

DISMISSED and Opinion Filed February 1, 2021



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-01089-CV

**HEATHER NICOLE SMITH AND MICHAEL THOMAS ARMSTRONG,
Appellants**

V.

**AMERICAN BEAUTY MILL A/K/A AMERICAN BEAUTY LOFTS, LTD.,
ACONITUM AMERICAN BEAUTY, LC, AND MERGE MANAGEMENT,
LLC, Appellees**

**On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-12203**

MEMORANDUM OPINION

**Before Chief Justice Burns, Justice Molberg, and Justice Smith
Opinion by Justice Smith**

Before the Court is Heather Nicole Smith and Michael Thomas Armstrong's motion for extension of time to file their notice of appeal from the trial court's September 2, 2020 judgment. The appeal follows the overruling by operation of law of Smith and Armstrong's motion for new trial and was filed December 16, 2020, outside the ninety-day deadline set by Texas Rule of Appellate Procedure 26.1(a) but within the fifteen-day extension period provided by appellate rule 26.3. *See* TEX. R. APP. P. 26.1(a), 26.3. The extension motion explains that Armstrong has been

unable to effectively communicate with counsel “in the matter for which the appeal is sought” because he was arrested after the judgment was signed and remains in custody. The motion also notes the motion for new trial was overruled December 15, 2020.

The timely filing of a notice of appeal is jurisdictional. *Brashear v. Victoria Gardens of McKinney, L.L.C.*, 302 S.W.3d 542, 545 (Tex. App.—Dallas 2009, no pet.) (op. on reh’g). To obtain an extension for filing a notice of appeal under rule 26.3, the party appealing must offer a reasonable explanation for the delay in filing. *See* TEX. R. APP. P. 10.5(b)(1)(C), 26.3(b). The Texas Supreme Court has defined a “reasonable explanation” as “[a]ny plausible statement of circumstances indicating that failure to file within the [specified] period was not deliberate or intentional, but was the result of inadvertence, mistake, or mischance.” *Hone v. Hanafin*, 104 S.W.3d 884, 886 (Tex. 2003) (per curiam) (quoting *Meshwert v. Meshwert*, 549 S.W.2d 383, 384 (Tex. 1977)). “Any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake, or mischance[.]” *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989).

The explanations provided by Smith and Armstrong in their extension motion do not show that the failure to file the notice of appeal within ninety days of judgment was “the result of inadvertence, mistake, or mischance.” To the extent Armstrong was unable to effectively communicate with counsel due to his incarceration, the law is settled that the need for additional time to communicate

about an appeal does not constitute a “reasonable explanation” for purposes of extending the time to file a notice of appeal. *Aero at Sp. Z.O.O. v. Gartman*, 469 S.W.3d 314, 317 n.2 (Tex. App.—Fort Worth 2015, no pet.). Moreover, that Armstrong may have been unable to communicate with counsel does not explain why Smith did not timely file her notice of appeal. To the extent that Smith and Armstrong both waited for the motion for new trial to be overruled by operation of law to decide whether to appeal, the law is also settled that the need for additional time to assess and decide whether to appeal is not a “reasonable explanation” within the meaning of rule 26.3. *See id.*; *see also Daniel v. Daniel*, 05-17-00469-CV, 2017 WL 2645432, at *1 (Tex. App.—Dallas June 20, 2017, no pet.) (mem. op.) (intentionally waiting for trial court to hear or rule on motion for new trial not reasonable excuse for untimely notice of appeal). Accordingly, we deny the extension motion and dismiss the appeal. *See* TEX. R. APP. P. 42.3(a); *Brashear*, 302 S.W.3d at 545.

/Craig Smith/

CRAIG SMITH
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

HEATHER NICOLE SMITH AND
MICHAEL THOMAS
ARMSTRONG, Appellants

No. 05-20-01089-CV V.

AMERICAN BEAUTY MILL
A/K/A AMERICAN BEAUTY
LOFTS, LTD., ACONITUM
AMERICAN BEAUTY, LC AND
MERGE MANAGEMENT, LLC,
Appellees

On Appeal from the 193rd Judicial
District Court, Dallas County, Texas
Trial Court Cause No. DC-18-12203.
Opinion delivered by Justice Smith,
Chief Justice Burns and Justice
Molberg participating.

In accordance with this Court's opinion of this date, we **DISMISS** the appeal.

We **ORDER** that appellees American Beauty Mill a/k/a American Beauty Lofts, Ltd., Aconitum American Beauty, LC and Merge Management, LLC recover their costs, if any, of this appeal from appellants Heather Nicole Smith and Michael Thomas Armstrong.

Judgment entered February 1, 2021.