IN THE
TENTH COURT OF APPEALS

No. 10-20-00066-CV

JENNIFER KORCZYNSKI,

Appellant

v.

COWBOY UP RANCH FURNITURE, LLC,

Appellee

From the 82nd District Court
Robertson County, Texas
Trial Court No. 18-03-20513-CV

OPINION

Jennifer Korczynski (Jennifer) appeals the grant of summary judgment in favor of Cowboy Up Ranch Furniture, LLC, (the furniture store) on her claim for damages incurred after she fell while on the furniture store's premises. We will dismiss the appeal.

Factual and Procedural Background

In August 2017, Jennifer fell while walking down a stairway inside the furniture store. In March 2018, Jennifer filed suit against the furniture store alleging a dangerous

premises defect caused her to fall and suffer injuries. The furniture store filed traditional and no-evidence motions for summary judgment. On October 30, 2019, the trial court signed an order granting the traditional and no-evidence motions for summary judgment.

On January 16, 2020, Jennifer filed a motion to extend post-judgment deadlines under Rule of Civil Procedure 306a,[1] a motion for new trial, a request for clarification, and a notice of appeal. On February 4, 2020, the trial court denied Jennifer's motion for new trial and her request for clarification. On February 5, 2020, the trial court granted Jennifer's Rule 306a motion to extend post-judgment deadlines, finding that neither Jennifer nor her attorney received a notice of the judgment or acquired actual knowledge of the signing of the judgment until December 17, 2019.

Jurisdiction

The furniture store has filed a motion to dismiss this appeal for want of jurisdiction in which it argues that Jennifer failed to timely file her notice of appeal. We agree.

The time for filing a notice of appeal is jurisdictional in this court, and absent a timely filed notice of appeal or timely filed motion for extension, we must dismiss the appeal. *See* TEX. R. APP. P. 25.1(b), 26.1, 26.3; *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997).

[1] In the substance of the motion, Jennifer requested that the trial court enter an order under both Rule of Civil Procedure 306a and Rule of Appellate Procedure 4.2.

Post-judgment procedural timetables typically run from the date that the judgment is signed. *See* TEX. R. APP. P. 26.1; TEX. R. CIV. P. 306a(1). The relevant version of Rule of Civil Procedure 306a(3) provided that "[w]hen 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." TEX. R. CIV. P. 306a(3) (amended 2022).[2] Rule of Appellate Procedure 26.1 then requires that the notice of appeal be filed within thirty days after the judgment is signed or within ninety days after the judgment is signed if any party timely files a motion for new trial, motion to modify the judgment, or motion to reinstate. TEX. R. APP. P. 26.1(a). Here, Jennifer did not file her notice of appeal within thirty days after the judgment was signed, nor did she timely file a motion for new trial, motion to modify the judgment, or motion to reinstate that would have allowed for the notice of appeal to have been filed within ninety days after the judgment was signed. Furthermore, Jennifer did not timely file a motion for extension of time to file her notice of appeal. *See* TEX. R. APP. P. 26.3 (stating that the appellate court may extend the time to file the notice of appeal if, within fifteen days after the deadline for filing the notice of appeal, the party files the notice of appeal and a motion for extension of time to file the notice of appeal). Rule of Civil Procedure 306a(4) and its parallel appellate rule, Rule of Appellate Procedure 4.2(a),

[2] The current version of the rule, effective May 1, 2022, states: "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 electronically or by first-class mail advising that the judgment or order was signed." TEX. R. CIV. P. 306a(3).

however, provide an exception to the general rule when a party or his attorney has not—within twenty days after the judgment was signed—either received the notice required by Rule 306a(3) or acquired actual knowledge of the signing of the judgment. *See* TEX. R. APP. P. 4.2(a); TEX. R. CIV. P. 306a(4). In such circumstances, the post-judgment procedural timetables run from the date that the party or his attorney either received the notice required by Rule 306a(3) or acquired actual knowledge of the signing of the judgment, whichever occurred first. *See* TEX. R. APP. P. 4.2(a); TEX. R. CIV. P. 306a(4).

Rule of Civil Procedure 306a(5) provides the procedure to modify post-judgment timetables so that they begin on the date that the party or the party's counsel first either received a notice of the judgment or acquired actual knowledge of the signing of the judgment. *See* TEX. R. APP. P. 4.2(b); TEX. R. CIV. P. 306a(5); *see also In re Simpson*, 932 S.W.2d 674, 676 (Tex. App.—Amarillo 1996, no writ). Rule 306a(5) states that the party must "prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed." TEX. R. CIV. P. 306a(5). Compliance with Rule 306a is a jurisdictional prerequisite. *Mem'l Hosp. of Galveston Cnty. v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987) (per curiam).

The sworn motion establishes a *prima facie* case that the party lacked timely notice and invokes the trial court's otherwise-expired jurisdiction for the limited purpose of

holding an evidentiary hearing to determine the date on which the party or his counsel first received notice of the judgment or acquired knowledge of its signing. *See In re Lynd Co.*, 195 S.W.3d 682, 685 (Tex. 2006); *Cont'l Cas. Co. v. Davilla*, 139 S.W.3d 374, 379 (Tex. App.—Fort Worth 2004, pet. denied).

To make a *prima facie* showing that establishes the trial court's jurisdiction for a hearing,

> "a [[R]ule 306a(5) motion] and/or its accompanying affidavits must state, under oath, two specific dates: (1) the specific date the party first either (a) received the clerk's notice of the judgment, or (b) acquired actual knowledge of the judgment; and (2) the specific date the party's attorney first either (a) received the clerk's notice of the judgment, or (b) acquired actual knowledge of the judgment."

Auto. Consultants v. Gen. Motors Corp., No. 05-01-00479-CV, 2002 WL 386856, at *3 (Tex. App.—Dallas Mar. 13, 2002, pet. denied) (not designated for publication) (emphasis omitted) (quoting *Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 619 (Tex. App.—Dallas 1998, pet. denied), *overruled in part on other grounds by John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 741 (Tex. 2001) (per curiam)). The specific dates must be more than twenty days after the judgment was signed. *Id.*

Here, Jennifer filed in the trial court her Rule 306a(5) motion to extend the post-judgment procedural deadlines. The motion had several attached exhibits, including declarations from Jennifer and attorney Carlos Leon. Leon stated in his declaration as follows: Jennifer had retained him and his law firm to represent her in this case, and he had been her attorney of record since the lawsuit was filed. Leon had read the Rule

306a(5) motion, and the facts set forth therein were true and correct. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 132.001(a) (providing that "an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law"). Leon never received notice from the trial court clerk's office via first-class mail that the trial court's October 30, 2019 order granting the furniture store's motions for summary judgment had been signed. Leon had no knowledge whatsoever that the trial court had signed the October 30, 2019 order until December 17, 2019, when a deputy clerk from the trial court clerk's office emailed him a copy of the order. The deputy clerk told Leon's associate, Piero Garcia, that she had emailed the order to Leon on October 30, 2019. Leon then searched his email and found the deputy clerk's October 30, 2019 email in his spam folder. Leon had not noticed, seen, read, or reviewed the deputy clerk's October 30, 2019 email until December 17, 2019.

Jennifer stated in her declaration that she had retained Leon and his law firm to represent her in this case and that Leon had been her attorney of record since the lawsuit was filed. Jennifer further stated that she never received notice from the trial court clerk's office via first-class mail that the trial court's October 30, 2019 order granting the furniture store's motions for summary judgment had been signed. Jennifer stated that until December 17, 2019, she had no knowledge whatsoever that the trial court had signed the October 30, 2019 order.

The trial court thereafter held a hearing on Jennifer's Rule 306a(5) motion, during which there was general argument of the facts and the law in support of each party's position, but Jennifer's counsel offered no evidence, either by way of testimony or exhibits. Jennifer's attorneys asserted, the furniture store's attorney acknowledged, and the trial court found that the trial court clerk failed to send notice of the signing of the October 30, 2019 order via first-class mail.

Counsel for the furniture store argued, however, that Jennifer's Rule 306a(5) motion failed to invoke the trial court's jurisdiction for the limited purpose of even conducting a hearing because all of Jennifer's attorneys had the burden to negate actual knowledge, and they had not.

On October 30, 2019, when the trial court signed the order granting the furniture store's motions for summary judgment, Jennifer had two attorneys of record. The original petition filed on March 27, 2018, was signed by attorney Piero Garcia and listed Carlos Leon as an attorney of record. At the time Jennifer's Rule 306a(5) motion was filed with the trial court clerk on January 16, 2020, she had four attorneys of record. On December 2, 2019, attorney Fred Davis filed his notice of appearance as co-counsel for Jennifer, and on December 13, 2019, Sean Reagan filed his notice of appearance as counsel for Jennifer. No declarations or affidavits from Piero Garcia, Fred Davis, or Sean Reagan were included with Jennifer's Rule 306a(5) motion.

Davis and Reagan were not attorneys of record during the thirty-day period provided by the general rule. *See* TEX. R. APP. P. 26.1. If Davis or Reagan had acquired actual knowledge of the October 30, 2019 order on the date each made his appearance, Jennifer's notice of appeal, filed on January 16, 2020, would have been untimely.

But the Rule 306a(5) motion failed to contain a factual assertion that Jennifer's counsel, particularly Garcia, did not have actual knowledge of the signing of the October 30, 2019 order within twenty days. Without such a factual assertion, the Rule 306a(5) motion did not negate the possibility that Garcia acquired actual knowledge of the signing of the order within twenty days after it was signed. *See City of Laredo v. Schuble*, 943 S.W.2d 124, 126 (Tex. App.—San Antonio 1997, orig. proceeding). Additionally, the Rule 306a(5) motion failed to contain a factual assertion that Jennifer's counsel Fred Davis and Sean Reagan did not have actual knowledge of the signing of the October 30, 2019 order before Carlos Leon acquired actual knowledge on December 17, 2019. Because the Rule 306a(5) motion, the motion for new trial, the request for clarification, and the notice of appeal were not filed until January 16, 2020, Davis or Reagan's potential actual knowledge of the signing of the October 30, 2019 order more than thirty days before filing the above motions was required to be negated. *See id.*

Jennifer's Rule 306a(5) motion therefore failed to invoke the otherwise-expired power of the trial court to hold an evidentiary hearing. *See Simpson*, 932 S.W.2d at 678.

Conclusion

Having concluded that the requisite jurisdictional facts were not alleged in the Rule 306a(5) motion, the trial court's plenary power expired thirty days after the signing of the October 30, 2019 order. Because the notice of appeal was not timely filed, we dismiss this cause for want of jurisdiction. As a result, the furniture store's motion to dismiss for want of jurisdiction is moot and is dismissed.

MATT JOHNSON
Justice

Before Chief Justice Gray,
Justice Johnson, and
Justice Smith
Dismissed
Opinion delivered and filed June 29, 2022
[CV06]