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09/27/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 22, 2023 Session

JIM HYSEN v. T.A. SMYTHE

Appeal from the Chancery Court for Williamson County
No. 21CV-50762 Joseph A. Woodruff, Judge

No. M2022-00816-COA-R3-CV

Because the notice of appeal was untimely, this Court lacks subject-matter jurisdiction over the appeal. Appeal dismissed.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

KENNY ARMSTRONG, J., delivered the opinion of the court, in which ARNOLD B. GOLDIN and CARMA DENNIS MCGEE, JJ., joined.

Paul Andrew Justice, III, Murfreesboro, Tennessee for the appellant, Thomas A. Smythe.

William R. O’Byran, Jr., Brady John, and Elizabeth Wise Moreton, Nashville, Tennessee, for the appellee, Jim Hysen.

OPINION

Appellant Thomas Smythe and Appellee Jim Hysen were 50% general partners in Inanna, G.P., a Tennessee general partnership. The partnership was governed by a written partnership agreement, which provided for arbitration of any disputes between the partners. After the partnership was formed, certain disputes arose between the parties regarding property held by the partnership. On August 18, 2021, Mr. Hysen demanded arbitration under the partnership agreement. Specifically, the demand letter stated that

Mr. Smythe, in apparent violation of “Decision Making” provisions of the partnership agreement, executed a contract with The Jones Company of Tennessee, L.L.C. purportedly for the sale of developed lots in the partnership’s project. Mr. Smythe executed the contract without the consent of, and, in fact, over the objection of Mr. Hysen as to the terms of the

proposed sale. The Contract has now become a recorded encumbrance against the partnership's property. Mr. Smythe has refused and/or failed to cause an acknowledgment from The Jones Company . . . of the invalidity and unenforceability of the contract and the removal of the recorded contract as an encumbrance against the partnership's project. The encumbrance has precluded the completion of arranged financing which would have provided funds to Inanna . . . to deal with its obligations Mr. Hysen seeks an award of expulsion and disassociation of Mr. Smythe as a partner of Inanna.

On September 3, 2021, Mr. Hysen petitioned the trial court for an order compelling arbitration. By order of October 8, 2021, the trial court granted Mr. Hysen's petition, and the parties proceeded to arbitration on January 13 and 14, 2022. The arbitrator ruled in favor of Mr. Hysen, finding that: (1) "Inanna G.P. holds legal title to and the rights to develop the partnership property located on Cox Pike"; (2) Mr. Smythe is a "wrongfully disassociated partner"; (3) "Inanna [] shall be dissolved pursuant to Tenn. Code Ann. § 61-1-801(5)"; (4) Mr. Hysen is appointed "the partner to wind-up its affairs"; (5) "Smythe shall have no authority to act for or interfere with the winding up of Inanna, but Smythe shall retain his distributive share of the profits and/or reimbursement of fees as provided in the Partnership Agreement and the Tennessee Revised Uniform Partnership Act."

On January 27, 2022, Mr. Hysen petitioned the trial court to enter judgment on the arbitrator's award. On February 7, 2022, Mr. Smythe filed a response in opposition to Mr. Hysen's petition for judgment on the arbitrator's award, stating that he planned to appeal the arbitrator's decision. By order of February 16, 2022, the trial court conditionally granted Mr. Hysen's petition; on March 18, 2022, Mr. Hysen filed a motion to amend the order confirming the arbitrator's award, wherein he asked the trial court to enter an order specifically affirming the arbitrator's award and incorporating the arbitrator's findings. On April 18, 2022, Mr. Smythe filed a motion to vacate the arbitrator's award. Mr. Hysen opposed the motion. On May 16, 2022, the trial court entered an order affirming the arbitrator's award in Case Number 21CV-50762. On June 16, 2022, Mr. Smythe filed a notice of appeal to this Court. The appeal was assigned Case Number M2022-00816-COA-R3-CV. On July 5, 2022, Mr. Hysen filed a motion, in this Court, to dismiss Mr. Smythe's appeal on the ground that the notice of appeal was untimely. By order of January 12, 2023, we reserved ruling on the motion to dismiss.

Meanwhile in the trial court, on June 8, 2022, Mr. Smythe filed a complaint against Mr. Hysen, asserting claims for intentional misrepresentation, breach of fiduciary duty, and breach of contract. Mr. Smythe's complaint was filed as Case Number 22CV-51564. On June 29, 2022, Mr. Hysen filed a motion to impose sanctions on Mr. Smythe for violation of the arbitrator's award as affirmed by the trial court. Mr. Hysen's motion was filed under Case Number 21CV-50762. On July 11, 2022, Mr. Smythe filed a response in opposition to Mr. Hysen's motion for sanctions. On December 9, 2022, Mr. Hysen filed a supplement to his motion to impose sanctions on Mr. Smythe.

On November 23, 2022, Mr. Hysen filed a motion, under Case Number 21CV-50762, to clarify and resolve the arbitrator's expenses. On January 12, 2023, the trial court held a hearing on the following: (1) Mr. Hysen's motion and supplemental motion to impose sanctions on Mr. Smythe for violation of the arbitration award as confirmed by the trial court (Case Number 21CV-50762); (2) Motion to Clarify and Resolve Arbitrator's Expenses (Case Number 21CV-50762); (3) Motion to Dismiss or Stay Pending Arbitration of the Issues (Case Number 22CV-51564); (4) Motion to Dismiss Count VI of the Complaint (Case Number 22CV-51564). On February 13, 2023, the trial court entered an order on the foregoing motions. The trial court declined to rule on matters under Case Number 22-CV-51564 and held that those matters would be stayed pending the appeal of the arbitrator's award. However, the trial court did make rulings on Mr. Hysen's motion for sanctions by enjoining Mr. Smythe from certain actions. The order was entered under Case Number 21CV-50762. On March 10, 2023, Mr. Smythe filed a notice of appeal of the trial court's February 13, 2023 order. The appeal was assigned Case Number M2022-00369-COA-R3-CV. By order of May 5, 2023, this Court consolidated the two appeals under Case Number M2022-00816-COA-R3-CV.

Mr. Smythe raises three issues for review as stated in his brief:

- I. The first notice of appeal challenged a judgment that affirmed an arbitration award, but the parties have disputed what date the judgment was even entered. Was the first notice of appeal timely?
- II. Did the arbitrator exceed his powers?
- III. The second notice of appeal challenged a later, second judgment, entering an injunction against Thomas Smythe that prohibits him from speaking. Did the trial court err by entering an injunction against Thomas Smythe, where (1) there was no summons or complaint, (2) there was no trial or proof, and (3) the injunction violated the First Amendment?

In his brief, Mr. Hysen raises the issue of “[w]hether Appellant filed an untimely notice of appeal by waiting until thirty-one (31) days after the trial court order’s file-stamp date of May 16, 2022.”

Before we consider the substantive issues raised by Mr. Smythe, we must first address Mr. Hysen's threshold issue of whether this Court has subject-matter jurisdiction to adjudicate this appeal. Tenn. R. App. P. 13(b). Subject-matter jurisdiction relates to a court's authority to adjudicate a particular type of case or controversy brought before it. *In re Estate of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012) (citing *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004)); *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). Tennessee Rule of Appellate Procedure 4(a) provides that, “[i]n an appeal as of right to the . . . Court of Appeals . . . the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days **after the date of entry** of the judgment appealed” (emphasis added). “The thirty-day time limit for filing a notice of appeal is

mandatory and jurisdictional in civil cases.” *Albert v. Frye*, 145 S.W.3d 526, 528 (Tenn. 2004). If a notice of appeal is not timely, the Court may not waive the procedural defect. See Tenn. R. App. P. 2; *Cobb v. Beier*, 944 S.W.2d 343, 344 n. 2 (Tenn. 1997); *Arjken & Assocs., P.A. v. Simpson Bridge Co., Inc.*, 85 S.W.3d 789, 791 (Tenn. Ct. App. 2002); *Am. Steinwinter Investor Grp. v. Am. Steinwinter, Inc.*, 964 S.W.2d 569, 571 (Tenn. Ct. App. 1997); *Jefferson v. Pneumo Services Corp.*, 699 S.W.2d 181, 184 (Tenn. Ct. App. 1985).

As set out above, under Tennessee Rule of Appellate Procedure 4(a), the thirty-day time period for filing a notice of appeal begins to run “after the date of entry of the judgment appealed.” This begs the question of what constitutes the “date of entry” of an order so as to commence the running of the 30-day time period for filing an appeal to this Court. Tennessee Rule of Civil Procedure 58 provides that, “[u]nless otherwise expressly provided by another rule, entry of a judgment or an order of final disposition or any other order of the court is effective when a judgment or order containing one of the following is **marked on the face by the clerk as filed for entry**” (emphasis added).¹

Here, the order appealed, *i.e.*, the trial court’s order affirming the arbitrator’s award, contains the following notation on its face:

ELECTRONICALLY FILED
2022 May 16 4:17 PM - 21CV-50762
Williamson County, Clerk & Master

Mr. Smythe’s notice of appeal contains the following notations on its face:

Electronically RECEIVED on June 16, 2022
Appellate Court Clerk

Electronically FILED on June 16, 2022
Appellate Court Clerk M2022-00816-COA-R3-CV

Although the order appealed states that it was “electronically filed” on “May 16,” in the body of his notice of appeal, Mr. Smythe indicates that he is appealing the trial court’s order entered on “May 17, 2022.” Mr. Smythe argues that the order appealed was not entered until May 17, 2022, and the trial court clerk erroneously backdated the order to show that it was entered on May 16, 2022. If, as Mr. Smythe contends, the order was entered on May 17, his June 16 notice of appeal would be timely and, thus, effective to confer jurisdiction on this Court. Tenn. R. App. P. 3(a) (“In civil actions every final judgment **entered by a trial court** from which an appeal lies to the Supreme Court or

¹ As is relevant here, “[o]ne of the following” includes “the signatures of the judge and all parties or counsel.” Tenn. R. Civ. P. 58(1).

Court of Appeals is appealable as of right.”) (emphasis added). However, as Mr. Hysen contends, if the order appealed was entered on May 16, then Mr. Smythe’s June 16 notice of appeal would be one day late, and this Court would not have jurisdiction over the appeal. Tenn. R. App. P. 4(a).

In support of his argument that the entry date of the order was May 17, 2022, Mr. Smythe asserts that the trial court clerk improperly backdated the order to reflect entry on May 16, rather than May 17. To support his argument, Mr. Smythe relies on Rule 58 of the Tennessee Rules of Civil Procedure to assert that an entry of judgment is not effective until the clerk marks on the face that it has been filed for entry. He then claims that the clerk accepted and marked the judgment on May 17, 2022, but inappropriately backdated the stamp to show the day of the submission by the trial court. To support this claim, Mr. Smythe cites the Notice of Electronic Filing, which was sent by the trial court clerk on May 17. Regarding Mr. Smythe’s reliance on the Notice of Electronic Filing, we note that Williamson County Civil E-Filing Rule 8 makes clear that “[t]he email is not always reliable and considered a courtesy notice.” Regardless, Mr. Smythe’s argument ignores the fact that, although the electronic notice of filing was sent on May 17, 2022, the notice clearly indicates “Official File Stamp: 05-16-2022:16:17:37.” Rule 4 of the Williamson County Civil E-Filing Rules provides that “[a]ny E-filed document shall be considered as filed with the clerk when the transmission of the entire document is received by the clerk.”

In a similar case, where the effective date of entry of the order appealed was contested, we dismissed the appeal because the notice of appeal was untimely. In so doing, we explained:

The effective date of entry of the order [appealed] was not the date upon which it was mailed to the parties (December 3, 2014), but rather the date upon which it was stamped filed by the Trial Court Clerk (November 19, 2014). Because the order bears “the signatures of the judge and all . . . counsel,” it was effective when “marked on the face by the clerk as filed for entry.” Tenn. R. Civ. P. 58(1). The date marked on the face of the order by the trial court clerk as the date the order was filed for entry was November 19, 2014. The Advisory Commission’s Comments to the 2005 amendment to Rule 58 note that “[t]he request and mailing, or failure to mail, do not affect the time for filing . . . a notice of appeal.” Tenn. R. Civ. P. 58, Advisory Comm’n Comment to 2005 Amendment.

Muse v. Jolley, No. E2014-02462-COA-T10B-CV, 2015 WL 303366, at *2 (Tenn. Ct. App. Jan. 23, 2015). Likewise, in the instant appeal, the order appealed bears “the signatures of the judge and all . . . counsel.” Tenn. R. Civ. P. 58(1). Thus, it was effective to start the running of the 30-day time period when the order was “marked on the face by the clerk as filed for entry.” ***Id.*** This Court has explained that

the effective date of a judgment is the date that the judgment is filed in accordance with Rule 58. **Grantham v. Board of Equalization**, 794 S.W.2d 751, 752 (Tenn. Ct. App. 1990). The purpose of the rule “is to insure that a party is aware of the existence of a final appealable judgment in a lawsuit in which he is involved.” **Masters v. Rishton**, 863 S.W.2d 702, 705 (Tenn. Ct. App. 1992). This is important for purposes of appeal because the time for filing an appeal from the final judgment of a trial court begins to run from the date the judgment is entered. See **Siebers v. Cunningham**, No. M2002-02782-COA-R3-CV, 2003 WL 21051741 (Tenn. Ct. App. May 12, 2003).

In re A.G., No. M2008-00879-COA-R3-CV, 2009 WL 3103839, *4 (Tenn. Ct. App. Sept. 28, 2009).²

From the foregoing, the effective date of entry of the judgment in this case was the date upon which the order was stamped electronically filed by the trial court clerk (*i.e.*, the day it was “marked on the face by the clerk as filed for entry”—May 16, 2022). Tenn. R. Civ. P. 58; *see, e.g.*, **Muse**, 2015 WL 303366, at *2 (“The effective date of entry of the order [appealed] was . . . the date upon which it was stamped filed by the Trial Court Clerk.”); **State v. Mostella**, No. M2020-01474-CCA-R3-CD, 2022 WL 187438, at *2 (Tenn. Crim. App. Jan. 21, 2022) (“[T]he effective date for the entry of a judgment is the date of its filing with the court clerk as shown by the file stamp date.”); **State v. Stephens**, 264 S.W.3d 719, 729 (Tenn. Crim. App. 2007) (“[T]he effective date for entry of a judgment or order . . . is the date of its filing with the court clerk after being signed by the judge.”), *abrogated on other grounds* as stated in **State v. Randall T. Beaty**, No. M2014-00130-CCA-R3-CD, 2016 WL 3752968 (Tenn. Crim. App., July 8, 2016). Because the effective date of entry of the order appealed was May 16, 2022, Mr. Smythe’s June 16, 2022 notice of appeal was one day late, and this Court does not have jurisdiction over the appeal.

Before concluding, we note that although Mr. Smythe’s notice of appeal was untimely, “[o]nce the notice of appeal was filed, the jurisdiction of [the appellate] court attached, and, correlatively, the trial court lost jurisdiction.” **State v. Snowden**, No. W2005-01851-CCA-R3-CD, 2006 WL 1303946, at *2 (Tenn. Crim. App. 2006) (citing **State v. Armstrong**, 126 S.W.3d 908, 912 (Tenn. 2003)); **State v. Irwin**, 962 S.W.2d 477, 479 (Tenn. 1998); **State v. Peele**, 58 S.W.3d 701, 704 (Tenn. 2001) (“After the trial court loses jurisdiction, generally it retains no power to amend a judgment”). As explained by the Tennessee Supreme Court, “orders and judgments entered by courts without jurisdiction

² Although the trial court held a hearing on the question of the timeliness of the notice of appeal, and the trial court clerk offered testimony at that hearing, for the reasons set out below, the trial court lacked jurisdiction over the case once the notice of appeal was filed. Thus, any evidence adduced from the trial court clerk and any findings made by the trial court concerning the timeliness of the notice of appeal are of no effect and have no bearing on our analysis in this appeal.

over the subject matter of a dispute are void.” *In re Estate of Trigg*, 368 S.W. 3d 483, 489 (Tenn. 2012) (citing *Brown v. Brown*, 281 S.W.2d 492, 497 (Tenn. 1955)). If a party wishes to seek relief from a judgment during that time, he or she has the option of applying to the appellate court for an order of remand. *See, e.g., City of Memphis v. Civil Serv. Comm'n of the City of Memphis*, No. W2002-01556-COA-R3-CV, 2003 WL 22204496, at *2 (Tenn. Ct. App. Sept. 15, 2003). Absent an application for remand, the trial court’s attempt to enter further orders addressing the case on appeal is a nullity. *See Moore v. Teddleton*, No. W2005-02746-COA-R3-CV, 2006 WL 3199273, at *4 (Tenn. Ct. App. Nov. 7, 2006). Additionally, “jurisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties.” *State v. Moore*, 814 S.W.2d 381, 382 (Tenn. Crim. App. 1991); *see also Chorost v. Chorost*, No. M2000-00251-COA-R3-CV, 2003 WL 21392065, at *4 (Tenn. Ct. App. June 17, 2003). As such, the trial court’s February 13, 2023 order, insofar as it rules on matters related to trial court Case Number 21CV-50762, is void *ab initio* due to a lack of subject-matter jurisdiction in the trial court. Therefore, we vacate the portions of that order regarding Case Number 21CV-50762, and the appeal taken from that order is dismissed.

For the foregoing reasons, the consolidated appeal is dismissed, and the trial court’s February 13, 2023 order is vacated. Costs of the appeal are assessed to the Appellant, Thomas A. Smythe, for which execution may issue if necessary.

S/ Kenny Armstrong
KENNY ARMSTRONG, JUDGE