AFFIMRED and Opinion Filed April 7, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01306-CV

DIANA BOKTOR AND AMIR BOKTOR, Appellants
V.
U.S. BANK TRUST, N.A. AS TRUSTEE FOR THE LSF9 MASTER PARTICIPATION TRUST AND CALIBER HOME LOANS, INC., Appellees

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-15-12174

MEMORANDUM OPINION

Before Justices Schenck, Smith, and Garcia
Opinion by Justice Smith

Diana Boktor and Amir Boktor appeal the trial court's take-nothing judgment in favor of U.S. Bank Trust, N.A., as trustee for the LSF9 Master Participation Trust and Caliber Home Loans, Inc. In their pro se brief, appellants raise five issues dealing with breach of contract, foreclosure, damages, attorney's fees, and sanctions. Having reviewed the limited record that was provided, we affirm the trial court's judgment.

In October 2015, appellants filed their original petition alleging that, in August 2006, they executed a promissory note and deed of trust in favor of Bank of

America in connection with a home equity loan on their residence. Appellants alleged an assignment of the mortgage and deed of trust executed in July 2015 and filed with the Dallas County Clerk purported to assign the mortgage and deed of trust from Bank of America to appellee U.S. Bank as trustee for LSF9 Master Participation Trust. The petition alleged appellee Caliber Home Loans, as servicer of the U.S. Bank loan, sent appellants notice that they were in default on the loan, and all unpaid principal and interest were due immediately.

As stated in their brief, appellants "filed the civil case below to challenge the foreclosure." Appellees filed a counterclaim seeking foreclosure, a declaratory judgment establishing that the limitations period for foreclosure of the underlying property had not expired, and attorney's fees.

In August 2018, appellees filed a notice of settlement stating the parties had settled all claims and counterclaims at issue. Attached to the notice was a Rule 11 agreement "entered between counsel via an email chain." Among other things, the agreement provided appellees would extend a new loan modification agreement to appellants "at a time between 60 and 90 days from the date of [the] Rule 11 agreement." The final email in the chain was sent by counsel for appellants and stated appellants "accept the Rule 11 proposal."

In December 2018, appellees filed an amended counterclaim. The amended counterclaim sought foreclosure, a writ of possession, a declaratory judgment, and

attorney's fees. The amended counterclaim also asserted a breach of contract cause of action based on appellants' alleged breach of the Rule 11 agreement.

Additionally, in December 2018, appellees filed a motion to compel and for sanctions asserting that appellees served their requests for disclosure and production on appellants more than two and a half years before the filing of the motion, but appellants never provided any responses or objections. Appellees argued they did not file a motion to compel prior to December 2018 because appellants repeatedly stated they intended to resolve the case. Appellees asked the trial court to enter an order stating (1) appellants waived any objections to discovery, (2) appellants must respond to discovery within fourteen days, and (3) appellants must pay appellees' attorney's fees incurred in filing and arguing the motion to compel. The parties resolved this first motion to compel by agreement.

In February 2019, appellees filed their second motion to compel and for sanctions alleging that, on January 11, 2019, they served appellants with notices for depositions to take place on February 13 and 14, 2019. Appellant Amir Boktor did not respond to the deposition notice. Amir's counsel appeared at the deposition by telephone and stated he had "communicated to [Amir] that he has a deposition today," but counsel had not heard anything from Amir regarding the deposition and did not know why Amir failed to attend. Appellant Diana Boktor also failed to appear for her deposition. In a cover email serving the depositions, appellees' counsel acknowledged Diana's counsel had stated that Diana was unable to travel to

Texas and invited Diana's counsel to discuss alternatives to an in-person deposition. As a condition of discussing such alternatives, appellees' counsel requested an affidavit or declaration under penalty of perjury signed by Diana stating the specific reasons she could not appear for deposition in Dallas. Diana did not appear at her deposition and did not provide an affidavit or declaration regarding her reasons for failing to appear. The trial court awarded appellees $4163 to partially reimburse them for costs incurred in preparing for depositions.

Appellees subsequently filed a third and a fourth motion to compel. By the time of the fourth motion to compel in July 2019, appellants had failed to appear at any deposition and failed to pay the monetary sanctions imposed by the trial court. As a result, appellees moved to strike appellants' pleadings, dismiss appellants' claims with prejudice, enter default judgment in favor of appellees, and conduct a trial solely to allow appellees to present evidence to establish the amount of their damages.

By order dated July 29, 2019, the trial court granted appellees' motion and ordered appellants' pleading stricken, dismissed appellants' claims with prejudice, and ordered that judgment by default should issue in favor of appellees on their counterclaims with trial to occur only as to the amount of appellees' damages.

That same day, the trial court entered a final judgment that expressly stated the following:

> On July 31, 2018, [appellants], through their attorney and authorized agent entered into a binding, written settlement agreement with [appellees]. That agreement constituted a valid and enforceable written contract. [Appellants] subsequently breached the agreement.

The final judgment further provided appellants take nothing on their claims and awarded appellees (1) declaratory judgment that appellees lien on the underlying property was valid and enforceable and not barred by limitations; (2) $1038.07 in costs and $107,810.50 in attorney's fees pursuant to section 37.009 and 38.001(8) of the civil practice and remedies code *in personam* as a personal judgment against appellants; and (3) $84.07 in costs and $14, 325 in attorney's fees *in rem* to be satisfied by the sale of the underlying property. The final judgment also directed the sheriff to seize and sell the underlying property, provided that the proceeds of the sale would be the property of appellees, and specified that the court's order should have all the force and effect of a writ of possession between appellees and appellants. This appeal followed.

As a preliminary matter, we note an appellate record generally consists of both the clerk's and reporter's records, but only the former was filed here. *See* TEX. R. APP. P. 34.1 (appellate record consists of clerk's record and reporter's record if the latter is necessary to the appeal). The record shows that, on December 5, 2019, the court reporter filed a letter stating she "had received a notice of overdue record in this case," but she had "never been requested to prepare a record from any of the parties in this case."

On December 6, 2019, we sent appellants a letter advising them the reporter's record had not been filed and giving them ten days to provide (1) notice that they requested preparation of the record and (2) written verification that they paid or made arrangements to pay the reporter's fee or written documentation of inability to pay costs. We specifically cautioned appellants that, if we did not receive the requested documentation within the time specified, we "may order the appeal submitted without the reporter's record." *See* TEX. R. APP. P. 37.3(c). On February 12, 2020, we entered an order stating, among other things, that the appeal would be submitted without a reporter's record.

We recognize appellants are pro se; however, pro se litigants are held to the same standards as licensed attorneys and, therefore, must comply with the applicable rules of appellate procedure. *See Wash. v. Bank of N.Y.*, 362 S.W.3d 853, 854 (Tex. App.—Dallas 2012, no pet.). To do otherwise would give pro se litigants an unfair advantage over litigants who are represented by counsel. *Id*.

When, as in this case, there is no reporter's record and findings of fact and conclusions of law are neither requested nor filed, the judgment of the trial court implies all necessary findings of fact to sustain the judgment. *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App.—Dallas 2008, no pet.); *see also Vasquez v. Firebird SFE I, LLC*, No. 05-19-00057-CV, 2020 WL 2059913, at *1 (Tex. App.—Dallas Apr. 29, 2020, no pet.) (mem. op.). In other words, we must presume the missing reporter's record supports the decisions of the trial court. *See*

Bennett v. Cochran, 96 S.W.3d 227, 230 (Tex. 2002). Similarly, statements in a brief that are unsupported by the record cannot be accepted as facts by an appellate court. *In re A.F.S.*, No. 05-16-01123-CV, 2018 WL 3434509, at *2 (Tex. App.—Dallas July 17, 2018, no pet.) (mem. op.) (citing *Bard v. Frank B. Hall & Co.*, 767 S.W.2d 839, 845 (Tex. App.—San Antonio 1989, writ denied)). While we seek to resolve appeals on their merits, litigants who ignore our rules do so at the risk of forfeiting appellate review. With that said, we turn to the issues at hand.

In their first issue, appellants argue appellees cannot be awarded both foreclosure and monetary damages for an alleged breach of a settlement agreement. In making this argument, appellants assert that "a claim for breach of settlement is not a claim for breach of contract," the "breach claim violates one satisfaction rule," appellees' "amended counter-petition does not include a copy of the settlement agreement," the party claiming breach is not identified, the settlement agreement violated Texas law, and this case must be remanded for appellees to make an election of remedies, and "tort attorney's fees could not be awarded."

As appellants argue, the "core argument is that Appellee[s] could not be awarded foreclosure on top of damages on an alleged breach of a settlement agreement." Appellants ignore the existence of the mortgage and deed of trust assigned to U.S. Bank. An analysis of appellants' challenges to the relief awarded appellees is dependent on evidence presented at trial. *See Taylor v. Wells Fargo Bank*, No. 05-16-00115-CV, 2017 WL 1282896, at *2 (Tex. App.—Dallas Apr. 6,

2017, no pet.) (mem. op.). In the absence of a reporter's record, we must presume appellees presented sufficient evidence to overcome appellants' complaints and establish their entitlement to foreclosure in addition to damages arising from appellants' breach of the Rule 11 agreement. We overrule appellants' first issue.

In their second issue, appellants argue they should not be held liable for failing to appear at multiple depositions. Specifically, appellants argue the trial court abused its discretion in awarding sanctions. In their fourth issue, appellants make the related argument that the trial court erred in striking their pleadings.

We review a trial court's imposition of discovery sanctions for an abuse of discretion. *Am. Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006) (per curiam). A trial court abuses its discretion if it acts without reference to any guiding rules and principles such that its ruling was arbitrary or unreasonable. *Id.* In making our review, we consider the entire record, including the evidence, arguments of counsel, written discovery on file, and the circumstances surrounding the party's discovery abuse. *Imagine Auto. Grp. v. Boardwalk Motor Cars, Ltd.*, 430 S.W.3d 620, 633 (Tex. App.—Dallas 2014, pet. denied).

Discovery sanctions serve three purposes: (1) to secure the parties' compliance with the discovery rules; (2) to deter other litigants from violating the discovery rules; and (3) to punish parties who violate the discovery rules. *Id.* When a party abuses the discovery process in resisting discovery, the trial court may impose sanctions to, among other things, prohibit the disobedient party from supporting or

opposing designated claims or defenses or to strike the party's pleadings. *See* TEX. R. CIV. P. 215.3; 215.2(b)(4), (5). Any sanction that adjudicates a claim and precludes the presentation of the merits of the case constitutes a "death penalty" sanction. *Davenport v. Scheble*, 201 S.W.3d 188, 193–94 (Tex. App.—Dallas 2006, pet. denied).

Although the choice of sanctions under civil procedure rule 215 is left to the sound discretion of the trial court, the sanctions imposed must be just. *Imagine Auto. Grp.*, 430 S.W.3d at 633. Whether a sanction is just is measured by two standards. *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig.proceeding). First, the sanction must bear a direct relationship to the offensive conduct. *Id.* A just sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party, and the sanction should be visited upon the offender. *Id.* Second, the sanction must not be excessive. *Id.* When assessing excessiveness, the punishment should "always fit the crime," and the sanction should be no more severe than necessary to further the purposes of sanctions generally. *See Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004).

A court must consider the availability of appropriate lesser sanctions, and, in all but the most egregious and exceptional cases, the court must first assess lesser sanctions before resorting to case-determinative or death penalty sanctions. *Id.* at 842. The imposition of severe sanctions, such as the death penalty sanction involved in this case, is also limited by due process concerns because it adjudicates the merits

of a party's claim or defenses. *TransAmerican*, 811 S.W.2d at 917–18. Therefore, severe sanctions are not appropriate unless the offensive conduct justifies a presumption that the party's claims or defenses lack merit. *Id.* at 918.

Here, appellants initiated the underlying suit and then essentially abandoned the proceedings they had set in motion. Appellants failed to participate in depositions even though the trial court and appellees attempted to make remote participation in the depositions possible. Not until appellees' fourth motion to compel did the trial court impose death penalty sanctions on appellants and strike their pleadings. Under these circumstances, we conclude the trial court did not abuse its discretion in awarding sanctions four times in response to appellants' failure to appear at depositions and ultimately striking appellants' pleadings. *See TransAmerican*, 811 S.W.2d at 913, 917–18. We overrule appellants' second and fourth issues.

In their third issue, appellants argue the trial court erred by ignoring all motions and briefs filed by appellants. Other than stating this argument as an issue, appellants do not further argue this issue. An appellant's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h), (i). Failure to cite applicable authority or provide substantive analysis waives an issue on appeal. *Gator Apple, LLC v. Apple Texas Restaurants, Inc.*, 442 S.W.3d 521, 538 (Tex. App.—Dallas

2014, pet. denied). We conclude nothing is presented for our review on this issue. We overrule appellants' third issue.

In their fifth issue, appellants argue the trial court erred in sua sponte issuing "an order of trial less than thirty days before trial" and holding a trial in absentia. The record contains a notice dated March 15, 2019 setting this case for trial on July 29, 2019, at 8:30 a.m. A second notice was provided on July 2, 2019, setting the matter for trial on the same date, July 29, 2019. Thus, appellants had notice of the trial setting more than four months before the date set for trial. We overrule appellants' fifth issue.

We affirm the trial court's judgment.

/Craig Smith/
CRAIG SMITH
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DIANA BOKTOR AND AMIR BOKTOR, Appellants

No. 05-19-01306-CV V.

U.S. BANK TRUST, N.A. AS TRUSTEE FOR THE LSF9 MASTER PARTICIPATION TRUST AND CALIBER HOMES LOANS, INC., Appellees

On Appeal from the 95th District Court, Dallas County, Texas
Trial Court Cause No. DC-15-12174.
Opinion delivered by Justice Smith.
Justices Schenck and Garcia participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees U.S. BANK TRUST, N.A. AS TRUSTEE FOR THE LSF9 MASTER PARTICIPATION TRUST AND CALIBER HOMES LOANS, INC. recover their costs of this appeal from appellants DIANA BOKTOR AND AMIR BOKTOR.

Judgment entered April 7, 2021.