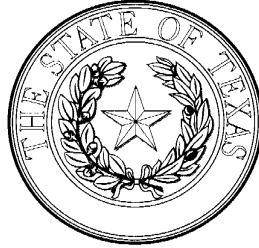


Opinion issued January 9, 2024



In The
Court of Appeals
For The
First District of Texas

NO. 01-22-00665-CV

JULIO PENA LABALLE, Appellant
V.
DAMIEN LAROY CRADDOCK, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2021-28449

MEMORANDUM OPINION

In this restricted appeal, Julio Pena Laballe attempts to appeal from the trial court's order denying his motion to reinstate his lawsuit after it was dismissed for want of prosecution. But the trial court's order denying Laballe's motion to reinstate is not an appealable order. Laballe could have challenged that order as part of an

appeal from the trial court’s order dismissing his suit for want of prosecution, which is an appealable order. But he did not do so by the six-month deadline that applies to a restricted appeal. Thus, we dismiss this restricted appeal for lack of jurisdiction.

BACKGROUND

The trial court dismissed Laballe’s suit for want of prosecution on October 4, 2021. One hundred and thirty days later, on February 11, 2022, Laballe filed a motion to reinstate his suit, explaining that his lawyer did not receive notice of the dismissal and learned of it on the same day that he sought reinstatement. Just over a month later, on March 14, 2022, the trial court denied Laballe’s motion. Almost six months later, on September 12, 2022, Laballe filed a notice of restricted appeal.

DISCUSSION

A party who did not participate in the hearing that resulted in an adverse judgment and who did not file a timely post-judgment motion, request for findings of fact and conclusions of law, or notice of appeal by the ordinary appellate deadline may file a restricted appeal. TEX. R. APP. P. 30. In a restricted appeal, the appellant must file his notice of appeal “within six months after the judgment or order is signed.” TEX. R. APP. P. 26.1(c), 30. This deadline is jurisdictional. *Ealy v. EVC Engage*, No. 01-21-00095-CV, 2022 WL 17835067, at *2 (Tex. App.—Houston [1st Dist.] Dec. 22, 2022, pet. denied). Without jurisdiction, we must dismiss an appeal.

Laballe contends his notice of restricted appeal is timely because he filed it within six months of the date when the trial court denied his motion to reinstate. But a trial court's ruling on a motion to reinstate is not a final, appealable order, and appellate deadlines are not calculated based on a trial court's ruling on a motion to reinstate. *Brown Mech. Servs. v. Mountbatten Surety Co.*, 377 S.W.3d 40, 43 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Weik v. Second Baptist Church of Houston*, 988 S.W.2d 437, 438 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Instead, the deadline for filing a notice of appeal runs from the trial court's dismissal order. *Brown Mech. Servs.*, 377 S.W.3d at 43; *Weik*, 988 S.W.2d at 438. And any challenge to a ruling on a motion to reinstate must be asserted as part of a timely appeal from the trial court's order dismissing the suit for want of prosecution.

Laballe filed his notice of restricted appeal just over eleven months after the trial court's dismissal order. Thus, he did not meet the six-month deadline for filing a notice of restricted appeal, and without a timely notice we lack jurisdiction.

Moreover, even if Laballe had timely filed a notice of restricted appeal, the averments he makes in his motion to reinstate disentitle him to the relief he seeks because the averments he makes show that his motion to reinstate was untimely.

A party ordinarily must file a motion to reinstate within thirty days of the date when the trial court signed the dismissal order. TEX. R. CIV. P. 165a(3). If the party avers lack of notice, as Laballe does, the deadline may differ. If the party neither

received notice nor acquired actual knowledge of the dismissal order within twenty days of signing, then the deadline for filing a motion to reinstate runs from “the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or other appealable order was signed.” TEX. R. CIV. P. 306a(4). Hence, when a party avers lack of notice in a motion to reinstate, he must aver that he received notice or acquired knowledge at the very latest ninety days after the signing of the dismissal order. *Id.*; *Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam). That is, a party cannot seek reinstatement based on notice received or actual knowledge acquired more than ninety days after the trial court signed the order of dismissal. *Est. of Howley v. Haberman*, 878 S.W.2d 139, 140 (Tex. 1994) (per curiam); *see also Winnow v. Tex. Workforce Comm’n Appeals*, No. 01-18-00029-CV, 2018 WL 1914865, at *1 (Tex. App.—Houston [1st Dist.] Apr. 24, 2018, no pet.) (per curiam) (mem. op.) (party cannot invoke Rule 306a(4) if he receives notice or acquires knowledge after ninety days).

Laballe avers that he first learned of the trial court’s October 4, 2021 dismissal order on February 11, 2022, or one hundred and thirty days after the trial court signed it. Thus, Laballe’s motion to reinstate, filed on February 11, 2022, was untimely. Consequently, the trial court lacked plenary power to even consider Laballe’s motion to reinstate. *See* TEX. R. CIV. P. 329b(d) (trial court retains plenary power for thirty

days after signing of judgment in absence of timely post-judgment motions); *Est. of Howley*, 878 S.W.2d at 140 (trial court lacked plenary power to reinstate suit because party had not received notice or acquired knowledge within ninety-day period).

As the Supreme Court noted in *Estate of Howley*, a party's only possible recourse under these circumstances is to file a bill of review, which is an independent equitable action to set aside a judgment that is no longer subject to challenge by post-judgment motion or appeal. 878 S.W.2d at 140; *see also Davis v. Smith*, 227 S.W.3d 299, 302 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (explaining bill of review).

CONCLUSION

We dismiss this appeal for lack of jurisdiction.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Guerra.