Karen Kristine Silvio v. Jolynn Boggan

2012 | Cited 0 times | Court of Appeals of Texas | February 16, 2012

MEMORANDUM OPINION

This is an appeal from a trial court judgment declaring two real property deeds void. We consider whether (1) the appellant preserved error to complain about the trial court's declaration that a real property deed was void, (2) the trial court erred in declaring a second deed void for lack of consideration absent a finding of fraud, (3) the trial court engaged in prohibited ex parte communication with plaintiffs' counsel, or (4) the trial court erred by refusing to excuse a juror who was unable to speak English. We affirm in part and reverse and render in part.

BACKGROUND

Joseph and Sybil Silvio were married and owned a home at 23102 Naples Drive, Spring, Texas ("the property"). When Joseph died in 1987, he left his portion of the home to his five children, Donna, JoLynn, Gary, Rebecca, and Karen. After Joseph's death, Karen moved in with her mother, Sybil, before eventually purchasing the house next door.

After Sybil died without a will on August 1, 2006, JoLynn was appointed administratrix of her estate. Shortly thereafter, JoLynn discovered that two deeds had been filed in Harris County. The first purported to convey the siblings' interest in the property to Karen ("the Siblings' Deed") and the second purported to convey Sybil's interest in the property to Karen ("the Mother's Deed").

Thereafter, the siblings filed suit against Karen seeking to have the deeds declared void, alleging that they were fraudulently obtained and not supported by consideration. At trial, the following evidence was adduced regarding each deed.

The Siblings' Deed of September 15, 2003

Karen testified at trial that she and her siblings discussed having them transfer their interest in the property so that the house could be sold and Karen and Sybil could move to a better neighborhood. Keven Hyden, Karen's nephew and Donna's son, testified that Karen asked him to take a blank a deed to Donna to sign, however, he never saw anyone sign the deed. JoLynn testified that one Saturday in September 2003, she went to Donna's house, where she and Donna discussed signing over their portion of the property. Donna's husband, Montie, and Sybil were also present. Donna and JoLynn both signed the document, but JoLynn became upset when she realized that the deed was transferring the property to Karen, not to Sybil. When she left, Jolynn instructed them to do nothing

with the deed until she had talked with her other sister, Rebecca. According to JoLynn, no notary was present when either Donna or JoLynn signed the document. JoLynn testified that she never authorized delivery of the deed to Karen. Donna predeceased Sybil, thus she did not testify at trial. Rebecca testified that she neither signed the deed, nor authorized its delivery to Karen. Gary testified that he did not sign the deed or authorize its delivery to Karen, although he did testify that Karen came to his house and demanded that he do so. In fact, a year later, in September 2004, Karen wrote a letter to her siblings demanding that they sign the deed, threatening them with a lawsuit if they did not.

Karen did not testify specifically about how she came to be in possession of the deed. She merely stated that "they called someone and told them to bring it to me." However, her nephew, Kevin, testified that Rebecca called him and asked him to pick up a document and take it to Karen. He did not know what the document was, but when she opened it, Karen asked him why Gary did not sign it. Kevin told her that he did not know and he would have to ask the others.

The Siblings' Deed, which was dated September 15, 2003, was not recorded until October 31, 2006, several months after Sybil died, but several months before the deed from her was recorded. The deed was signed by all the siblings, except Gary, despite Rebecca's testimony that she never signed it. September 15, 2003 was a Monday, in conflict with JoLynn's and Montie's testimony that JoLynn and Donna signed on a Saturday. The deed was also notarized, in conflict with JoLynn's and Montie's testimony that no notary was present during the Saturday meeting at Donna's house. The notary, however, was never able to produce her notary book as evidence of the deed's execution.

The Mother's Deed of September 18, 2004

The deed purporting to convey Sybil's interest in the property to Karen was dated September 18, 2004. Karen testified that her mother gave the deed on her birthday of that year, but she did not immediately record the deed because she was busy "with life." Karen did not file the deed of record until February 2007, siX

months after Sybil's death and several months after the Siblings' Deed was filed. The notary on the document never produced her notary book with evidence of the transaction.

The Lawsuit

JoLynn, individually and as administratrix of Sybil's estate, Rebecca, and Gary, filed suit against Karen, seeking to have both deeds declared void. After a jury trial, at which Karen appeared pro se, the trial judge (1) entered a judgment declaring the Mother's Deed void based on a jury finding of no consideration, and

(2) granted a directed verdict and did not allow jury questions on the Siblings' Deed because he found

no fact issues were presented on either delivery or consideration. This appeal followed.

PROPRIETY OF DECLARATORY JUDGMENT

Declaratory Judgment on the Siblings' Deed

In her first issue, Karen contends the trial court erred in directing a verdict in the plaintiffs' claim seeking invalidation of the Siblings' Deed. Specifically, Karen contends that she raised a fact issue as to whether the Siblings' Deed was delivered to her by her siblings.

The trial court's judgment on the Siblings' Deed provided as follows:

It is ORDERED, ADJUDGED and DECREED that the General Warranty Deed purportedly dated and signed on September 15, 2003, by Grantors, Donna Hyden, JoLynn Boggan, and Rebecca Wagley convey to Grantee and named Defendant, herein, Karen Silvio, all of the ownership interest in and to the real property more commonly known as "23120 Naples Drive, Spring, Harris County, Texas 77373." . is declared to be void ab initio and is no force and effect, there being no consideration, as this term is understood in law, supporting such deed from Grantee to Grantors, nor delivery, as this term is understood in law, of such deed by and from Grantors to Grantee.

Karen's brief on appeal challenges only the trial court's ruling regarding delivery, but not consideration. Because Karen has failed to challenge in her original brief, a ground that may have been the basis for the trial court's ruling, that issue has been waived on appeal. See In re TCW Global Project Fund II, Ltd., 274 S.W.3d 166, 171 (Tex. App.--Houston [14th Dist.] 2008, orig. proceeding) (citing Dallas County v. Gonzales, 183 S.W.3d 94, 104 (Tex. App.--Dallas 2006, pet. denied)). Moreover, because the trial court's directed verdict can rest on more than one ground and Karen has not challenged each of those grounds, we may affirm the trial court's judgment on the ground to which no error was assigned. Fox v. Maguire, 224 S.W.3d 304, 307 (Tex. App.--El Paso 2005, pet. denied); Inscore v. Karnes County Sav. & Loan Ass'n, 787 S.W.2d 183, 184 (Tex. App.--Corpus Christi 1990, no writ). We therefore overrule Karen's first issue.

Judgment after Jury Verdict on the Mother's Deed

In her second issue on appeal, Karen contends the trial court erred in entering judgment declaring the Mother's Deed void based on the jury's finding of no consideration. Specifically, Karen contends that she was not required to show consideration because she possessed a general warranty deed and no fraud was shown. We agree.

The jury charge in this case provided the following two questions: Juror Question No. 1

Do you find that the signature of the Deceased was forged on the First Deed? Answer: "Yes" or "No".

Answer:_____No_____

Juror Question No. 2

Do you find that Karen Silvio paid "$10.00 and other good and valuable consideration" in connection with the First Deed?

You are instructed that the term "good and valuable consideration" as used herein means a consideration of some value. It means something more than nominal consideration, one bearing no relation to the value of the property, or for love and affection, and must be a consideration bearing some relation to the value of the property.

Answer "Yes" or No".

Answer:_____No_____

However, a mere lack of consideration is not enough to void a deed. Watson v. Tipton, 274 S.W.3d 791, 801 (Tex. App.--Fort Worth 2009, pet. denied); Uriarte v. Prieto, 606 S.W.2d 22, 24 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). In addition to a lack of consideration, there must be fraud or undue influence in obtaining the deed. Uriarte, 606 S.W.2d at 24.

As seen from the jury's responses, the jury rejected the fraud claims against Karen, concluding that the Mother's Deed was not forged. Therefore, the issue of consideration should not have been submitted to the jury and the jury's response to question two is immaterial. See Casa El Sol-Acapulco, S.A. v. Fontenot, 919 S.W.2d 709, 717 (Tex. App.--Houston [14th Dist.] 1996, writ dism'd by agr.) ("Because the doctrine of disproportionate forfeiture was not applicable in this instance, it should not have been submitted as a jury issue."). An appellate court may disregard a jury finding on a question that is immaterial. See Spencer v. Eagle Star Ins. Co. of Am., 876 S.W.2d 154, 157 (Tex. 1994). A jury question is immaterial if it should not have been submitted, if it was rendered immaterial by other findings, or if it called for a finding not within the jury's province, such as a question of law. Id. Because the jury's answer to question two was immaterial, the trial court should have disregarded it. See Southeastern Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 172 (Tex. 1999). As such, the jury's finding of no consideration will not support the trial court's judgment.

We sustain Karen's second issue on appeal.

Ex Parte Communication

In her third issue, Karen contends the trial court erred by participating in prohibited ex parte communications with her siblings' counsel. The record in this case shows that the trial court requested counsel to prepare a proposed charge.

Counsel for the siblings submitted his proposed charge to the trial court on a zip drive and also gave a copy of the proposed charge to Karen. The trial judge opened the zip drive during a break so that he could begin preparing the charge. Karen complained that the zip drive was an improper ex parte communication. We disagree.

Under Texas Code of Judicial Conduct, Canon 3(B), a judge is prohibited from initiating, permitting, or considering ex parte communications concerning the merits of a pending case. TEX. CODE JUD. CONDUCT, Canon 3(B), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. B (West 1997). An ex parte communication is one that involves fewer than all parties who are legally entitled to be present during the discussion of any matter. See Erskine v. Baker, 22 S.W.3d 537, 539 (Tex. App.--El Paso 2000, pet. denied). The purpose behind prohibiting ex parte communications is to ensure that all legally interested parties are given their full right to be heard under the law and to ensure equal treatment of all parties. Abdygapparova v. State, 243 S.W.3d 191, 207 (Tex. App.--San Antonio 2007, pet. ref'd).

Here, Karen had notice that the proposed charge had been requested by the judge and she was given a copy of it. The charge was fully discussed and Karen was given the opportunity to propose her own charge and to object to plaintiffs' charge. Thus, we hold that the zip drive containing the plaintiffs' proposed jury charge was not an improper ex parte communication.

We overrule issue three.

Refusal to Remove Juror

In issue four, Karen contends the trial court erred by failing to remove a juror who could not understand English. During trial, the following exchange took place

THE COURT: Ms. Silvio, I guess, it was Ali Chowdhury came to the Court this morning. He came in the front door, not back where he was told yesterday afternoon. He told the court reporter that he doesn't speak or read English very well and doesn't really understand what's going on. He wonders if he has to be a juror. I'm not going to declare a mistrial if everybody agrees to accept a verdict with 11. I'm inclined to just let him sit in the jury box. I mean, I guess he managed to fill out his card. So he reads English well enough to fill out a jury card and send it back in. And I said, If you don't speak or read English, raise your hand and he didn't raise his hand. Maybe he doesn't understand anything.

MR. RUBIN: Well, apparently, he followed enough instructions to make it to the courtroom yesterday as well.

THE COURT: Yeah. So I don't know. I'm just telling you. I'm not going to do anything about it right now. He wrote -- he filled out his card but not completely.

After this exchange, Karen never objected to proceeding with the juror. Thus, she has waived this issue on appeal. See TEX. R. APP. P. 33.1(a)(1) (providing that party must make "timely request, objection, or motion" to present complaint for appellate review).

We overrule issue four.

CONCLUSION

We reverse the trial court's judgment as it relates to the Mother's Deed of September 18, 2004 and render judgment that the siblings' take nothing on their claims as it relates to that deed. We affirm the remaining portions of the judgment. We dismiss any pending motions as moot.

Panel consists of Chief Justice Radack and Justices Higley and Brown.