Affirmed and Opinion filed August 17, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00327-CV

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MARK MANTELL AND PAM MANTELL, IND. A/N/F OF MICHELLE MANTELL, CORY MANTELL AND KELLY MANTELL, Appellants

V.

MICHAEL TESTA, TESTA & TESTA, CHARLES C. ORSBURN AND DAMON R. CAPPS, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 95-54836

O P I N I O N

Mark Mantell and Pam Mantell, individually and as next friends of Michelle Mantell, Cory Mantell and Kelly Mantell, appellants, appeal from a summary judgment granted in favor of their former trial attorneys, Michael Testa, Testa & Testa, Charles C. Orsburn and Damon R. Capps, appellees. After reviewing the record and finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants, as plaintiffs, were represented by appellees in a medical malpractice case, the trial of which culminated in a "take nothing" judgment against appellants. Believing they had lost the case due to negligence on the part of their attorneys, appellants brought a legal malpractice action against appellees in late 1995. In 1996, Capps filed for summary judgment, followed by similar motions in 1997 from Testa, Testa & Testa and Orsburn. Appellants filed responses in opposition on both a *pro se* basis and later through retained counsel. Appellees gave notice that the motions for summary judgment would be heard on January 9, 1998, and appellants' responses were on file by January 2, 1998.

For reasons not clear from the record, the trial court did not hold a hearing on January 9, 1998. On January 14, 1998, and January 19, 1998, appellees notified appellants that the hearing on the merits was being reset to January 30, 1998. The appellants did not file any objections to the resetting or request any continuances or file any additional responses. On January 30, 1998, appellants' counsel failed to appear at the summary judgment hearing, and the trial court granted the motions, dismissing appellants' claims against appellees. Appellants' counsel filed a motion for rehearing alleging the trial court had erred in granting summary judgment without allowing a full twenty-one days' notice of the hearing, but appellants did not attack the summary judgments on their merits. The trial court denied the motion for rehearing.

ISSUES

Appellants raise two points of error on appeal. By their first point, appellants complain the trial court erred in not setting aside the summary judgments for good cause, as their attorney had been unavoidably detained and was not present at the hearing. Under their second point, appellants allege the trial court erred in holding the hearing without the required twenty-one days' notice. Appellants do not attack the merits of the summary judgments on appeal.

Summary Judgment Hearing

Appellants' first point of error is without support in either the law or the facts. There is nothing in the record to substantiate appellants' claim that their attorney was unavoidably detained the morning of the hearing. While appellants have attached affidavits of their attorney and his secretary to their appellate brief, attesting that their efforts to obtain a signed controverting summary judgment affidavit the morning of the hearing made them unavoidably late for the hearing, these affidavits do not appear in the record. Therefore, we may not consider them as evidence on appeal. *See Zodiac Corporation v. General Electric Credit Corp.*, 566 S.W.2d 341 (Tex. Civ. App.—Tyler 1978, no writ).

Moreover, appellants did not raise the argument they now present under the first point of error in their motion for rehearing in the court below. Although appellants allege in their brief that this argument was made orally to the trial court at the hearing on the motion for rehearing, no transcript of the hearing is in the record. Regardless, the trial court did not err by hearing the summary judgment motions in the absence of appellants' counsel. A summary judgment is to be considered on the written motions and responses on file with the court. *See* TEX. R. CIV. P. 166a(c). No oral hearing is required, no oral testimony is allowed, and no controverting evidence may be filed the day of the hearing without leave of court. *See Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357 (Tex. 1998). Appellants have shown no error. Their first point of error is overruled.

Sufficiency of Notice

By their second point of error, appellants complain the trial court erred in hearing the motions without the requisite twenty-one days' notice. Specifically, they argue that fewer than twenty-one days elapsed from the reset notices of January 14, 1998, and January 19, 1998, to the summary judgment hearing date of January 30, 1998. Appellants did not file any objections to the reset date, or request a continuance based on insufficient notice.

Appellants' point of error is without merit. Appellants do not contend they did not receive timely notice under the original setting, but only that notice under the resetting was

deficient. This court has previously held that the twenty-one day notice provision does not apply to resettings of a hearing, provided the non-movant receives twenty-one days' notice prior to the original setting. *See Brown v. Capital Bank, N.A.*, 703 S.W.2d 231, 233 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.). In the event of a resetting, "reasonable notice" is required, which this court has held to be not less than seven days, so that the non-movant may file any necessary responses within seven days of the hearing as required under Texas Rule of Civil Procedure 166a(c). *See LeNotre v. Cohen*, 979 S.W.2d 726 (Tex. App.—Houston [14th Dist.] 1998, review denied). The record shows that appellants received the required notices for both the original and the reset hearing dates. In any event, appellants would be required to allege they were harmed by any insufficient notice, which they have not done. In the absence of such harm, no reversible error is shown. *See Martin*, 989 S.W.2d at 359; *Tivoli Corp. v. Jeweler's Mutual Insurance Co.*, 932 S.W.2d 704, 710 (Tex. App.—San Antonio 1996, writ denied). Appellants' second point of error is overruled.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed August 17, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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