In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00214-CV

MICHAEL DOUGLAS TUBBS, Appellant

V.

PLAINS EXPLORATION AND PRODUCTION COMPANY, Appellee

On Appeal from the 88th District Court
Tyler County, Texas
Trial Cause No. 21090

MEMORANDUM OPINION

In this restricted appeal, Michael Douglas Tubbs appeals from the trial court's order striking his pleadings and dismissing his case for failure to respond to discovery. Tubbs sued Plains Exploration and Production Company for negligence. After the trial court dismissed his suit, Tubbs filed a motion to reinstate. The trial court's order denying reinstatement states the court did not have jurisdiction to consider the motion.

In a restricted appeal, the appealing party must establish, among other things, that error is apparent on the face of the record. *Ins. Co. of State of Pa. v. Lejeune*, 297 S.W.3d 254, 255 (Tex. 2009); *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 847-48 (Tex.

2004). An appellate court does not consider extrinsic evidence in a restricted appeal; the review is limited to the face of the record. *Alexander*, 134 S.W.3d at 848 (holding that "an affidavit that was executed after the case had reached this Court . . . constitutes extrinsic evidence that cannot be considered in a restricted appeal."). "[E]rror that is merely inferred will not suffice." *Ginn v. Forrester*, 282 S.W.3d 430, 431 (Tex. 2009) (per curiam). If extrinsic evidence is necessary to challenge the judgment, a timely motion for new trial or bill of review filed in the trial court is the appropriate remedy. *Id.* at 432-33.

Tubbs asserts that he did not receive notice that his case would be dismissed or notice that the trial court signed an order of dismissal. In *Ginn v. Forrester*, the Court explained as follows:

> The rules governing dismissals for want of prosecution direct the district clerk to mail notice containing the date and place of hearing at which the court intends to dismiss the case, TEX. R. CIV. P. 165a(1), and a similar notice of the signing of the dismissal order, see TEX. R. CIV. P. 306a(3). But the rules do not impose upon the clerk an affirmative duty to record the mailing of the required notices; accordingly, the absence of proof in the record that notice was provided does not establish error on the face of the record.

Id. at 433. The error appellant asserts is not apparent on the face of the record. *See Alexander*, 134 S.W.3d at 849 (The failure of the record to affirmatively show that notice of the pre-trial hearing was sent to counsel or that notice of the order dismissing the case was sent to counsel at a particular address is not error on the face of the record.).

More than ninety days passed between the date the trial court dismissed the case and the date Tubbs filed the motion to reinstate. *See* Tex. R. Civ. P. 306a(1), (4). As the Texas Supreme Court explained in *Estate of Howley v. Haberman*, Rule 306a(4) means that a "party who does not have actual knowledge of an order of dismissal within 90 days of the date it is signed cannot move for reinstatement." 878 S.W.2d 139, 140 (Tex. 1994) (orig. proceeding); s*ee also Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam) (Where party received notice on the ninety-first day after dismissal, the trial court no longer had jurisdiction to reinstate the party's case.). In his verified motion to reinstate, Tubbs stated at one point that he received notice of dismissal on March 4, 2010. At another point in his motion, he stated he received a copy of the "Order of Dismissal" on February 23, 2010. Under Rule 306a(4), the ninety day period from the November 19, 2009 order of dismissal had passed. The trial court did not err in concluding it lacked jurisdiction.

Error is not apparent on the face of the record. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on July 27, 2011
Opinion Delivered August 11, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.