Affirmed and Opinion Filed August 24, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00270-CV

DR. ARNOLD W. MECH AND ARNOLD W. MECH, M.D., P.A., D/B/A THE MECH CENTER, Appellants
V.
GXA NETWORK SOLUTIONS, Appellee

On Appeal from the 380th Judicial District Court
Collin County, Texas
Trial Court Cause No. 380-02173-2015

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

In this restricted appeal, appellants, Dr. Arnold W. Mech and The Mech Center, seek reversal of the trial court's no-answer default judgment in favor of appellee GXA Network Solutions. We conclude appellants have established jurisdiction, but failed to show there was error apparent on the face of the record. Accordingly, the judgment of the trial court is affirmed. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2, 47.4.

I. Factual and Procedural Context

On December 11, 2012, appellants entered into a Services Agreement with appellee. Appellee filed this suit on June 1, 2015, claiming that appellants breached this contract by failing to pay sums due under the contract and by terminating the contract in violation of its terms.

In its original petition, appellee sought recovery of monetary damages for breach of the Services Agreement, attorney's fees, costs of court, and pre- and postjudgment interest. After appellants failed to respond to the petition, appellee filed a "Motion for Default Judgment" on September 3, 2015. That same day appellee also sent a letter to the district clerk in which it asked the clerk to present the order for default judgment to the trial court. On September 8, 2015 the trial court signed a "Final Default Judgment." In the default judgment, the trial court stated that: (1) appellants had failed to appear and answer after having been "duly and legally cited to appear and answer," and that (2) "[c]itation was served according to the law and returned to the Clerk where it remained on file for the time required by law." The district clerk then sent the notice of default judgment to appellants on September 9, 2015.

On September 23, 2015, fifteen days after the trial court signed the default judgment, appellants electronically filed ("e-filed") a motion for new trial through their e-filing service provider. On September 25, 2015, appellants e-filed an amended motion for new trial. A copy of at least one of the motions for new trial was served on appellee. However, as to both attempted filings, the district clerk sent a notice to appellants that stated the motion was "rejected" for failure to pay the applicable $75.00 filing fee. At or about the same time the motion for new trial was filed, appellants submitted a fiat form to the district clerk in order that a hearing could be set on the motion for new trial. The record before us shows the district clerk, in fact, did accept for filing a "Fiat as to Defendant's Motion for New Trial" on September 28, 2015, twenty days after the date of the default judgment. The fiat was completed by the clerk's office and states: "A hearing on Defendant Dr. Arnold W. Mech's Motion for New Trial has been set for 9:00 am on the 22 day of October, 2015, in the courtroom of 380th District Court of Collin County, Texas."

According to appellee, appellants "serve[d] a copy of the motion upon [a]ppellee's counsel, obtain[ed] a hearing date, and serve[d] notice of the hearing." Appellants do not deny having notice of the hearing.

On October 22, 2015, the trial court held a hearing on the motion for new trial. Appellee attended, but appellants did not. The trial court signed an "Order Denying Motion for New Trial" dated October 22, 2015. In that order the trial court stated, in part, that the movant "failed to appear and further failed to file a motion or affidavit" and "the Motion be and hereby is denied."[1]

On November 24, 2015 appellants filed "Defendant's First Amended Motion for New Trial" ("November motion"). In that motion, appellants argued that their failure to answer appellee's original petition was due to an "internal inadvertent mistake in the law office" such that "the Answer, Counterclaim, and Request for Disclosure [were] not filed with the Court." The verification page of the November motion shows that it was signed by counsel for appellants on September 23, 2015. Exhibits attached to the November motion include two affidavits, both signed and notarized on September 23, 2015, one by Arnold Mech, and the other by counsel for appellants. The affidavit of appellant, Arnold Mech, states, in part:

> I hired Andrew V. Howard, attorney, to represent me. I met with him and he prepared an answer, counterclaim, and request for disclosure and provided documents to him. I did all of this in time to file the answer and counterclaim prior to the first Monday after 20 days after I was served.

The affidavit of counsel for appellants states, in part, that, "We prepared an answer, counterclaim, and request for disclosure to file. Apparently there was an internal filing error that

[1] The "Order Denying Motion for New Trial" reads in its entirety as follows:

> On this day came on to be heard the Motion for New Trial Filed by Dr. Arnold W. Mech and The Mech Center (the "Motion"). Movant failed to appear and further failed to file a motion or affidavit. Therefore, it is
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> ORDERED that the Motion be and hereby is DENIED. It is further
>
> ORDERED that all costs be borne jointly and severally by all defendants to this cause.

caused the Answer not to be filed. This was an inadvertent mistake and certainly not an act of conscience indifference."

On December 4, 2015, appellants filed their "First Amended Answer and Request for Disclosure." Shortly thereafter, on January 6, 2016, appellants filed "Defendant's First Amended Motion for New Trial," which included an attachment, Exhibit A, "Defendant's Original Answer, Original Counterclaim, and Request for Disclosure," which was signed by counsel for appellants verified by appellant, Dr. Arnold Mech, and was dated September 23, 2015. On January 6, 2016, appellants also filed a "First Amended Counterclaim." The counterclaim was signed by counsel for appellants, verified by appellant, Dr. Arnold Mech, and was dated September 25, 2015.

On January 8, 2016, appellants filed a "Motion for Protective Order" in which they asked the court to "file this Motion for Protective Order as to Plaintiffs' First Set of Interrogatories in Aid of Enforcement of Judgment to Judgment Debtor." In this motion, appellants stated that, since the date the default judgment was signed, "Defendants have filed one or more Motions for New Trial and have also filed a First Amended Counterclaim." Appellants further stated in this motion that, "Counsel for Defendants is awaiting a setting on the pending Motion for New Trial."

The district clerk completed two fiats dated January 8, 2016: a "Fiat as to Defendant's First Amended Motion for New Trial" and a "Fiat as to Defendant's Motion for Protective Order." Each fiat set a hearing for January 21, 2016. Neither the clerk's record nor the parties' briefs filed with this Court state whether this January 21 hearing occurred. Further, no reporter's record is offered of any such hearing. No party to this appeal contends appellants' pleadings and motions filed November 24, 2015, December 4, 2015, or January 8, 2016, constitute timely filed postjudgment motions.

The "Notice of Appeal" for this restricted appeal was filed on March 7, 2016.

II. Review of Jurisdiction

By letter of May 13, 2016, this Court requested the parties file a letter brief "explaining how this Court has jurisdiction over this appeal." That letter explained the jurisdictional question as follows:

> The default judgment was signed on September 9, 2015. Appellant filed his notice of restricted appeal on March 7, 2016. A requirement for a restricted appeal is that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal. *See* TEX. R. APP. P. 25.1(d)(7)(B). The record before this Court includes: (1) a "Fiat as to Defendant's Motion for New Trial" file-stamped on September 28, 2015; and (2) order denying the motion for new trial filed by "Dr. Arnold W. Mech and The Mech Center" signed on October 22, 2015. Thus, the record before this Court indicates that appellant did, in fact, file a timely postjudgment motion.

In appellants' letter brief, they concede they "did fil[e] a postjudgment motion on September 25, 2015," seventeen days after the date of judgment. However, they explained that the motion is not in the clerk's record because it "was rejected by the 380th District Clerk" during the e-filing process. Attached to appellants' letter brief is a copy of the e-filing notice of rejection of the motion for new trial appellants received from the district clerk.[2] This notice of rejection states the September 25, 2015, motion for new trial was rejected because appellants failed to pay the $75.00 filing fee. The notice also lists "eService Details" and shows the "Status" of the eService of the motion for new trial. According to this document, the motion for new trial was "Sent" and "Served" on a person named Shirley James. Shirley James's e-mail address reflects that he or she works at the Fishman Jackson Ronquillo PLLC law firm, which represents appellee in this case.

[2] We note that this Court may refer to evidence not in the trial court record to determine our jurisdiction. *See Harlow Land Co. v. City of Melissa*, 314 S.W.3d 713, 716 n.4 (Tex. App.—Dallas 2010, no pet.) (citing TEX. GOV. CODE ANN. § 22.220(c) (West 2015); *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex.1979); *Kenseth v. Dallas County*, 126 S.W.3d 584, 593 (Tex. App.—Dallas 2004, pet. denied)).

Further, appellants assert in their letter brief that, while the clerk did issue a fiat setting a hearing, "there was no corresponding motion to which the FIAT was attached." Appellants claim the failure to accept and file the motion was "an internal mistake of the Collin County Clerk's office." Additionally, appellants contend "the order denying the motion for new trial signed on October 22, 2015 was another mistake of the [trial] Court" because the trial court "did not have an accepted motion upon which it could rule." Therefore, appellants conclude, since the motion for new trial was rejected, our Court "does have jurisdiction over this appeal." Appellee did not submit a brief on jurisdiction.

We note, in their briefs on the merits, the parties addressed at least part of the jurisdictional issue we inquired about in our May 13 letter. Appellants' arguments are essentially the same as those argued in their letter brief on jurisdiction. Appellee argues in its brief on the merits that this Court does not have jurisdiction because appellants' September 2015 motions for new trial were timely filed postjudgment motions. Hence, according to appellee, appellants have not established jurisdiction in this Court in accordance with rules 25.1(d)(7)(B), 26.1, and 30. *See* TEX. R. APP. P. 25.1(d)(7)(B), 26.1, 30. In support of that assertion appellee also cites Texas Rule of Civil Procedure 21(f)(5). That rule provides, in part, that an electronically filed document is "deemed filed" when "transmitted to the filing party's electronic filing service provider . . . ." Further, appellee asserts appellants (i) admit they had knowledge of the default judgment in time to file a motion for new trial; (ii) did, in fact, file a postjudgment motion for new trial; (iii) "serve[d] a copy of the motion upon Appellee's counsel"; (iv) "obtain[ed] a hearing date" for the motion; (v) "serve[d] notice of the hearing"; (vi) failed to take any "steps to withdraw the notice of hearing or otherwise make clear that [they] did not intend to go forward with the motion"; and (vii) "had time to correct any errors in the e-filing" process, but chose not

correct the error. According to appellee, for these reasons appellants should not be "permitted to take advantage of [their] own unexplained neglect."

A. Applicable Law

1. Requirements of a Restricted Appeal

"A restricted appeal is a direct attack on the trial court's judgment." *Rone Eng'g Serv., Ltd. v. Culberson*, 317 S.W.3d 506, 508 (Tex. App.—Dallas 2010, no pet.) (citing *Gen. Elec. Co. v. Falcon Ridge Apts., Joint Venture*, 811 S.W.2d 942, 943 (Tex. 1991)). "It is typically taken from a default judgment that has been rendered after a party fails to attend trial." *In re E.K.N.*, 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.). "A restricted appeal is available for the limited purpose of providing a party that did not participate at trial with the opportunity to correct an erroneous judgment." *De La Rocha v. Lee*, 354 S.W.3d 868, 872 (Tex. App.—El Paso 2011, no pet.) (citing *Clopton v. Pak*, 66 S.W.3d 513, 516 (Tex. App.—Fort Worth 2001, pet. denied)).

To establish jurisdiction, appellants must show: "(1) [they] filed notice of the restricted appeal within six months after the judgment was signed; (2) [they were parties] to the underlying suit; and (3) [they] did not participate in the hearing that resulted in the judgment complained of and did not timely file any postjudgment motions or requests for findings of fact and conclusions of law." *De La Rocha*, 354 S.W.3d at 871 (citing *Clopton*, 66 S.W.3d at 515); *see* TEX. R. APP. P. 25.1(d)(7)(B), 26.1, and 30. If the appellate court has jurisdiction, it must determine whether there is error apparent on the face of the record. *Whitehead v. Bulldog Battery Corp*., 400 S.W.3d 115, 117 (Tex. App—Dallas 2013, pet. denied) (citing TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004)).

2. *Timeliness of Electronically Filed Motions*

Texas Rule of Civil Procedure 21 addresses the electronic filing of court documents. *See* TEX. R. CIV. P. 21(f). The rule states, in part, "Unless a document must be filed by a certain time of day, a document is considered timely filed if it is electronically filed at any time before midnight (in the court's time zone) on the filing deadline." TEX. R. CIV. P. 21(f)(5). The rule further states that:

> An electronically filed document is deemed filed *when transmitted to the filing party's electronic filing service provider*, except:
>
> > (A) if a document is transmitted on a Saturday, Sunday, or legal holiday, it is deemed filed on the next day that is not a Saturday, Sunday, or legal holiday; and
> >
> > (B) if a document requires a motion and an order allowing its filing, the document is deemed filed on the date that the motion is granted.

Id. (emphasis added).

3. Failure to Pay Filing Fee

The Texas Supreme Court has stated that when a motion for new trial is tendered to the clerk without payment of the filing fee, it is a conditional filing that must later be completed by paying the filing fee. *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993); *see also id*. at 319 n.3 ("The filing is not completed until the fee is paid, and absent emergency or other rare circumstances, the court should not consider it before then."). Importantly, a conditionally filed motion for new trial, for which the filing fee has not been paid, nevertheless extends the appellate timetable. *Garza v. Garcia*, 137 S.W.3d 36, 38 (Tex. 2004); *Tate v. E.I. DuPont de Nemours & Co., Inc*., 934 S.W.2d 83, 84 (Tex. 1996).

Furthermore, some courts of appeals have explained that, although a pleading or motion might only be conditionally filed, a trial court may still rule on it. *See Howard Constr. Co., Inc. v. Tex. Ass'n of Women's Clubs*, No. 07–15–00361–CV, 2016 WL 67779, at *2 (Tex. App.—

Amarillo Jan. 4, 2016, order) (per curiam) (mem. op.) (addressing a conditionally filed counterclaim, the court of appeals said, in part, "While a pleading seeking affirmative relief is considered 'conditionally filed' until the required filing fee is paid, because the trial court does not lack subject matter jurisdiction in its discretion it may proceed to disposition of the conditionally-filed request for relief."); *Kujawa v. Myrta Kujawa*, No. 01–11–00963–CV, 2012 WL 1753637, at *2–3 (Tex. App.—Houston [1st Dist.] May 17, 2012, no pet.) (mem. op.); *Nolte v. Flournoy*, 348 S.W.3d 262, 268 (Tex. App.—Texarkana 2011, pet. denied) ("Therefore, even though a defendant does not have an unconditional right to be heard on counterclaims absent the payment of a filing fee, a trial court may, in its discretion, consider such counterclaims without payment of the statutory filing fee.").

In *Garza*, the Texas Supreme Court considered a conditionally filed motion for new trial in which the movant raised a factual sufficiency complaint. *Garza*, 137 S.W.3d at 37–38. In its discussion, that court noted the "factual sufficiency complaint had to be raised in a motion for new trial" in order to preserve that point. *Id*. at 38. That court concluded the filing of the motion, even without the filing fee ever being paid by the time the motion was overruled by operation of law, does extend the "appellate timetable." *Id*. at 38–39. However, that court stated, "[B]ecause [the movant] never paid the $15 fee, the trial court was not required to review it." *Id*. at 38. Finally, the supreme court held, "[a]s [the movant's] complaint [as to factual sufficiency] was never properly made to the trial court, it preserved nothing for review." *Id*.[3]

[3] The Texas Supreme Court mandated the adoption of uniform statewide electronic filing and service rules, to be effective January 1, 2014. *Tex. Dep't of Aging & Disability Servs. v. Mersch*, 418 S.W.3d 736, 741 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing Tex. Sup. Ct., Order Requiring Electronic Filing in Certain Courts, Misc. Docket No. 12–9206 (Dec. 11, 2012)). "That mandate was prompted in part by the confusion engendered with 'the decentralized nature of the current system and accompanying local e-filing rules.'" *Id*. None of the cases which we cite as to conditional filing identify whether e-filing was involved or not. *See Garza*, 137 S.W.3d at 37–38; *Tate*, 934 S.W.2d at 83; *Jamar*, 868 S.W.2d at 318–19; *Howard Constr. Co., Inc.*, 2016 WL 67779, at *2; *Kujawa*, 2012 WL 1753637, at *2–3; *Nolte*, 348 S.W.3d at 268.

B. Application of Law to the Facts

The parties do not dispute that appellants filed notice of this restricted appeal within six months after the judgment was signed, and appellants were parties to the underlying suit, and appellants did not participate in the hearing on the motion for default judgment. TEX. R. APP. P. 25.1(d)(7)(B), 26.1, and 30; *De La Rocha*, 354 S.W.3d at 871. Therefore, the only jurisdictional requirement at issue in this case is whether appellants did not timely file any postjudgment motions. Appellants assert they met this jurisdictional requirement because they did not timely file any postjudgment motions.

The clerk's record before us shows that the district clerk sent notice to appellants of the final default judgment of September 8, 2015. Appellants then transmitted a motion for new trial and exhibits to their e-filing provider on September 23 and 25, 2015, well within thirty days of the date of the default judgment. *See* TEX. R. CIV. P. 329b(a). However, the motion for new trial filings were rejected by the district clerk because appellants failed to pay the $75.00 filing fee. Appellants do not say, nor does the record show, they took any action to pay the necessary filing fees after receiving the notice of rejection. At the request of appellants, a hearing was set on the motion and notice given. On the date of the hearing, appellee attended, but appellants did not. The trial court's order on the motion for new trial states appellant "failed to file a motion" and the motion was denied. Neither side contends the "motion" was physically or electronically before the trial court at the hearing.

According to rule 21(f)(5), appellants filed their motion for new trial when they tendered the motion by transmitting it to their e-filing service provider. However, without payment of the filing fee, the motion for new trial was only conditionally filed. *Garza*, 137 S.W.3d at 37–38; *Jamar*, 868 S.W.2d at 318–19. So, even though the trial court had jurisdiction to rule on this motion, *Garza*, 137 S.W.3d at 38 n.11; *Jamar*, 868 S.W.2d at 319 n.3, the trial court was not in a

position to address the substantive merits of the motion at the hearing because: (1) the record shows the motion for new trial was rejected by the district clerk, (2) the record does not show the motion was ever in the clerk's record, and (3) the record does not show the motion was physically or electronically before the trial court.[4]

The opinion in *Garza* does not state whether the motion for new trial in that case was actually in the clerk's record, or was physically or electronically available to the trial court, at any point from the date of the motion's filing through the perfection of the appeal.[5] Yet, the supreme court concluded, because the filing fee was not paid, it was conditionally filed, "the trial court was not required to review the motion," appellant's "complaint was never properly made to the trial court," and the motion "preserved nothing for review." *Garza*, 137 S.W.3d at 38. In the case before us, like in *Garza*, the motion for new trial was conditionally filed. However, in this case, the record is clear that appellants' motion for new trial was "rejected" by the district clerk. The trial court's order expressly stated appellants "failed to file a motion or affidavit." Nothing in the record shows either of the motions for new trial were before the trial court to actually review at the time of the hearing. We conclude, on this record, appellants "did not timely file any postjudgment motions." *De La Rocha*, 354 S.W.3d at 871. Accordingly, we have jurisdiction to decide this restricted appeal.

III. Error Apparent on the Face of the Record

Now, we address whether there was error apparent on the face of the record.

[4] We express no opinion about the propriety of the district clerk's rejection of the motion for new trial. *Cf. Garza*, 137 S.W.3d at 38.

[5] In *Tate*, the supreme court observed that when the motion for new trial was filed without the filing fee, "the clerk treated the motion as 'received only' rather than filed, and did not forward it to the court for ruling." *Tate*, 934 S.W.2d at 83. However, the other relevant opinions we cite as to conditional filing do not state whether or not e-filing was used in the filing of the pleadings or motions in the trial courts. *Garza*, 137 S.W.3d at 37–38; *Tate*, 934 S.W.2d at 83; *Jamar*, 868 S.W.2d at 318–19; *Howard Constr. Co., Inc.*, 2016 WL 67779, at *2; *Kujawa*, 2012 WL 1753637, at *2–3; *Nolte*, 348 S.W.3d at 268.

A. Applicable Law

"Our review is confined to error apparent on the face of the record. We are prohibited from assigning error based on inferences." *Dole v. LSREF2 APEX2, LLC*, 425 S.W.3d 617, 625 (Tex. App.—Dallas 2014, no pet.) (citing *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004)). "The face of the record, for purposes of restricted appeals, consists of all the papers on file in the appeal, including the reporter's record, as they existed in the trial court at the time the default judgment was entered." *In re E.K.N.*, 24 S.W.3d at 590. The "rule in Texas 'has long been that evidence not before the trial court prior to final judgment may not be considered in a [restricted appeal] proceeding.'" *Brown v. Ogbolu*, 331 S.W.3d 530, 536 (Tex. App.—Dallas 2011, no pet.) (quoting *Gen. Elec. Co.*, 811 S.W.2d at 944). "Such a prohibition is appropriate because an appeal by writ of error[6] directly attacks the judgment rendered." *Campsey v. Campsey*, 111 S.W.3d 767, 771 (Tex. App.—Fort Worth 2003, no pet.).

B. Application of Law to the Facts

We interpret appellants' argument to assert the requisite "error apparent on the face of the record" is the action of the trial court in denying the motion for new trial when it "had no live pleading on the basis of which to issue a ruling." This argument is based on the recitation in the trial court's order denying the appellants' motion for new trial that states, in part, "Movant failed to appear and further failed to file a motion or affidavit."

Appellants have the burden to demonstrate error on the face of the record as to the default judgment. *See Jackson v. Biotectronics, Inc.*, 937 S.W.2d 38, 42–43 (Tex. App.—Houston [14th Dist.] 1996, no writ). In a restricted appeal, the "face of the record" consists of "the papers on file in the appeal, including the reporter's record, as they existed in the trial court at the time the

[6] Writ of error appeals under former rule of appellate procedure 45 were replaced in 1997 with restricted appeals under rule 30. *See* TEX. R. APP. P. 30 & cmt.

default judgment was entered." *In re E.K.N.*, 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.). The default judgment is dated September 8, 2015. However, the ruling on the motion for new trial, recited in the Order of October 22, 2015, necessarily occurred after the trial court granted the default judgment. Accordingly, the action of the trial court regarding the motion for new trial is not a matter appearing "in the face of the record." We are not authorized to consider it. *See Otis Spunkmeyer, Inc. v. Lee*, No. 05–00–01521–CV, 2001 WL 637814, at *2 (Tex. App.—Dallas June 11, 2001, no pet.). We conclude appellants have not met their burden to demonstrate error on the face of the record.

IV. Conclusion

We affirm the judgment of the trial court.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DR. ARNOLD W. MECH AND ARNOLD W. MECH, M.D., P.A., D/B/A THE MECH CENTER, Appellants

No. 05-16-00270-CV V.

GXA NETWORK SOLUTIONS, Appellee

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Trial Court Cause No. 380-02173-2015.
Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 24th day of August, 2017.