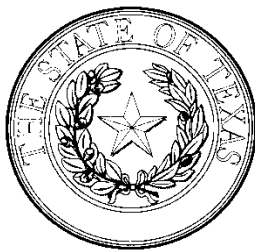


Opinion issued December 23, 2010



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00514-CV

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**CLUTE APARTMENTS 1, LTD. & GEORGE MICHAELSON, Appellants**

**V.**

**JERRY LORSON d/b/a TUFFTOP REFINISHING SERVICES, Appellee**

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**On Appeal from the County Court at Law No. 4  
Brazoria County, Texas  
Trial Court Case No. CI042011**

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**MEMORANDUM OPINION**

The trial court rendered partial summary judgment for appellee, Jerry Lorson d/b/a Tufftop Refinishing Services (“Lorsen”), in his suit to recover from appellants, Clute Apartments 1, Ltd. and George Michaelson (collectively,

“Michaelson”), for breach of contract, fraud, and fraud in the inducement, giving him the right to foreclose a lien on Michaelson’s property. The court severed Lorson’s claims against Michaelson and later granted a post-judgment motion to modify the judgment filed by Lorson in the severed case. Michaelson filed a motion for rehearing or, in the alternative, for a new trial, arguing that he had failed to receive adequate notice of the post-judgment motion before the trial court granted it. The trial court denied this motion. In two issues on appeal, Michaelson contends that (1) the trial court lacked subject-matter jurisdiction to grant the partial summary judgment because Lorson’s suit was one to enforce a lien on land—a type of suit, he contends, over which the trial court lacked jurisdiction, (2) the court erred in denying his motion for rehearing or, in the alternative, for a new trial because he did not receive adequate notice of Lorson’s post-judgment motion before the court granted it. We affirm.

## **BACKGROUND**

In 2006, Lorson filed suit against Michaelson and two other defendants in the Brazoria County Court at Law No. 3, alleging breach of contract, fraud, and fraud in the inducement. On January 29, 2009, the Brazoria County Court at Law No. 4, to which the cause had been transferred, granted Lorson’s motions (a) for partial summary judgment on his claims against Michaelson and (b) to sever those claims from the original cause so as to render them final and appealable. As part

of its summary-judgment order, the trial court granted Lorson the right to foreclose on a mechanic's and materialmen's lien that he held on Michaelson's property.

On February 18, 2009, Lorson filed a "Motion for Final Summary Judgment Nunc Pro Tunc" in the severed cause, requesting revisions of three alleged "clerical errors" in the order granting partial summary judgment: (1) that a legal description of appellants' property attached to the order had mistakenly described appellants' property as containing 20.07 rather than 10.07 acres; (2) that the order should have been styled a "final summary judgment" because it had in fact disposed of all claims against appellants; and (3) that the recorded amount of interest granted in the order was smudged and needed to be "cleaned up." Five days later, and without conducting a hearing, the trial court signed an order implementing the requested changes and granting "Final Summary Judgment" for Lorson in the severed cause.

On March 23, 2009, Michaelson filed a motion for rehearing or, in the alternative, for a new trial, alleging that his failure to have received adequate notice of Lorson's "Motion for Final Summary Judgment Nunc Pro Tunc" had rendered the subsequent final judgment invalid. The trial court held a hearing on this motion on April 17, 2009. At the hearing, the trial court stated that it had erred in granting Lorson's motion because the misstatement of the acreage of Michaelson's property was substantive and could not be corrected by a judgment nunc pro tunc;

the hearing ended, however, with Michaelson's motion unresolved. On April 27, 2009, the trial court denied the motion by written order.

### **SUBJECT-MATTER JURISDICTION**

In his first issue, Michaelson argues that the Brazoria County Court at Law No. 4 lacked subject-matter jurisdiction to grant summary judgment because Lorson's suit was in effect one to enforce a lien on land—a type of cause, he contends, over which the trial court lacked jurisdiction. Although Michaelson did not contest the court's jurisdiction below, “[s]ubject-matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties.” *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Michaelson argues that the jurisdiction of the trial court was governed by section 26.043 of the Texas Government Code, which states that “[a] county court does not have jurisdiction over . . . a suit for the enforcement of a lien on land.” TEX. GOV'T CODE ANN. § 26.043(2) (Vernon 2004). This argument, however, overlooks the fact that the Brazoria County Court at Law No. 4 is a statutory trial court, not a constitutional county court. *See* TEX. GOV'T CODE § 25.0221(4) (Vernon Supp. 2010).

The Texas Constitution and state statutes are the sole sources of jurisdiction for Texas courts. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996). Under the Texas Constitution, the judicial power of the State is “vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.” TEX. CONST. art. V, § 1. The Texas Constitution also authorizes the legislature to “establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and [to] conform the jurisdiction of the district and other inferior courts thereto.” *Id.*; *see id.* § 15 (“There shall be established in each county in this State a County Court. . . .”). Texas courts that are enumerated in the constitution are referred to as “constitutional courts,” while courts that are established pursuant to the legislature’s power to create “other courts” are referred to as “legislative” or “statutory” courts. 1 Roy W. McDonald & Elaine A. Grafton Carlson, *Texas Civil Practice* § 3:3 (2d ed.2004); *see also* TEX. GOV’T CODE ANN. § 21.009(1), (2) (Vernon 2004).

The Brazoria County Court at Law does not derive its jurisdiction from the Constitution; rather it was established by statute and its jurisdiction is prescribed by sections 25.0003 and 25.0222 of the Government Code. *See* TEX. GOV’T CODE

ANN. § 25.0003 and 25.0222 (Vernon 2004). Section 25.0003 contains the general grant of jurisdiction to all statutory county courts, and provides as follows:

- (a) A statutory county court has jurisdiction over all causes . . . prescribed by law for [constitutional] county courts.

. . .

- (c) *In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in:*

- (1) civil cases in which the matter in controversy exceeds \$500 but does not exceed \$100,000 . . . .

*Id.* § 25.0003(a), (c)(1) (Vernon Supp. 2010) (emphasis added).

Section 25.0222(a)(1) contains the specific grant of jurisdiction to the statutory county courts in Brazoria County and provides in part as follows:

- (a) *[i]n addition to the jurisdiction provided by Section 25.0003 and other law, a statutory county court in Brazoria County has concurrent jurisdiction with the district court in:*

- (1) civil cases in which the matter in controversy exceeds \$500 but does not exceed \$100,000 . . . .

*Id.* § 25.0222(a)(1) (Vernon Supp. 2010) (emphasis added).

Thus, both the general and specific grants of jurisdiction expand the jurisdiction of the statutory county courts in Brazoria County over that of the

constitutional county courts to include concurrent jurisdiction with the district courts in civil cases with an amount in controversy between \$500 and \$100,000.

Appellant correctly notes that a county court lacks jurisdiction in the eight types of civil suits that are listed in section 26.043 of the government code. *See* TEX. GOV'T CODE ANN. § 26.043 (Vernon 2010). Included within this list of cases excluded from a county court's jurisdiction are suits for the enforcement of a lien on land. TEX. GOV'T CODE ANN. § 26.043(2) (Vernon 2010). A "county court," however, is defined in the government code as "the" court created in each county pursuant to the Texas Constitution's article V, section 15. TEX. GOV'T CODE ANN. § 21.009(1); *see* TEX. CONST. ART. V, § 15. By contrast, statutory county courts—such as Brazoria County Court at Law No. 4—are defined in the Government Code as courts created by the legislature pursuant to its power under the Texas Constitution's article V, section 1. TEX. GOV'T CODE ANN. § 21.009(2); *see* TEX. CONST. ART. V, § 1. The plain language of section 26.043 does not apply to statutory county courts at law; section 26.043 restricts only the matters that may be heard in the constitutional "county court." *See id.* §§ 21.009(1) (defining "county court"), (2) (defining "statutory county court"), 26.043 (restricting subject-matter jurisdiction of "county court"); *see also Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 447 (Tex. 1996) (discussing jurisdictional conflict between county court at law and district court in context of Labor Code section 451.003 and

concluding that to extent statutory courts shared concurrent jurisdiction with district courts, nothing in plain meaning of that statute limited or excluded that concurrent jurisdiction).

The parties concede that suits for the enforcement of liens fall within the jurisdiction of the district courts and that the amount in controversy in this case is between \$500 and \$100,000. Thus, both the general and specific grants of jurisdiction to the Brazoria County Court at Law No. 4 found in sections 25.0003 and 25.0222(a)(1) of the government code confer jurisdiction to the Brazoria statutory county courts to hear cases such as the one presented here. Further, we hold that section 26.043(2) does not restrict the trial court's jurisdiction in this case because the trial court is a statutory county court, not a constitutional county court.

Accordingly, we overrule appellant's first issue.

### **DENIAL OF MOTION FOR NEW TRIAL**

In his second issue, Michaelson contends that the trial court erred in denying his motion for rehearing or, in the alternative, for a new trial because he did not receive adequate notice of Lorson's motion for "Final Summary Judgment Nunc Pro Tunc" before the trial court granted it. We review a trial court's ruling on a motion for new trial for an abuse of discretion. *DolgenCorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). Michaelson's argument is predicated on his additional contentions that (1) though Michaelson failed to file his motion within



30 days of the summary-judgment order,<sup>1</sup> Lorson’s motion was in effect a motion to modify the judgment and extended the time in which Michaelson could file his own motion for new trial<sup>2</sup> and (2) a motion to modify a judgment, like that filed by Lorson, is subject to the notice requirements of Rule 166a of the Texas Rules of Civil Procedure for initial motions for summary judgment. *See* TEX. R. CIV. P. 166a(c) (requiring movant to serve opposing counsel with notice of motion for summary judgment at least 21 days in advance of “the time specified for hearing”). Thus, Michaelson argues that Lorson’s motion both “saved” his motion for a new trial (by extending the trial court’s plenary jurisdiction) and provided the basis for his moving for a new trial (because Lorson failed to provide him with adequate notice).

In *Go Leasing, Inc. v. Groos National Bank*, 628 S.W.2d 143, 144 (Tex. App.—San Antonio 1982, no writ), as here, a party obtaining a judgment filed a motion nunc pro tunc which was later recognized—there by the appellate court<sup>3</sup>—

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<sup>1</sup> *See* TEX. R. CIV. P. 329b(a) (providing that motion for new trial must be filed within 30 days of complained of order or judgment).

<sup>2</sup> *See* TEX. R. CIV. P. 329b(g) (providing that motion to modify judgment extends plenary power of court).

<sup>3</sup> Here, the trial court stated at the hearing on Michaelson’s motion for a new trial that it had erred in granting Lorson’s motion for “Final Summary Judgment Nunc Pro Tunc” as a Rule 316 motion because the motion had in effect been a Rule 329 motion to substantively modify the summary-judgment order. *See* TEX. R. CIV. P. 329b(g) (providing for motions to modify judgment or order within 30 days).

to have been a motion to modify the judgment. *Id.* at 144. The trial court granted the motion within 30 days of the judgment, and the appellate court—while noting that “considerations of professionalism should prompt counsel to make an effort to notify other interested parties that he intends to ask the court to modify the judgment”—held that the judgment was valid because no notice had been required for a motion to modify or for a ruling thereon at any time within 30 days of the final judgment. *Id.* at 144, 144 n.2. The application of the *Go Leasing* court’s holding is even more justified in this case because Lorson provided notice of his motion for “Final Summary Judgment Nunc Pro Tunc”; he merely did not provide 21 days notice as required for motions for summary judgment under Rule 166a(c). *See* TEX. R. CIV. P. 166a(c).

Michaelson cites no authority to support his contention that Rule 166a’s service requirements apply to Rule 329 motions to modify a judgment, and we have found none. Even if Lorson’s motion had not extended the trial court’s plenary jurisdiction, the court itself issued its amended judgment within 30 days of its initial summary-judgment order. The court did not abuse its discretion by denying Michaelson’s motion for a new trial on the basis that he lacked notice of Lorson’s motion before the trial court issued its amended judgment.

We overrule Michaelson’s second issue.

## CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack  
Chief Justice

Panel consists of Chief Justice Radack and Justices Massengale and Nuchia.<sup>4</sup>

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<sup>4</sup> The Honorable Sam Nuchia, Senior Justice, Court of Appeals for the First District of Texas, participating by assignment.