Petition for Writ of Mandamus Conditionally Granted and Memorandum Opinion filed July 29, 2010.

In The

Fourteenth Court of Appeals

NO. 14-10-00228-CV

IN RE SHAHIN JAMEA, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

MEMORANDUM OPINION

In this original proceeding we must determine whether certain orders the trial court signed are void. Relator, Shahin Jamea has filed a petition for writ of mandamus asking this court to compel the Honorable Randy Wilson, presiding judge of the 157th District Court of Harris County, to set aside as void all orders signed in the trial court after November 21, 2009, when the relator claims the trial court's plenary power expired. *See* Tex. Gov't Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. We conditionally grant the petition.

Background

Jamea, the plaintiff in the trial court, brought suit against real parties in interest, Trinity Universal Insurance Company ("Trinity Universal"), Security National Insurance Company, and Trinity Universal Insurance Company of Kansas, Inc. (hereinafter collectively, "Trinity"), defendants below, seeking a declaratory judgment. According to Jamea's live pleading, Trinity forwarded correspondence to him that "[b]y the terms of the indemnification agreement you signed as a condition for our issuance of . . . [a] bond, we may pursue personally through the court system for reimbursement of all amounts. . . ." Jamea claimed that he never signed an indemnification agreement, and that the signature on the agreement was not his. Jamea sought a declaratory judgment that the signature on the indemnification agreement was not his, he was not a party to the agreement, and he was not liable for any amounts under the agreement.

Trinity Universal filed a counterclaim for breach of contract, alleging that the lawsuit arose out of a "beverages and gross receipt" surety bond issued by Trinity Universal to Isis Partners, LP, as principal and Jamea as guarantor. Trinity Universal claimed that Jamea signed the application for the bond and the indemnity agreement. Trinity Universal then issued the "beverages and gross receipts" surety bond and the Texas Comptroller of Public Accounts subsequently made a demand on Trinity Universal to pay $30,000 in unpaid taxes owed by Isis. Trinity Universal was obligated under the terms of the bond to pay, and paid, the $30,000 unpaid balance. Trinity Universal alleged that Jamea was required, per the agreement, to repay the bond, but failed to do so. Under the indemnity agreement Trinity Universal claimed was signed by Jamea as a condition for the issuance of the bond, Trinity Universal sought to recover the funds it paid to the State.

Jamea filed his no-evidence motion for summary judgment on Trinity Universal's breach-of-contract claim on August 19, 2009. The no-evidence summary judgment motion was set for submission on September 14, 2009, at which time the trial court granted Jamea's no-evidence motion for summary judgment as follows:

> On September __, 2009, the Court considered *Counter Defendant Shahin Jamea's No-Evidence Motion for Summary Judgment*. The Court, after considering Counter-Plaintiff's lack of response, finds that the motion should, in all things, be GRANTED.
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> The Court ORDERS that Counter-Plaintiff take nothing on its breach of contract claim against Counter-Defendant Shahin Jamea.

On October 16, 2009, relator filed the following notice of nonsuit:

> Plaintiff Shahin Jamea hereby gives notice to this Court and to all parties to this suit that, in accordance with Rule 162, he is taking a nonsuit without prejudice against all claims against all Defendants.

The trial court signed an order of nonsuit on October 22, 2009.

On January 11, 2010, Trinity filed a motion for resubmission or rehearing on Jamea's no-evidence motion for summary judgment. In its motion, Trinity argued that its response to the no-evidence motion for summary judgment was mailed on September 8, 2009, and therefore, was filed timely, but was not file-marked by the court until September 15, 2009.[1] Trinity requested that the trial court rehear Jamea's no-evidence motion for summary judgment, consider Trinity's response to the motion, and deny the motion. Trinity asserted, because the case was still active in the court's computer system and there was no final and appealable judgment in the court's record, the court still had plenary power to hear the matter. Trinity's motion for rehearing was not sworn and did

[1] Trinity asked the trial court to take judicial notice that Labor Day was September 7, 2009. Because the seventh day prior to the hearing was a holiday, Trinity asserted its response was timely filed when it was mailed on September 8, 2009. *See* Tex. R. Civ. P. 4.

not make reference to Texas Rule of Civil Procedure 306a, entitled "Periods to Run From Signing of Judgment".

In a phone conference with the parties' counsel on January 12, 2010, the trial court requested briefing regarding whether the court still had plenary power. Trinity filed its unsworn written response in a letter to the trial court on January 19, 2010. Trinity argued that, pursuant to Rule 306a, the trial court had jurisdiction to grant relief. The card mailed by the clerk regarding the trial court's October 22, 2009 order states, "BE ADVISED ON 10-22-10 THE FOLLOWING ACTIVITY OCCURRED ORDER OF PARTIAL NONSUIT SIGNED AS TO THE FOLLOWING PARTIES-JAMEA, SHAHIN." Trinity argued that the "partial nonsuit" language on the postcard did not comply with the notice requirement of Rule 306a(3) because notice is required for a "final judgment or other appealable order." *See* Tex. R. Civ. P. 306a(3) ("When the final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys of record by first-class mail advising that the judgment or order was signed."). Trinity did not argue that the postcard was required to state that the judgment was final and appealable, but that a "partial nonsuit" would indicate some claims and/or parties still existed, and would lead to the conclusion that there was no final or appealable judgment. Therefore, Trinity argued, it never had notice of a final or appealable judgment. Trinity stated that on January 5, 2010, it obtained actual knowledge, that there was a signed order on January 5, 2010, when its counsel contacted Jamea's attorney for a certificate of conference on a motion for continuance of the January 18, 2010 trial date. Therefore, according to Trinity, January 20, 2010 was the ninety-day deadline to timely file a motion pursuant to Rule 306a.

In an order dated January 20, 2010, the trial court granted Trinity's motion for resubmission or rehearing, vacated the September 14, 2009 order granting the no-evidence motion for summary judgment, ordered that the no-evidence motion for

summary judgment would be reconsidered in light of Trinity's timely-filed response, and set the no-evidence motion for summary judgment for hearing/submission on February 19, 2010.

On February 12, 2010, Jamea filed a motion to dismiss for lack of jurisdiction, arguing that, while the order granting the no-evidence motion for summary judgment was interlocutory when it was signed, it became final when Jamea nonsuited all of his claims against all parties, and the trial court's plenary power expired thirty days after it granted the motion because no timely post-judgment motion extending the court's plenary power had been filed. Jamea's motion to dismiss was also set for submission on February 19, 2010. On that date, the trial court denied Jamea's no-evidence motion for summary judgment and motion to dismiss. Trinity also nonsuited its suit against Jamea.

On March 12, 2010, Jamea filed a petition for writ of mandamus initiating this original proceeding and asserting that all orders the trial court signed after November 21, 2009, are void because the trial court's plenary power had expired. Jamea asks this court to compel the trial court to vacate as void its (1) January 20, 2010 order granting Trinity's motion for resubmission or rehearing and vacating the trial court's September 14, 2009 summary judgment order, and (2) February 19, 2010 order denying Jamea's no-evidence motion for summary judgment. Jamea also requests that this court compel the trial court to withdraw its order denying his motion to dismiss and grant the same.

Standard of Review

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court abused its discretion and there is no adequate remedy by appeal. *In re Gulf Exploration, LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law, or if it clearly fails to correctly analyze or

apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). When an order is void, the relator need not show that he does not have an adequate appellate remedy, and mandamus relief is appropriate. *In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam).

Analysis

Parties have an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial. Tex. R. Civ. P. 162; *Villafani v. Trejo*, 251 S.W.3d 466, 468–69 (Tex. 2008). However, the right to nonsuit

> shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal under this rule shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court. . . .

Tex. R. Civ. P. 162. A claimant for affirmative relief must allege a cause of action, independent of the plaintiff's claim, on which the claimant could recover compensation or relief, even if the plaintiff could recover compensation or relief. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990) (orig. proceeding). Though the date on which the trial court signs an order dismissing the suit is the "starting point for determining when a trial court's plenary power expires," a nonsuit is effective when it is filed. *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (orig. proceeding) (per curiam).

Although a nonsuit may have the effect of vitiating the trial court's earlier interlocutory orders, a nonsuit does not vitiate the trial court's previously-made decisions on the merits, such as a summary judgment or even a partial summary judgment, which becomes final upon disposition of the other issues in the case. *Hyundai Motor Co. v.*

Alvarado, 892 S.W.2d 853, 854–55 (Tex. 1995) (per curiam). Once a trial court announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit. *Id.* at 855.

At the time Jamea filed his nonsuit, the trial court had granted his no-evidence motion for summary judgment on Trinity's contract claim—the only claim Trinity had asserted against Jamea. Therefore, no claim was pending against Jamea at the time he filed his nonsuit. Jamea's "taking a nonsuit without prejudice against all claims against all Defendants" was effective the moment it was filed.

If a court has dismissed all of the claims in a case but one, an order determining the last claim is final. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). When a judgment is interlocutory because unadjudicated parties or claims remain before the court, and when a litigant moves to have such unadjudicated claims or parties removed by severance, dismissal, or nonsuit, the appellate timetable runs from the signing of a judgment or order disposing of those claims or parties. *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995) (per curiam). It is the order granting the nonsuit, not the filing of the nonsuit, that triggers the appellate deadlines. *Harris County Appraisal Dist. v. Wittig*, 881 S.W.2d 193, 194 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding). "The trial court loses its plenary power 30 days after it signs the order granting the non-suit (if no motion for new trial is filed), or 75 days after it signs the order (if a motion for new trial is filed)." *Id.*

The trial court signed the order granting Jamea's nonsuit on October 22, 2009, making final the interlocutory summary judgment on Trinity's breach-of-contract claim.[2]

[2] *See McGrew v. Heard*, 779 S.W.2d 455, 458 (Tex. App.—Houston [1st Dist.] 1989, orig. proceeding) (holding interlocutory summary judgment became final on date order granting nonsuit was signed); *Roquemore v. Kellogg*, 656 S.W.2d 646, 649 (Tex. App.—Dallas 1983, no writ) (holding summary judgment became final and appealable when trial court signed order granting motion for

The appellate timetables started to run upon the signing of the order of nonsuit. Therefore, in the absence of a timely-filed motion for new trial, the trial court would lose its plenary power after November 21, 2009.

When a final judgment or other appealable order is signed, the clerk of the court shall immediately give notice to the parties or their attorneys by first-class mail advising that the judgment or order was signed. Tex. R. Civ. P. 306a(3). If within twenty days after the judgment or other appealable order is signed, a party adversely affected by it or his attorney has neither received the notice required by paragraph (3) of Rule 306a nor acquired actual knowledge of the order, then with respect to that party, time periods for filing post-judgment motions and the notice of appeal shall begin on the date the party received such notice or acquired actual notice of the signing, whichever occurred first, but in no event shall such periods begin more than ninety days after the original judgment or appealable order was signed. Tex. R. Civ. P. 306a(4). In order to take advantage of the extended time periods provided in paragraph (4) of Rule 306a, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date upon which the party or his attorney first either received notice of the judgment or acquired actual knowledge of its signing, and that this date was more than twenty days after the date the judgment was signed. Tex. R. Civ. P. 306a(5).

Rule 306a places the burden to establish its applicability on the movant. *City of Laredo v. Schuble*, 943 S.W.2d 124, 126 (Tex. App.—San Antonio 1997, orig. proceeding); *In the Interest of Simpson*, 932 S.W.2d 674, 677 (Tex. App.—Amarillo 1996, no writ). Compliance with the provisions of Rule 306a is a jurisdictional

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nonsuit); *cf. McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 707 (1961) (orig. proceeding) (holding interlocutory default judgment became final when plaintiff nonsuited other defendants and time to appeal started to run from date of order of dismissal); *Tom Benson Co. v. Ervine*, 574 S.W.2d 221, 221 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.) (holding interlocutory default judgment became final when trial court granted plaintiff's motion for nonsuit against co-defendant).

prerequisite. *Mem'l Hosp. of Galveston County v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987) (per curiam); *In the Interest of Simpson*, 932 S.W.2d at 677; *Carrera v. Marsh*, 847 S.W.2d 337, 342 (Tex. App.—El Paso 1993, orig. proceeding). Rule 306a(5), entitled "Motion, notice and hearing," requires that the party alleging late notice of a judgment file a sworn motion with the trial court establishing the date the party or its counsel first learned of the judgment. *Nathan A. Watson Co. v. Employers Mut. Cas. Co.*, 218 S.W.3d 797, 800 (Tex. App.—Fort Worth 2007, no pet.); *Vineyard Bay Dev. Co. v. Vineyard on Lake Travis*, 864 S.W.2d 170, 171 (Tex. App.—Austin 1993, writ denied). Unless a party establishes, in the manner prescribed by Rule 306a(5), on sworn motion, that neither he nor his attorney had notice or knowledge of the judgment within twenty days of the judgment date, the general rules for expiration of the trial court's plenary power apply. *Carrera*, 847 S.W.2d at 342.

The purpose of a sworn motion is to establish a prima facie case of such lack of notice, thereby reinvoking the jurisdiction of the trial court for the limited purpose of conducting a hearing to determine the date on which the party or its counsel first received notice or acquired knowledge of the judgment. *Nathan A. Watson Co.*, 218 S.W.3d at 800; *In the Interest of Simpson*, 932 S.W.2d at 677; *Montalvo v. Rio Nat'l Bank*, 885 S.W.2d 235, 237 (Tex. App.—Corpus Christi 1994, no writ), *disapproved on other grounds by John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738 (Tex. 2001) (per curiam); *Carrera*, 847 S.W.2d at 342. Absent a prima facie showing of this lack of notice, presented on sworn motion filed pursuant to Rule 306a(5), the trial court's plenary power is not reinvoked and the trial court is without jurisdiction to conduct a hearing pursuant to Rule 306a(5). *In the Interest of Simpson*, 932 S.W.2d at 678; *Montalvo*, 885 S.W.2d at 237; *Carrera*, 847 S.W.2d at 342; *but see Thermex Energy Corp. v. Rantec Corp.*, 766 S.W.2d 402 (Tex. App.—Dallas 1989, writ denied).

Jamea argues that Trinity did not file a sworn motion in compliance with Rule 306a(5) and, therefore, the trial court's jurisdiction was never reinvoked. On January 11, 2010, Trinity filed a motion for resubmission or rehearing on the no-evidence summary judgment. Trinity did not make reference to Rule 306a in that motion, but instead argued that the trial court still had plenary power to hear the matter because there was no final and appealable judgment. In response to the trial court's January 12, 2010 request, Trinity filed an unsworn letter addressing the court's plenary power. Trinity's counsel asserted that he obtained actual knowledge on January 5, 2010, that an order granting the nonsuit had been signed and, therefore, the ninety-day deadline to file a motion within the court's plenary power was January 20, 2010.

Trinity asserts that, while its January 19, 2010 letter was not a formal sworn motion about "the date on which the party or his attorney first either received notice of the judgment or acquired actual knowledge of the signing," it substantially complied with Rule 306a because the letter was signed by the attorney of record, who is an officer of the court, and the letter identified the date on which Trinity's counsel received notice of the order granting Jamea's nonsuit. The January 19, 2010 letter from Trinity's counsel to the trial court states, in relevant part:

> The two requirements of section [306a](4) are that *counsel* neither received notice in compliance with Rule 306a(3), nor did *counsel* have actual knowledge of the order. *Counsel* did not receive notice that complied with section (3) of Rule 306 because [the clerk of the court] erroneously did not give *counsel* notice that the order was final or appealable, nor did *counsel* have actual knowledge that an Order was signed. . . . *Counsel* obtained actual knowledge that an Order was signed on or about January 5, 2010, when the undersigned contacted Plaintiff's attorney, David Fettner, for a certificate of conference on a Motion for Continuance of the January 18, 2010 trial date.[3]

[3] Emphasis added.

Contrary to Trinity's counsel's assertions regarding the requirements of Rule 306a(4), the rule specifies that the party must prove "the date on which the *party or his attorney* first either received a notice of the judgment or acquired actual knowledge of the signing." Tex. R. Civ. P. 306a(4) (emphasis added). Notice and actual knowledge must be negated by both the party and the party's counsel in order to make a prima facie showing of lack of timely notice. *Schuble*, 943 S.W.2d at 126. The January 19, 2010 letter addresses only notice and actual knowledge as to Trinity's counsel. The letter does not negate the possibility that Trinity received notice or acquired actual knowledge within twenty days after the trial court signed the order of nonsuit. Therefore, even if Trinity's counsel's signing the "Rule 306a letter" were sufficient to constitute a sworn motion—an issue we do not reach—the letter is not sufficient to make the prima facie showing required by Rule 306a(5).[4]

Trinity relies on *Thermex Energy* in support of its argument that it substantially complied with Rule 306a. In *Thermex Energy*, the Dallas court of appeals considered whether an unverified motion under Rule 306a(5) served to extend the trial court's plenary power. 766 S.W.2d at 403. Though the Rule 306a motion was not sworn, the opposing party did not object, and trial court conducted a hearing on the motion. The trial court conducted a Rule 306a hearing within thirty days of the date on which Thermex or its attorney first had notice or knowledge of the judgment. Thermex presented sworn testimony satisfying its burden of proof under Rule 306a(5). In this context, the *Thermex Energy* court held that Thermex's failure to verify its Rule 306a

[4] *See Schuble*, 943 S.W.2d at 126 (holding that affidavit only established when member of plaintiffs' legal team acquired knowledge and was not sufficient to show that plaintiffs had not received written notice or acquired actual knowledge of the entry of judgment in timely fashion); *In the Interest of Simpson*, 932 S.W.2d at 678 (holding Rule306a motion, which only stated party's past and present attorney had no notice or knowledge of signing of judgment until his present attorney acquired actual knowledge and did not refer to whether party himself had notice or knowledge of judgment within twenty-day period, did not negate possibility that party had received notice or knowledge within twenty-day period).

motion did not prevent the trial court from finding in its Rule 306a order that its plenary power had been extended. *See id*. at 405–06.

Even if this court were to follow the *Thermax Energy* case, it is not on point. Trinity filed its January 19, 2010 unsworn letter addressing the trial court's plenary power in response to the trial court's request for briefing on the issue during a January 12, 2010 telephone conference. The trial court granted the motion for rehearing on January 25, 2010, without a hearing. Trinity does not assert that an evidentiary hearing was held on any Rule 306a motion or that Trinity provided any sworn testimony in support of its unsworn "306a letter." Thus, even if the trial court could have conducted a Rule 306a hearing without Trinity first having made a prima case in a sworn motion, no such hearing was held, and Trinity did not provide sworn testimony of "the date on which [Trinity or its] attorney first either received notice of the judgment or acquired actual knowledge of the signing."

We conclude that Trinity did not establish the date on which it or its attorney first either received notice of the judgment or acquired actual knowledge of the signing of the judgment pursuant to Rule 306a. Therefore, Trinity did not reinvoke the trial court's jurisdiction after jurisdiction expired on November 21, 2009, rendering void the trial court's January 20, 2010 order jurisdiction granting Trinity's motion for rehearing and vacating the September 14, 2010 summary judgment order and the February 19, 2010 order denying Jamea's no-evidence motion for summary judgment.

Trinity argues that the relief sought by Jamea in this original proceeding is moot in light of Jamea's nonsuit of his claims against Trinity and Trinity's February 19, 2010 nonsuit of its claims against Jamea.[5] In support of this position, Trinity relies on

[5] Trinity's notice of nonsuit states:

University of Texas Medical Branch at Galveston v. Estate of Blackmon ex rel. Shultz, 195 S.W.3d 98 (Tex. 2006) (per curiam). In *Blackmon*, The University of Texas Medical Branch ("UTMB") appealed the trial court's denial of its plea to the jurisdiction. *Id.* at 100. The court of appeals initially reversed the trial court's order and rendered judgment for UTMB, but withdrew the judgment upon granting the plaintiff's motion for rehearing. *Id.* Three weeks later, the plaintiff filed a nonsuit and moved to dismiss the appeal for want of jurisdiction. *Id.* The court of appeals denied the plaintiff's motion and issued a new opinion affirming the denial of UTMB's plea to the jurisdiction. *Id.* The Supreme Court of Texas agreed with the plaintiff's argument that there was no longer a case or controversy, and that her nonsuit deprived the court of appeals of jurisdiction over UTMB's appeal. *Id.* The *Blackmon* court explained:

> Finally, UTMB argues that a plaintiff cannot nonsuit a claim once a court has rendered a judgment on the merits. . . . In this case, however, the court of appeals withdrew its judgment for UTMB before the nonsuit was filed. As a result, the nonsuit vitiated only the trial court's interlocutory order denying UTMB's plea to the jurisdiction. That ruling favored Shultz and, consequently, its nullification did not prejudice UTMB.

Id. at 101 (citations omitted).

Trinity asserts that when the trial court granted its motion for rehearing and vacated the order granting Jamea's no-evidence motion for summary judgment, there was no judgment on the merits of its breach-of-contract claim. According to Trinity, because

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> This Notice of Nonsuit Without Prejudice is brought by Defendants/Counter-Plaintiffs Trinity Universal Insurance Company, Security National Insurance Company and Trinity Universal Insurance Company of Kansas, Inc. (Trinity Universal). In support, Trinity Universal would show:
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> At this time, they no longer desire to prosecute this suit against Plaintiff/Counter-Defendant Shahin Jamea and request this matter be dismissed without prejudice, with court costs taxed against the party incurring the same.

the denial of the no-evidence motion for summary judgment favored Trinity, its nullification did not prejudice Jamea. When Trinity then filed its nonsuit, there were no claims pending against it because Jamea had nonsuited "all claims against all Defendants." Therefore, Trinity argues, upon the filing of its nonsuit, Jamea's motion to dismiss for lack of jurisdiction and the court's ruling denying the motion became moot.

Contrary to Trinity's contention, the relief Jamea seeks in this original proceeding is not moot. As addressed above, Trinity's breach-of-contract claim had been adjudicated on the merits, the summary judgment became final upon the signing of the order of nonsuit on Jamea's claim, no timely motion was filed extending the trial court's plenary power beyond thirty days after judgment, and Trinity did not reinvoke the trial court's jurisdiction pursuant to Rule 306a. Because the trial court's plenary power expired, the court's January 20, 2010 order granting the motion for rehearing and vacating the September 14, 2009 summary judgment order and the February 19, 2010 order denying Jamea's no-evidence motion for summary judgment are void. Therefore, Trinity's breach-of-contract claim was not pending when it filed its nonsuit.

Conclusion

In the absence of a proper Rule 306a motion, the trial court's plenary power was not extended and it expired on November 21, 2010. Therefore, the trial court did not have plenary power to set aside the September 14, 2009 order granting Jamea's no-evidence motion for summary judgment or to deny the no-evidence motion for summary judgment. These orders constitute an abuse of discretion. Because the orders are void, Jamea does not have to show lack of an adequate remedy by appeal. *See In re Sw. Bell Tel. Co.*, 35 S.W.3d at 605.

Accordingly, we conditionally grant Jamea's petition for writ of mandamus and direct the trial court to set aside its (1) January 20, 2010 order granting Trinity's motion

for resubmission or hearing and vacating the September 14, 2009 order granting Jamea's no-evidence motion for summary judgment, and (2) February 19, 2010 order denying Jamea's no-evidence motion for summary judgment. We further order the trial court to vacate its February 19, 2010 order denying Jamea's motion to dismiss, and to grant the motion to dismiss. The writ will issue only in the unlikely event the trial court fails to act in accordance with this opinion.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.