BEAGLES V. TIMBERON WATER & SANITATION DIST.

DEWAYNE BEAGLES,
Plaintiff-Appellant/Cross Appellee,
v.
TIMBERON WATER & SANITATION DISTRICT,
Defendant,
IN THE MATTER OF ATTORNEY CHARGING LIEN, J. ROBERT BEAUVAIS, P.A.,
Appellee/Cross-Appellant.

No. 33,407

COURT OF APPEALS OF NEW MEXICO

December 11, 2014

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Matthew G. Reynolds, District Judge

COUNSEL

The Perrin Law Firm, Doug Perrin, Santa Fe, NM, for Appellant

J. Robert Beauvais, Ruidoso, NM, Pro Se Appellant

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: LINDA M. VANZI, Judge, J. MILES HANISEE, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} DeWayne Beagles (Appellant) appeals from the district court's order denying his second motion to set aside the district court's October 1, 2010 order granting J. Robert Beauvais' (Cross-Appellant) charging lien against judgment proceeds. [RP 2707] Cross-Appellant appealed from the district court's decision denying sanctions against Appellant and his counsel under Rule 1-011 NMRA. This Court's first notice proposed to affirm the district court's order on both accounts. Appellant filed a memorandum in opposition to the proposed disposition; Cross-Appellant did not. We have considered Appellant's arguments, and affirm the district court's order. *See State v. Johnson*, 1988-NMCA-029, ¶ 8, 107 N.M. 356, 758 P.2d 306 (stating that when a case is decided on the summary calendar, an issue is deemed abandoned where a party fails to respond to the proposed disposition of the issue).

{2} This Court's first notice proposed to affirm the district court's determination that the notice of hearing was mailed to the care of Appellant's brother Virgil Beagles (Brother), who was also a party to the charging lien, at the address where Appellant had previously received correspondence, and had expressly indicated as a return address in letters co-written with Brother to Cross-Appellant. [RP 2704] *See Thompson v. Thompson*, 1983-NMSC-025, ¶ 10, 99 N.M. 473, 660 P.2d 115 (concluding that service was properly made by mailing the notice to the party's last known address where the record was replete with various mailings to the party at that address, and where there was no designation of a permanent change of address sufficient to alert the district court that mail should be sent elsewhere than to the last known address). Appellant argues there was no evidence that the mailing address for Brother, where the amended notice of hearing was sent, was the last known address for Appellant. [MIO 3] While it may not have been Appellant's actual address, the district court determined that it was the last known address for Appellant since in August 2010, prior to the September 2010 hearing, Appellant signed correspondence to Cross-Appellant, and written right below his signature was Brother's address. [RP 2704] This was a factual determination made by the district court for which there was sufficient evidence and "we will not reweigh the evidence nor substitute our judgment for that of the fact finder." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329, 940 P.2d 177.

{3} Appellant continues to challenge the propriety of the notice of hearing. Appellant's memorandum in opposition does not assert that he was unaware of the hearing, only that he was not served with the notice of hearing and that he never received it. [MIO 3] Appellant also argues that the amended notice of hearing was sent to Brother, and there was no certificate of service on Appellant. [MIO 2] These assertions challenge the propriety of the notice and not the factual determination of whether Appellant had knowledge of the hearing. Appellant attempts to dispute the evidence to support the district court's determination by pointing to the conflicting evidence. [MIO 3] "However, when there is a conflict in the testimony, we defer to the trier of fact." *See Buckingham v. Ryan*, 1998-NMCA-012, ¶ 10, 124 N.M. 498, 953 P.2d 33. We therefore conclude that the district court did not abuse its discretion in denying Defendant's motion to set aside the order. *See Edens v. Edens*, 2005-NMCA-033, ¶ 13, 137 N.M. 207, 109 P.3d 295 (stating that we generally review a district court's ruling under Rule 1–060(B) NMRA motion for relief from judgment for an abuse of discretion).

{4} For the reasons stated above, and those stated in the first notice of proposed disposition, we affirm.

{5} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

LINDA M. VANZI, Judge

J. MILES HANISEE, Judge