

Opinion issued January 13, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-01092-CV

JAMES LANDOR, Appellant

V.

MOL (AMERICA), INC. AND MITSUI OSK LINES, Appellees

**On Appeal from the 165th District Court
Harris County, Texas
Trial Court Case No. 0614284**

MEMORANDUM OPINION

This is an attempted appeal from the trial court's take-nothing judgment on the claims of appellant, James Landor, against appellees, MOL (America), Inc. and Mitsui Osk Lines ("MOL" and "Mitsui," respectively).

MOL and Mitsui moved to strike Landor's notice of appeal, arguing that it was untimely and that this Court lacked jurisdiction over his appeal. Landor responded, contending that the trial court entered final judgment on November 9, 2009, and thus his notice of appeal, filed on December 15, 2009, was timely.

However, the record reflects that, following a trial on the merits of Landor's claims in trial court cause number 0614284, the trial court entered judgment on January 3, 2008. This judgment was titled, "FINAL JUDGMENT," stated that the trial court "renders judgment for the defendants," "order[ed] that Plaintiff, JAMES LANDOR, take nothing by his suit," and explicitly denied "all relief not granted in this document." It then reiterated, "This is a FINAL JUDGMENT." On January 8, 2008, Landor moved for new trial, stating that, prior to trial, he had settled his claims against the Port of Houston, one of MOL's co-defendants, and had non-suited all of the remaining defendants except for MOL and Mitsui. His motion for new trial requested a new trial on his claims against MOL and Mitsui because the jury's verdict was against the great weight and preponderance of the evidence. The trial never ruled on the motion for new trial, and it was overruled by operation of law.¹ See TEX. R. CIV. P. 329b(c).

¹ On November 9, 2009, twenty-two months after entering final judgment, the trial court signed an order granting Landor's motion to non-suit Frederick Trucking LLC, one of the parties that Landor had originally sued and that he had represented in his January 8, 2008 motion for new trial as having been non-suited prior to trial. This November 9, 2009 order had no effect on the January 3, 2008

Thus, Landor’s notice of appeal was due 90 days after the January 3, 2008 judgment was signed. Landor’s notice of appeal, filed on December 15, 2009, was, therefore, untimely. *See* TEX. R. APP. P. 26.1(a) (providing that notice of appeal must be filed within 90 days when there is timely filed motion for new trial); TEX. R. APP. P. 26.3 (allowing motion to extend time to file appeal to extend filing deadline). An untimely notice of appeal fails to vest jurisdiction in the court of appeals. *See* TEX. R. APP. P. 25.1; *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997).

We dismiss the appeal for want of jurisdiction. All pending motions are dismissed as moot.

PER CURIAM

Panel consists of Justices Keyes, Sharp, and Massengale.

final judgment. A trial on the merits of Landor’s claims had already occurred, and, therefore, he no longer had a right to seek to non-suit an individual party. *See* TEX. R. CIV. P. 162 (“At any time *before the plaintiff has introduced all of his evidence* other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit. . . .”) (emphasis added); *see also C/S Solutions, Inc. v. Energy Maint. Servs. Grp. LLC*, 274 S.W.3d 299, 306–07 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (explaining that “a voluntary dismissal that abandons the case as to certain parties and/or claims” is distinguishable from “a pure Rule 162 nonsuit” of entire case and that such partial voluntary dismissals are in substance amended pleadings). Furthermore, the trial court’s plenary power had already expired. *See Moore Landrey, L.L.P. v. Hirsch & Westheimer, P.C.*, 126 S.W.3d 536, 538–39 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating that trial court’s plenary power expires 30 days after signing final judgment unless parties timely file motion seeking substantive change in judgment (citing TEX. R. CIV. P. 329b (extending plenary power up to 105 days after signing final judgment when timely motion for new trial is filed))).