Opinion issued July 31, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00410-CV

BIO LANDSCAPE & MAINTENANCE, INC., Appellant

V.

SALLE MORSE, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2005-77992

MEMORANDUM OPINION

Appellant, Bio Landscape & Maintenance, Inc. ("Bio"), challenges the trial

court's judgment entered in favor of appellee, Salle Morse, and Sid Morse,[1] in the Morses' suit against Bio for damages based on a breach of contract. In its sole issue, Bio contends that the trial court erred in allowing an undisclosed witness to testify at trial.

We dismiss Bio's appeal.

Procedural Background

On December 6, 2006, the trial court signed its final judgment, and Bio filed a motion for new trial on January 2, 2007. On March 21, 2007, Bio's motion to extend post-judgment deadlines "was presented to the [t]rial [c]ourt at oral hearing." The trial court found that Bio did not receive notice of the final judgment until December 27, 2006, twenty-one days after the trial court signed its final judgment. On March 23, 2007, Bio filed its notice of appeal.

Motion to Extend Post-judgment Deadlines

Texas Rule of Civil Procedure 306a provides that a party's deadline to file various documents may start on the day that the party received actual knowledge of the final judgment, rather than when the trial court signed its final judgment. *See* TEX. R. CIV. P. 306a. This includes the applicable time period to file a notice of appeal. *Levit v. Adams*, 850 S.W.2d 469, 469–70 (Tex. 1993).

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[1] Bio does not contest the trial court's judgment rendered in favor of Sid Morse.

The Texas Supreme Court has explained that complying with the provisions of Rule 306a is a jurisdictional prerequisite. *Mem'l Hosp. v. Gillis*, 741 S.W.2d 363, 365 (Tex. 1987); *see Grondona v. Sutton*, 991 S.W.2d 90, 91 (Tex. App.—Austin 1998, pet. denied) (per curiam). The Texas Supreme Court has also explained,

> Post-judgment procedural timetables—including the period of the trial court's plenary power—run from the day a party receives notice of judgment, rather than the day judgment is signed, if the party: (1) *complies with the sworn motion*, notice[,] and hearing requirements mandated by Rule 306a(5), and (2) proves it received notice of the judgment more than twenty (but less than ninety-one) days after it was signed. Specifically, Rule 306a(5) requires that the party alleging late notice of judgment *file a sworn motion with the trial court* establishing the date the party or its counsel first learned of the judgment. *The motion must be filed* before the trial court's plenary power—measured from the date of notice established under Rule 306a(4)—expires. The sworn motion establishes a prima facie case that the party lacked timely notice and invokes a trial court's otherwise-expired jurisdiction for the limited purpose of holding an evidentiary hearing to determine the date on which the party or its counsel first received notice or acquired knowledge of the judgment.

In re Lynd Co., 195 S.W.3d 682, 685 (Tex. 2006) (internal citations omitted) (emphasis added); *see Jon v. Stanley*, 150 S.W.3d 244, 248 (Tex. App.—Texarkana 2004, no pet.) ("Even if Rule 306a(4) did apply to [the plaintiff], in order to establish the applicability, he was required to file a sworn motion in the trial court establishing the date on which he first received notice or acquired actual knowledge of the signing of the order."); *Grondona*, 991 S.W.2d at 92 ("The sworn motion serves the purpose

of establishing a prima-facie case of lack of timely notice, thereby invoking the trial court's jurisdiciton for the limited purpose of holding a hearing to determine the date of notice."); *In re Simpson*, 932 S.W.2d 674, 678 (Tex. App.—Amarillo 1996, no writ) ("[I]t was held . . . that[,] absent a sworn motion showing a prima facie lack of notice of the judgment, the trial court's plenary power was not invoked and the [trial] court was without jurisdiction to hold a hearing.").

Here, Bio did not file its notice of appeal within ninety days after the trial court signed its final judgment. *See* TEX. R. APP. P. 26.1(a)(1). The clerk's record does not include a sworn motion seeking to extend post-judgment deadlines due to a lack of actual knowledge of the final judgment. On February 25, 2008, we ordered the trial court clerk to supplement the clerk's record with any such sworn motion. In our order, we also informed the parties of their ability to supplement the clerk's record. On March 3, 2008, the trial court clerk supplemented the clerk's record, and the supplemental clerk's record did not contain a sworn motion. On July 8, 2008, we again ordered the trial court clerk to supplement the clerk's record with any such sworn motion and also ordered the trial court clerk to supplement the clerk's record by stating that, if there was not a sworn motion from Bio, that it did not have such a sworn motion. On July 8, 2008, the trial court clerk supplemented the clerk's record by stating that it did not have such a sworn motion. Thus, Rule 306a(4) does not

operate to make Bio's notice of appeal timely filed. *See Lynd*, 195 S.W.3d at 695.

If an appeal is not timely perfected, we do not have jurisdiction to consider the merits of the appeal and can take no action other than to dismiss the appeal. *In re A.L.B.*, 56 S.W.3d 651, 652 (Tex. App.—Waco 2003, no pet.). Accordingly, we dismiss the appeal for lack of jurisdiction. *See* TEX. R. APP. P. 42.3.

Conclusion

We dismiss Bio's appeal for lack of jurisdiction.

Terry Jennings
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.