

FROM MY SIDE OF THE BENCH

Motions to Dismiss

BY HON. RANDY WILSON

IN 2011, THE TEXAS LEGISLATURE enacted §22.004(g) of the Texas Government Code which provided:

The Supreme Court shall adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. The rules shall not apply to actions under the Family Code.¹

The matter was referred to the Supreme Court Advisory Committee, who, in turn, referred it to a subcommittee chaired by Hon. David Peebles, which prepared a proposed rule. In addition, a second proposal was submitted by a voluntary Working Group of representatives from the Texas Chapters of the American Board of Trial Advocates, the Texas Association of Defense Counsel, and the Texas Trial Lawyers Association. A third proposal was submitted by the State Bar Rules Committee.²

The various drafts were discussed at length by the full Supreme Court Advisory Committee on November 18, 2011,³ and again on December 9, 2011.⁴ The full committee then referred the proposed rule to the Supreme Court who made extensive changes in the final rule 91a.

The rule, as adopted, permits a party to move for the dismissal of a cause of action that “has no basis in law or fact.”⁵ No basis in fact is defined to mean “no reasonable person could believe the facts pleaded.”⁶ Although the rule looks a bit like Federal Rule 12(b)(6), the Supreme Court Advisory Committee and its subcommittee went out of their way to make clear that the dismissal rule is not merely a little rule 12(b)(6).

Perhaps the biggest difference between Rule 91a and 12(b)(6) is that the trial court must award attorneys’ fees to the

prevailing party. Thus, unlike federal court where 12(b)(6) motions are filed as a matter of course, a defendant must consider the consequences of filing a Rule 91a motion. To date, I’ve had only encountered two motions to dismiss under Rule 91a and the defendant won one and lost the other. The losing defendant was required to pay attorneys’ fees to defend the motion.

No Basis in Law. Rule 91a authorizes dismissal of actions where there is no basis in law. Presumably, this is meant to cover situations where a plaintiff pleads a cause of action not recognized under Texas law, e.g., negligent infliction of emotional distress. The problem with the rule, however, as

previously noted, is that it requires an award of attorneys’ fees to the party who prevails on the motion. If you file a rule 91a motion and lose, you must pay the other side’s attorneys’ fees. There is a much cheaper alternative, however—file special exceptions. A special exception can be filed to chal-

lenge pleadings that allege no viable cause of action. “If the plaintiff’s suit is not permitted by law, the defendant may file special exceptions and a motion to dismiss.”⁷ The prevailing party is not entitled to attorneys’ fees for special exceptions. A special exception is a viable alternative to a rule 91a motion.

No Basis in Fact. The second ground for a rule 91a motion is when there is no basis in fact for the pleading, i.e., no reasonable person could believe the facts pleaded. The facts must be so outrageous as to be unbelievable. This is intentionally different from the federal requirement that the facts be “plausible.” The “plausibility” standard of *Twombly*⁸ and *Iqbal*⁹ should not be imported into Rule 91a.

Rule 91a is a useful tool to dismiss the occasional nut suits that we sometimes encounter. For example, one Harris County judge recently dismissed a case under rule 91a where the handwritten petition stated she was murdered by defendants, resurrected by God at jail where she had been incarcerated

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for 330 years. “It took a time machine and Jesus Christ to get [me] out of jail.”

It remains to be seen how frequently rule 91a is used. For a suit alleging a claim with no basis in law, it is largely redundant to special exceptions. Rule 91a is useful to dismiss the pro se nut suits, but, of course, even if you are awarded attorneys’ fees for preparing such a motion, collecting such fees could prove challenging.

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¹ Tex. Gov’t Code §22.004(g).

² <http://www.supreme.courts.state.tx.us/MisDocket/12/12919100.pdf>

³ Transcript of hearing of Supreme Court Advisory Committee can be found at <http://www.supreme.courts.state.tx.us/rules/scac/2011/transcripts/sc11182011.pdf>

⁴ Transcript of hearing of Supreme Court Advisory Committee can be found at <http://www.supreme.courts.state.tx.us/rules/scac/2011/transcripts/sc12092011.pdf>

⁵ Tex. R. Civ. P. Rule 91a.1.

⁶ Id.

⁷ Wayne Duddleston, Inc. v. Highland Ins. Co., 110 S.W.3d 85, 96-97 (Tex. App.—[1st Dist.] 2003, pet. denied)

⁸ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

⁹ Ashcroft v. Iqbal, 556 U.S. 662 (2009).