Affirmed and Opinion filed January 24, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00382-CV

HATTIE SCOTT TRUST; MURLINE SCOTT GLENN, as Executrix of HIAWATHA SCOTT, Deceased and MURLINE SCOTT GLENN; HATTIE SCOTT TRUST by and through its beneficiaries E. L. SCOTT, CAROLYN JEAN SCOTT, MURLINE SCOTT GLENN and IVORY DELL SCOTT, Appellants

V.

CYNTHIA MCDADE; PAUL MCDADE; JESSIE LANE SCOTT; the unknown heirs of HATTIE SCOTT; and RANDAL L. SMITH, Appellees

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On Appeal from the 155th District Court
Waller County, Texas
Trial Court Cause No. 99-10-15,150

O P I N I O N

This case involves a dispute over title to a tract of land that has been the subject of previous litigation. The trial court granted summary judgment in favor of appellees/defendants, Paul and Cynthia McDade (the "McDades") and Jessie Lane Scott, based on the affirmative defense of res judicata. The trial court also awarded sanctions against appellants/plaintiffs, Hattie Scott Trust; Murline Scott Glenn, as Executrix of Hiawatha Scott, Deceased and Murline Scott Glenn; Hattie Scott Trust by and through its

beneficiaries E. L. Scott, Murline Scott Glenn, and Ivory Scott (collectively, "the Scotts"). We affirm the trial court's judgment.

I. FACTUAL BACKGROUND

On October 25, 1978, the surviving children of Hattie Scott and Edward Scott, Jr., executed partition deeds dividing up a 151.4 acre tract of land into tracts of approximately 19 acres each. One of these deeds conveyed to Elmer Scott all of the right, title, and interest of his living brothers and sisters in and to a tract of land in Waller County ("1978 Deed"). The 1978 Deed describes this tract of approximately 19.5 acres of land ("Property"). On or about May 23, 1986, Elmer Scott and Carolyn Scott executed two promissory notes in favor of Wells Fargo Credit Corp. ("Wells Fargo"), and they also executed two different deeds of trust that gave Wells Fargo deed-of-trust liens in the Property to secure payment of each of these notes. Elmer Scott and Carolyn Scott defaulted under these obligations. After a complex series of events, Wells Fargo eventually foreclosed the interest of Elmer and Carolyn Scott in the Property, and Wells Fargo obtained title to the Property as a result of a foreclosure sale, at which Wells Fargo foreclosed one of its two deed-of-trust liens.

Meanwhile, Elmer Scott had filed a lawsuit regarding the Property against Wells Fargo, all heirs of Hattie Scott and Edward Scott, Jr., and other defendants ("First Action"). In addition to claims against other defendants, Elmer Scott asserted that the two Wells Fargo liens were invalid and that the 1978 Deed was invalid due to an inadequate property description. In the First Action, Elmer Scott asked the court to partition the original 151.4 acre tract among his siblings and him. On August 18, 1989, the court dismissed the First Action with prejudice. Shortly thereafter, in a separate forcible-entry-and-detainer action filed by Wells Fargo against Elmer Scott and Carolyn Scott, the court ruled in favor of Wells Fargo and granted it a writ of possession for the Property.

On or about April 6, 1994, the Hattie Scott Trust ("Trust") filed suit against Wells Fargo and an individual to whom Wells Fargo was trying to sell the Property ("Second

Action"). In the Second Action, the Trust challenged the validity of the two Wells Fargo liens and asserted that the 1978 Deed was invalid due to an inadequate property description. The Trust asserted that it was the sole owner of the fee simple interest in the Property and sought a judgment to this effect. On May 31, 1996, the court in the Second Action dismissed the Trust's claims and found that the Second Action was groundless. The trial court also found that the Trust had filed this action in bad faith, for an improper purpose, and to harass Wells Fargo.

The McDades purchased the Property from Wells Fargo in April of 1997, and Wells Fargo released its liens in the Property, including the other deed-of-trust lien upon which it had not foreclosed. In May of 1997, Murline Scott Glenn and Ivory Scott filed a motion to set aside Wells Fargo's sale of the Property to the McDades, as part of the probate proceedings for the Estate of Hiawatha Scott, Deceased ("Third Action"). In the Third Action, Murline Scott Glenn and Ivory Scott alleged that Hiawatha Scott owned an interest in the Property, and they also alleged that the April, 1997 sale of the Property to the McDades should be set aside. On September 11, 1997, the court in the Third Action granted the McDades' motion for summary judgment and decreed that the McDades alone hold title to the Property.

In 1999, the Scotts filed this trespass-to-try-title action against the McDades, Jessie Lane Scott, the unknown heirs of Hattie Scott and Randall L. Smith ("Fourth Action"). In this Fourth Action, the Scotts assert that the property description in the 1978 Deed was legally insufficient and seek a declaration that the Trust owns all of the Property and that the McDades have no interest in the Property. On February 11, 2000, the trial court in this Fourth Action granted summary judgment based on res judicata, ordered that the Scotts take nothing by this action, decreed that the McDades are the owners of the Property, and granted the McDades' request for sanctions under Rule 13 of the Texas Rules of Civil Procedure and Chapter 10 of the Texas Civil Practice and Remedies Code. On March 13, 2000, the trial court signed another order dismissing the Scotts' claims against Jessie Lane Scott and

awarding sanctions against the Scotts and in favor of Jessie Lane Scott because the Scotts violated Chapter 10 of the Texas Civil Practice and Remedies Code by filing a frivolous lawsuit.

II. ISSUES PRESENTED FOR REVIEW

In this appeal, the Scotts claim that the trial court erred in: (1) ruling that res judicata bars the Fourth Action; (2) granting summary judgment because of genuine issues of material fact that precluded summary judgment; (3) granting summary judgment because the property description used in the 1978 Deed was legally insufficient and void; (4) granting sanctions in its February 11, 2000 judgment because the court had previously denied sanctions in its verbal and written rulings; and (5) awarding attorney's fees to Jessie Lane Scott because she submitted no evidence in any motion for summary judgment and because the court had no jurisdiction to issue its March 13, 2000 order in her favor.

III. STANDARD OF REVIEW

The trial court granted summary judgment based on the affirmative defense of res judicata. This summary judgment was proper only if the movants conclusively established each element of their defense of res judicata. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex.1997). In reviewing this summary judgment, we take as true all evidence favorable to the Scotts and indulge every reasonable inference in their favor. *Id*.

IV. ANALYSIS

Does Res Judicata Bar this Fourth Action as a Matter of Law?

In their first point of error, the Scotts contend the trial court erred in holding that res judicata bars the Fourth Action. In their second point of error, they assert that genuine issues of material fact preclude summary judgment.

Res judicata prevents parties and their privies from re-litigating a claim with a final adjudication from a competent tribunal. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997

S.W.2d 203, 206-7 (Tex. 1999). If a party through diligence, could have litigated claims or defenses in a prior suit but did not, then res judicata bars those claims. *Id*. The rationale supporting the doctrine of res judicata is to prevent splitting claims, thus curbing vexatious litigation and promoting judicial economy. *Id*. To be entitled to summary judgment on this affirmative defense, the movant must establish: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) the claims in the pending action are based on the same claims that were raised or that could have been raised in a previous action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). The Texas Supreme Court uses a transactional approach to res judicata. *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 651 (Tex. 2000). This means that the factual matters comprise the subject matter of the litigation and determine "the gist of the complaint." *Id*. Subsequent litigation cannot be based on claims that arise from those facts. *Id*.

On appeal, the Scotts have not disputed that the respective courts in the First Action, Second Action, and Third Action issued prior, final judgments on the merits and were courts of competent jurisdiction. Even if the Scotts had contested this issue, we would hold that the summary-judgment evidence conclusively proved this first element of res judicata.

As to the second element of res judicata—identity of parties or those in privity with them—the Scotts argue only that Elmer Scott and his wife, Carolyn Scott, were not parties to the Third Action. As to Carolyn Scott, she was not added as a plaintiff until the Second Amended Petition. This petition was filed without seeking leave of court on January 10, 2000, six days after the trial court held a hearing on the motion for summary judgment. The McDades objected to the late-filed Second Amended Petition and asserted that the court should ignore it. The plaintiffs did not seek or obtain leave to amend their petition after the summary-judgment hearing. Therefore, the Second Amended Petition was not properly before the trial court, and the trial court did not have to consider Carolyn Scott as a plaintiff in ruling on the motion for summary judgment. *See* TEX. R. CIV. P. 166a(c); *Leinen v.*

Buffington's Bayou City Serv. Co., 824 S.W.2d 682, 685 (Tex. App.—Houston [14th Dist.] 1992, no writ) (holding that trial court can only consider pleadings and proof on file at the time of summary-judgment hearing or filed after the hearing and before judgment with the permission of the court). Although Elmer Scott was not a party to the Third Action, he was a plaintiff in the First Action, and the Trust of which he is a beneficiary was the plaintiff in the Second Action. Therefore, the Scotts' argument as to the second element fails. The Trust was plaintiff in the Second Action. Murline Scott Glenn was a plaintiff in the Third Action and appears to have been acting on behalf of the estate of Hiawatha Scott. Ivory Scott was a plaintiff in the Third Action. Further, Murline Scott Glenn and Ivory Scott were parties in the First Action. The summary-judgment evidence conclusively proves that all of the plaintiffs in the First Amended Petition in this Fourth Action were parties in one or more of the previous actions or were in privity with those parties. *See Amstadt*, 919 S.W.2d at 652; *In re Estate of Ayala*, 986 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1999, no pet.).

As to the third element, the Scotts argue that this Fourth Action is not based on the same claims as were raised or could have been raised in the previous three actions for the following reasons: (1) the previous actions were decided before Wells Fargo executed a release of lien regarding the Property in April of 1997; (2) the Third Action did not relate to the Property because it related only to property belonging to the Estate of Hiawatha Scott; and (3) in the Fourth Action, Elmer and Carolyn Scott are also claiming title to the Property based on a deed executed on or about May 23, 1986. We disagree. The Scotts have based this Fourth Action on claims that either were raised or could have been raised in the previous actions.

Wells Fargo executed the April 1997 release of lien before the Third Action was filed; therefore, any claims based on this release could have been asserted in the Third Action. Furthermore, the plaintiffs in the First Action and Second Action unsuccessfully attacked the validity of the Wells Fargo liens on the Property, and the Scotts argue in this case that they had title based on either the allegedly void 1978 Deed or on the May 23, 1986

deed. The 1978 Deed and the 1986 deed were part of the subject matter of the previous actions, and the claims that the Scotts now assert either were or could have been raised in those actions. Wells Fargo's execution of the 1997 release of lien is not a change in material fact; if the claims based on the 1978 Deed and the 1986 deed are barred by res judicata, the release of any Wells Fargo lien in 1997 does not give the Scotts any claim of title. *See Hilltop Baptist Temple, Inc. v. Williamson County Appraisal Dist.*, 995 S.W.2d 905, 909 (Tex. App.—Austin 1999, pet. denied) (new reason for why court should rule differently than in previous action is not a change in material fact to avoid res judicata effect of previous judgment).

As to the Scotts' two remaining arguments under the third element of res judicata, their argument that the Third Action did not involve the Property is belied by the uncontroverted summary-judgment evidence showing that the Third Action involved the Property that Wells Fargo had conveyed to the McDades. The Scotts' argument that they have title to the Property based on a deed executed on or about May 23, 1986 could have been raised in any of the three previous actions and is not a change of material fact. *See id*.

In sum, we find no merit in the Scotts' arguments against res judicata. We conclude that the Scotts' claims in this Fourth Action were raised or could have been raised in the previous three actions. The Scotts have not cited, and we have not found, any summary-judgment evidence that raises a genuine issue of material fact as to the affirmative defense of res judicata.[1] As a matter of law, res judicata bars the claims asserted by the Scotts in this case. Accordingly, we overrule the Scotts' first and second points of error. We also overrule the Scotts' third point of error, which addresses the merits of the Scotts' arguments as to why the property description in the 1978 Deed is legally insufficient.

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[1] Under their second point of error, the Scotts refer to an alleged adverse-possession claim based on their alleged occupation of the Property from 1986 through 1999. This claim was not before the trial court because it was not raised until the Second Amended Petition, which, as discussed above, was not properly before the trial court. *See Leinen*, 824 S.W.2d at 685.

Did the Scotts Preserve Error as to their Fourth Point of Error?

In their fourth point of error, the Scotts assert that the award of sanctions against them and in favor of the McDades was erroneous because the trial court had previously stated at the summary-judgment hearing and in a letter to the parties that it was denying the McDades' request for sanctions. To preserve this complaint of error in the trial court's judgment, the Scotts had to present this complaint to the trial court by a motion to amend or correct the judgment, a motion for new trial, or some other similar method. *See* TEX. R. APP. P. 33.1; *Willis v. Willis*, 826 S.W.2d 700, 202 (Tex. App.—Houston [14th Dist.] 1992, no writ). The Scotts have not cited us to, nor have we found, evidence in the appellate record of any of the following: (1) any alleged statement by the court at the January 4, 2000 hearing that the McDades' request for sanctions was denied; (2) the trial court's letter to the parties stating that a motion for sanctions was denied[2]; and (3) the Scotts' preservation of error as to their fourth point of error by presenting this complaint to the trial court. Because the Scotts did not present the complaint in their fourth point of error to the trial court, they did not preserve error. *See* TEX. R. APP. P. 33.1; *Hall v. Lone Star Gas Co.*, 954 S.W.2d 174, 177 (Tex. App.—Austin 1997, pet. denied); *Willis*, 26 S.W.2d at 202.

The Scotts assert that they never received the notice of judgment required by Rule 306a(3) of the Texas Rules of Civil Procedure regarding the trial court's February 11, 2000 judgment, which awarded sanctions to the McDades. The Scotts do not state when they received actual notice of this judgment, and they do not argue as to the effect of this failure to receive notice from the district clerk. Even if the Scotts never received this notice, this fact does not affect the Scotts' failure to preserve error as to their fourth point of error. If the Scotts acquired actual notice of this judgment within twenty days after the signing of the judgment or more than ninety days after the signing of the judgment, then the Scotts had no recourse under Rule 306a. TEX. R. CIV. P. 306a; *Levit v. Adams*, 850 S.W.2d 469, 469-70

[2] The Scotts did append a letter from the court to their brief, but this letter is not part of the record in this case, and so we will not consider it.

(Tex. 1993). If the Scotts acquired actual notice of this judgment more than twenty days after the signing of the judgment but within ninety days of its signing, then the Scotts may have had recourse under Rule 306a; however, they waived any protections that they may have had under this rule because they did not take the procedural steps required by Rule 306a(5). *See* TEX. R. CIV. P. 306a; *In re Bokeloh*, 21 S.W.3d 784, 791 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Therefore, any lack of notice to the Scotts from the district clerk does not affect the disposition of this point of error.

Even if the Scotts had preserved error, we would not find any error in the trial court granting a request for sanctions contained in a motion upon which an oral hearing was conducted. Even if the trial court stated at the hearing and in its letter that sanctions would not be granted, we would not find that such a pronouncement prevented the trial court from changing its ruling upon granting summary judgment. We overrule the Scotts' fourth point of error.

Did the Trial Court Have Plenary Power on March 13, 2000?

In their fifth point of error, the Scotts argue that the trial court erred in awarding attorney's fees to Jessie Lane Scott because she submitted no evidence in any motion for summary judgment and because the trial court had no jurisdiction to issue its March 13, 2000 order in her favor. The Scotts provide no analysis, no citations of legal authorities, and no citations to the record on appeal to support their first argument, and thus, we find they have waived review of this issue. *See* TEX. R. APP. P. 38.1(h); *Baker v. Gregg County*, 33 S.W.2d 72, 79-80 (Tex. App.—Texarkana 2000, pet. dism'd); *Houghton v. Port Terminal R. R. Ass'n*, 999 S.W.2d 39, 51 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

In support of their argument that the trial court had no jurisdiction to issue its March 13, 2000 order in favor of Jessie Lane Scott, the Scotts contend that the trial court signed its final judgment on February 11, 2000, and that the trial court lost its plenary power thirty days later on March 12, 2000. We take judicial notice of the calendar for 2000. TEX. R.

CIV. EVID. 201(b); *Higginbotham v. General Life and Acc. Ins. Co.*, 796 S.W.2d 695, 696 (Tex. 1990). Because March 12, 2000 was a Sunday, the trial court had plenary power through March 13, 2000; therefore, the trial court had the power to issue its March 13, 2000 order. *See* TEX. R. CIV. P. 4.1(a); *Davis v. Methodist Hosp.*, 4 S.W.3d 389, 390 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Long John Silver's Inc. v. Martinez*, 850 S.W.2d 773, 776 (Tex. App.—San Antonio 1993, writ dism'd w.o.j.). Accordingly, we overrule the Scotts' fifth point of error.

Having overruled all of the Scotts' points of error, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed January 24, 2002.
Panel consists of Justices Edelman, Frost, and Murphy.[3]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Chief Justice Paul C. Murphy sitting by assignment.