldwell v. Barnes*, 975 S.W.2d 535, 537 (Tex.1998)). Although it is an equitable proceeding, the fact that an injustice has occurred is not sufficient to justify relief by bill of review. *See id.* at 927 (citing *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996, 998 (1950)). Generally, bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party. *See id.* (citing *Tice v. City of Pasadena*, 767 S.W.2d 700, 702 (Tex.1989); *Petro-Chemical. Transp., Inc. v. Carroll*, 514 S.W.2d 240, 243 (Tex.1974)). If legal remedies were available but ignored, relief by equitable bill of review is unavailable. *See id.* (citing *Caldwell*, 975 S.W.2d at 537).

Betco points out that Montgomery knew a default judgment had been entered against him in February of 1998, when he was ordered to appear in court to answer Betco's post-judgment bill of discovery. Betco maintains that, at this time, Montgomery could have obtained relief by pursuing a restricted appeal. The trial court evidently concluded that this was some evidence that Montgomery did not exercise due diligence in pursuing available legal remedies and, therefore, that Montgomery was not entitled to equitable relief. We agree.

The Texas Supreme Court has held, repeatedly, that a party who fails to timely avail itself of available legal remedies is not entitled to relief by bill of review. *See Wembley*, 11 S.W.3d at 927 (citing *Caldwell*, 975 S.W.2d at 537). Here, Montgomery had six months to pursue a restricted appeal, from the time the default judgment was signed on September 24, 1997, until March 24, 1998. *See* TEX. R. APP. P. 26.1(c) and 30. It is evident from the record that Montgomery was aware of the default by February of 1998, leaving at least a month to file a restricted appeal. Because he failed to pursue a restricted appeal within the time allowed, he is not entitled to an equitable bill of review in this instance. *See Wembley*, 11 S.W.3d at 927. Montgomery's sole point of error is overruled, and Betco's cross-point of error is sustained. The trial court's order granting summary judgment in Betco's favor and dismissing Montgomery's bill of review is affirmed.

/s/ Wanda McKee Fowler  
Justice

Judgment rendered and Corrected Opinion filed August 3, 2000.

Panel consists of Justices Fowler, Edelman and Cannon.<sup>1</sup>

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

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<sup>1</sup> Senior Justice William B. Cannon sitting by assignment.