Opinion issued August 17, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00840-CV

JOSEPH R. WILLIE II, D.D.S., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2016-16578

MEMORANDUM OPINION

Appellant, Joseph R. Willie II, D.D.S., filed a *qui tam* lawsuit pursuant to the Texas Medicaid Fraud Prevention Act ("TMFPA"). The appellee, the State of

Texas, intervened and moved to dismiss the lawsuit.[1] The trial court held a non-evidentiary hearing and subsequently dismissed the suit. Willie attempted to perfect an appeal to challenge the trial court's dismissal of the TMFPA claim. The State argues, however, that this Court lacks jurisdiction because Willie's notice of appeal was untimely. We agree, and, accordingly, we dismiss the case for want of jurisdiction.

Background

On March 14, 2016, Willie filed suit against an unrelated dental office pursuant to the TMFPA. On June 17, 2016, the State intervened and moved to dismiss the lawsuit. The State gave Willie notice of its motion to dismiss, and the trial court held a non-evidentiary hearing on August 12, 2016.

On August 18, 2016, the trial court signed an order dismissing the case without prejudice.

On September 20, 2016, Willie filed his verified "Motion to Determine Date of Notice of Dismissal" pursuant to Texas Rule of Civil Procedure 306a(5),

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[1] *See* TEX. HUM. RES. CODE ANN. §§ 36.104 (West 2013) (providing that, within enumerated deadlines, State must either proceed with action or notify court that it declines to take over action); *id.* § 36.107(a) (setting out rights of parties if State continues action, and providing that "the state has primary responsibility for prosecuting the action and is not bound by an act of the person bringing the action"); *id.* § 36.107(b) ("The state may dismiss the action notwithstanding the objections of the person bringing the action if: (1) the attorney general notifies the person that the state has filed a motion to dismiss; and (2) the court provides the person with an opportunity for a hearing on the motion.").

claiming that he did not receive notice of the trial court's judgment until September 19, 2016.

On October 11, 2016, Willie requested findings of fact and conclusions of law "in accordance with TEX. R. CIV. P. 297 and TEX. HUM. RES. CODE § 36.102(e)." On that same day, Willie also requested a ruling on his motion to determine the date he received notice of the dismissal order. The State responded to Willie's request for findings of fact and conclusions of law, arguing that it was untimely regardless of whether the trial court ultimately granted Willie's Rule 306a(5) motion and that the request was inappropriate because the trial court dismissed the case based on the pleadings and without holding an evidentiary hearing.

On October 19, 2016, Willie filed a notice of appeal to this Court. On October 24, 2016, Willie filed a reply in the trial court stating that "the issue concerning the requested Findings of Fact and Conclusions of Law is legally moot and jurisdiction lies with the First Court of Appeals."

Jurisdiction

As a preliminary matter, the State argues that this Court lacks jurisdiction over Willie's appeal. The State argues that (1) Willie's notice of appeal was untimely, (2) Willie did not secure a ruling on his Rule 306a(5) motion, and

(3) Willie's request for findings of fact and conclusions of law was untimely, improper, and did not extend the time to file the notice of appeal.

Absent a timely filed notice of appeal from a final judgment or recognized interlocutory order, we do not have jurisdiction over an appeal. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Generally, "a notice of appeal must be filed within thirty days after the judgment is signed." TEX. R. APP. P. 26.1(a). The time to file a notice of appeal is extended to ninety days after the signing of the judgment if any party files a timely motion for new trial, motion to modify the judgment, motion to reinstate, or a request for findings of fact and conclusions of law that is either required by the Rules of Civil Procedure or properly considerable by the appellate court. TEX. R. APP. P. 26.1(a)(1–4).

Here, the trial court signed the dismissal order on August 18, 2016. Willie filed his notice of appeal on October 19, 2016, sixty-two days later—well past the thirty-day deadline provided for by Rule of Appellate Procedure 26.1. *See also* TEX. R. APP. P. 26.3 (providing appellate court may extend time to file notice of appeal if, within fifteen days after deadline for filing notice of appeal, party files notice of appeal and motion to extend time); *Verburgt v. Dorner*, 959 S.W.2d 615, 617–18 (Tex. 1997) (construing predecessor rule and holding that motion to extend time is implied when appellant, acting in good faith, filed notice of appeal beyond

time allowed by Rule 26.1 but within fifteen-day grace period provided by Rule 26.3).

Although Willie filed a request for findings of fact and conclusions of law, he did so on October 11, 2016, more than twenty days after the trial court signed the dismissal order. Thus, his untimely request for findings of fact and conclusions of law could not serve to extend the time for filing a notice of appeal. *See* TEX. R. CIV. P. 296 (providing that, "[i]n any case tried in district or county court without a jury," party may request written findings of fact and conclusions of law "within twenty days after judgment is signed"); TEX. R. APP. P. 26.1(a)(4) (providing that "notice of appeal must be filed within 90 days after the judgment is signed if any party *timely* files . . . a request for findings of fact or conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court.") (emphasis added); *see also IKB Indus. (Nig.) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 443 (Tex. 1997) ("A request for findings of fact and conclusions of law does not extend the time for perfecting appeal of a judgment rendered as a matter of law.").

Accordingly, we conclude that Willie's notice of appeal was untimely.

Willie argues that his counsel filed a verified motion pursuant to Rule 306a and averred that she never received notice from the Harris County District Clerk that the dismissal order had been signed. Willie argues, "As a result of not being

given official notice that the Dismissal Order had been signed, the timetables and deadlines contained in TEX. R. CIV. P. 306a(4) and 329b are deemed to begin on September 19, 2016, the date [Willie's] counsel received actual notice of the signing of the Dismissal Order."

Texas Rule of Civil Procedure 306a(3) requires, "When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties . . . advising that the judgment or order was signed." TEX. R. CIV. P. 306a(3). The rule further states that "[f]ailure to comply with the provisions of this rule shall not affect the periods [running from the date of the signing of the judgment,] except as provided in paragraph (4)." *Id.*

Rule of Civil Procedure 306a(4) provides that when more than twenty days have passed between the date that the trial court signs the judgment or appealable order and the date that a party receives notice or acquires actual knowledge of the signing, the period for filing a notice of appeal will begin on the earlier of the date the party received notice or acquired actual knowledge of the signing, and in no event will the period begin more than ninety days after the judgment was signed. TEX. R. CIV. P. 306a(4); TEX. R. APP. P. 4.2(a)(1); *see Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 176 (Tex. App.—Dallas 2013, no pet.) (citing TEX. R. CIV. P. 306a and *John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 740 (Tex. 2001)). To benefit from this extended time period, Willie must have proved, in the

trial court on sworn motion and notice, the date on which he first received notice or acquired actual knowledge of the August 18, 2016 order—a date that must be more than twenty days after the date the order was signed. *See* TEX. R. CIV. P. 306a(5); TEX. R. APP. P. 4.2(a)(1),(b). Furthermore, the trial court must have signed a written order making a finding of the date when Willie first received notice or acquired actual knowledge that the order was signed. *See* TEX. R. APP. P. 4.2(c); *Moore Landrey, L.L.P. v. Hirsch & Westheimer, P.C.*, 126 S.W.3d 536, 540 (Tex. App.–Houston [1st Dist.] 2003, no pet.).

The clerk's record filed in this Court does not include the trial court's order and finding required by Texas Rule of Appellate Procedure 4.2(c). Without that order and finding, the period for filing a notice of appeal of the August 18, 2016 judgment began on the date it was signed. *See Nedd–Johnson v. Wells Fargo Bank, N.A.*, 338 S.W.3d 612, 613 (Tex. App.—Dallas 2010, no pet); *see also Johnson v. Linebarger Goggan Blair & Sampson, LLP*, No. 01–15–00950–CV, 2017 WL 1173886, at *3 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet. h.) (mem. op.). Because Willie did not follow the procedures required by Texas Rule of Civil Procedure 306a and Texas Rule of Appellate Procedure 4.2 to gain additional time to perfect his appeal, we lack jurisdiction over his attempted appeal. *See Mem'l Hosp. v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987) (per curiam) (holding that

requirements of rule 306a(5) are jurisdictional); *Grondona v. Sutton*, 991 S.W.2d 90, 92 (Tex. App.—Austin 1998, pet. denied) (holding same).

Conclusion

We dismiss Willie's appeal for want of jurisdiction.

Evelyn V. Keyes
Justice

Panel consists of Chief Justice Radack and Justices Keyes and Massengale.