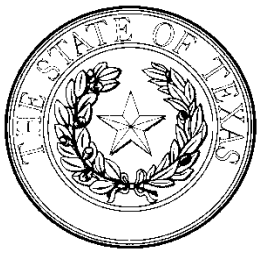
Opinion issued April 26, 2016



In The

Court of Appeals

For The

First District of Texas

NO. 01-15-01097-CV

SENGER CREEK DEVELOPMENT, LLC, JAMES GILBERT, CLAY MOORE, AND TRENTON TORREGROSSA, Appellants

V.

IH45 INVESTMENTS, LLC, Appellee

NO. 01-15-01098-CV

SENGER CREEK DEVELOPMENT, LLC, JAMES GILBERT, CLAY MOORE, AND TRENTON TORREGROSSA, Appellants

V.

RICHARD L. FUQUA, II, FUQUA FAMILY LIMITED PARTNERSHIP, LEVEL 2 SOLUTIONS, INC., Appellees

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Case Nos. 2014-31147-A & 2014-31147-B

MEMORANDUM OPINION AND ORDER

Appellants, Senger Creek Development, LLC, James Gilbert, Clay Moore, and Trenton Torregrossa, attempt to appeal from the trial court's August 19, 2015 judgment that severed the claims of appellee, IH45 Investments, LLC. We dismiss the appeal in appellate cause number 01–15–01097–CV.

Generally, a party wishing to appeal a judgment must file a notice of appeal within thirty days after the judgment is signed. *See* TEX. R. APP. P. 26.1. In certain circumstances, the Rules of Appellate Procedure extend the deadline to file a notice of appeal to 90 days after the date the judgment is signed. TEX. R. APP. P. 26.1(a). The deadline is extended if any party timely files (1) a motion for new trial; (2) a motion to modify the judgment; (3) a motion to reinstate; or (4) if findings of fact and conclusions of law are required by the Rules of Civil Procedure or could properly be considered by the appellate court, a request for findings of fact and conclusions of law. *See id.* A party may also obtain additional time to file a notice of appeal if, within fifteen days after the deadline to file the notice of appeal, the party properly files a motion for extension of time. *See* TEX. R. APP. P. 10.5(b), 26.3. Courts imply a motion for extension of time when an appellant, acting in good faith,

files a notice of appeal beyond the time allowed by rule 26.1, but within the fifteen-day extension period provided by rule 26.3. *See* TEX. R. APP. P. 26.1, 26.3; *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997).

The underlying suit involves appellants' claims against multiple defendants for trespass-to-try-title and wrongful foreclosure for a tract of land in Houston. The record reflects that the trial court signed a judgment on March 6, 2015, granting the IH45 defendant's motion for summary judgment. The record also shows that the trial court granted the Fuqua defendants' motion for summary judgment on March 6, 2015, in a separate order.

Both the IH45 defendant and the Fuqua defendants moved to sever the claims against them. On August 19, 2015, the trial court granted the IH45 defendant's motion for severance, ordering the clerk to docket the severed cause under a new cause number, 2014-31147-A with IH45 Investments, LLC as the Defendant and Senger Creek Development LLC, James Gilbert, Clay Moore, and Trenton Torregrossa as the Plaintiffs. The trial court further stated, "Defendant IH45 Investments, LLC will pay for the severed case. The severed cause of action, No 2014-31147-A will be final." On September 19, 2015, the trial court also severed the claims against the Fuqua defendants into a second cause number 2014-31147-B, as explained below.

As a rule, severance of an interlocutory judgment into a separate action makes it final, unless the order of severance indicates further proceedings are to be conducted in the severed action. *See Diversified Fin. Sys. Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795, 795 (Tex. 2001) (severed action remained interlocutory where severance order stated action would "proceed as such to final judgment or other disposition"); *Martinez v. Humble Sand & Gravel, Inc*., 875 S.W.2d 311, 313–14 (Tex. 1994) (severance order permitting additional defendants to be added to severed action was interlocutory).

Here, the trial court's August 19 severance order states that it is final and does not provide that further proceedings are to be conducted in the severed action. The August 19 severance order in cause number 2014-31147-A is therefore a final judgment. Thus, appellants' notice of appeal had to be filed by September 18, 2015, unless they filed a post-judgment motion. *See* TEX. R. APP. P. 26.1(a)(1).

Appellants filed a motion for new trial on September 18, 2015 in cause number 2014-31147-A, stating within their motion that on "August 19, 2015, the Court signed its Severance Order, severing all causes of action asserted by Plaintiffs against Defendant IH45 Investments, LLC." The appellants' electronically filed document also contained the comment, "Dear Clerk: This Motion for New Trial is to be filed in the severed matter assigned Case No. 2014-31147-A."

Because appellants filed a motion for new trial, they had 90 days, or until November 17, 2015, to timely file their notice of appeal. *See* TEX. R. APP. P. 26.1(a)(1). With the addition of the 15-day extension, appellants had until December 2, 2015 to file an extension of time. *See* TEX. R. APP. P. 26.3; *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). The record reflects that appellants did not file their notice of appeal until December 18, 2015, when appellants filed a notice of appeal in both trial court cause numbers 2014-31147-A and 2014-31147-B. Once we received the notice of appeal, the Clerk of the Court assigned (1) trial court cause number 2014-31147-A to appellate cause number 01–15–01097–CV and (2) trial court cause number 2014-31147-B to appellate cause number 01–15–01098–CV. The IH45 defendant and the Fuqua defendants are listed as appellees in both appellate cause numbers.

On January 29, 2016, the IH45 defendant filed a motion to dismiss in this Court asserting that appellants' notice of appeal was untimely and therefore this Court lacked jurisdiction. In response, appellants have asserted that the trial court's September 19 severance order modified the August 19 severance order and therefore restarted the appellate timetables pursuant to rule 329b(h).[1]

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[1] If a judgment is modified, corrected or reformed in any respect, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment. TEX. R. CIV. P. 329b(h).

Appellants maintain that the September 19 severance order modifies the August 19 severance order because it added language that the "Fuqua Defendants as parties to the judgment in the 'A' case" and it added "pleadings and other documents pertaining to IH45 and Fuqua Defendants to the severed record in the 'A' case," and it ordered "IH45 and Fuqua Defendants to 'pay for the severed case.'"

Although appellants argue that the September 19 severance order placed the Fuqua defendants' claims into the "A" case, the record reflects that the order gave the trial court the option to sever the claims against the Fuqua defendants into either (1) cause number 2014-31147-A along with the IH45 defendant or (2) cause number 2014-31147-B with just the Fuqua defendants. The order then states that either cause number 2014-31147-A would be final or that cause number 2014-31147-B would be final. The optional nature of the trial court's September 19 severance order is supported by the Fuqua defendants' counsel's letter that accompanied the filing of the Fuqua defendants' proposed severance order, in which counsel wrote, "I have included the option of merging the severed action with the IH45 Investments, LLC action (the A-case) or severing this action into its own action (a B-case)."

The trial court's September 19 severance order is thus ambiguous because it gave the trial court the option whether to sever the Fuqua defendants' claims into the "A" case or "B" case. "Generally, an ambiguous order may be construed in light of the motion upon which it was granted. . . ." *Lone Star Cement Corp. v. Fair*, 467

S.W.2d 402, 404 (Tex. 1971); *see also Point Lookout West v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1988) ("The entire content of the written instrument and the record should be considered."). A rule of construction applicable to contracts and other like instruments directs that courts follow a reasonable construction placed on the instrument by the parties involved. *Lone Star Cement*, 467 S.W.2d at 405. This rule may also be applied to court orders. *Id*.

In reviewing the entire record, we note that the Fuqua defendants' motion for severance stated, "[T]he Fuqua defendants submit that the claims asserted against them should be included in that severed action rather than the main action." However, a "Form For Severances" document included in the record indicates that, on September 24, 2015, the Fuqua defendants' claims were severed into cause No. 2014-31147-B.

Moreover, appellants' conduct subsequent to the trial court's August 19 and September 19 orders demonstrates that they were aware that the claims of the IH45 defendant and the Fuqua defendants were in separate, severed cause numbers. The record shows that, on October 19, 2015, the appellants participated in the severed "B" case when appellants filed a motion for new trial in cause number 2014-31147-B. The motion for new trial's certificate of service shows that the motion for new trial was served only on counsel for the Fuqua defendants. As stated earlier, appellants also participated in the severed "A" case when appellants filed a motion

for new trial in cause number 2014-31147-A and acknowledged within the motion that the trial court had severed the claims against the IH45 defendant.

Despite participating in both severed cause numbers 2014-31147-A and 2014-31147-B, appellants waited until December 16, 2015 to file an emergency motion to modify or correct the judgment in cause numbers 2014-31147, 2014-31147-A, and 2014-31147-B, arguing that the September 19 severance order "contains a patent ambiguity that must be corrected in order for the judgment to become final." Specifically, appellants stated,

> [T]he Severance Order severed Plaintiffs' claims against Fuqua Defendants into the same severed action as Defendant IH45 Investments, LLC. But the Severance Order also purports to sever Plaintiffs' claims against Fuqua Defendants into a case separate and apart from Defendant IH45. This ambiguity makes it impossible to determine from the language of the order which parties and claims were severed into which case.

On December 18, 2 015, the trial court signed an order stating that it did not have jurisdiction to grant the relief requested in plaintiffs emergency motion to modify or correct the judgment. On December 30, 2015, however, the trial court denied plaintiff's motion.

Because appellants participated in both severed cause numbers separately, and the record reflects that the trial court severed the IH45 defendant's claims into the "A" case, while severing the Fuqua defendants' claims into the "B" case, we conclude that the September 19 severance order did not modify the August 19

severance order. We further conclude that the trial court's August 19, 2015 severance order was a final judgment because it severed the IH45 defendant's claims into a separate action, and the severance order did not indicate that further proceedings would be conducted in the severed action. *See Diversified Fin. Sys.*, 63 S.W.3d at 795. Thus, the appellate timetables began on August 19, 2015, and the notice of appeal had to be filed no later than December 2, 2015. *See* TEX. R. APP. P. 26.1(a)(1). Appellants did not file a notice of appeal in trial court cause number 2014-31147-A until December 18, 2015, which was not timely.

Without a timely-filed notice of appeal, we may not exercise jurisdiction over the merits of an appeal. *See* TEX. R. APP. P. 2 (prohibiting court from suspending rules to extend deadline for filing notice of appeal in civil cases), 25.1(b) (requiring notice of appeal be filed to invoke appellate court jurisdiction), 26.1 (setting deadline for filing notice of appeal), 26.3 (authorizing extension of time to file notice of appeal if motion to extend is filed within 15 days of deadline); *Verburgt*, 959 S.W.2d at 617 (authorizing extension based on implicit motion for extension if notice of appeal is filed within 15 days of deadline).

We recognize that Texas courts "construe rules reasonably but liberally, when possible, so that the right to appeal is not lost by creating a requirement not absolutely necessary from the literal words of the rule." *Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996) (quoting *Jamar v.*

Patterson, 868 S.W.2d 318, 319 (Tex. 1993)). But Texas Rule of Appellate Procedure 2 specifically prohibits us from suspending the operation of Rule 26 "to alter the time for perfecting an appeal in a civil case." *See* TEX. R. APP. P. 2, 26.

Accordingly, we dismiss the appeal in appellate cause number 01–15–01097–CV. *See* TEX. R. APP. P. 42.3(a), (c); *Verburgt*, 959 S.W.2d at 617.

The IH45 defendant has also filed a motion to dismiss them from appellate cause number 01–15–01098–CV. Because the IH45 defendant's claims were severed into the "A" case, we grant their motion to dismiss them from appellate cause number 01–15–01098–CV.

The Fuqua defendants have also filed a motion to dismiss in appellate cause number 01–15–01097–CV because they were not parties to the "A" case. We grant their motion to dismiss because the Fuqua defendants' claims were severed into the "B" case which corresponds to appellate cause number 01–15–01098–CV and which remains pending. Because we dismiss appellate cause number 01–15–01097–CV for lack of jurisdiction, we deny appellants' motions to consolidate 01–15–01097–CV with 01–15–01098–CV filed in both appellate cause numbers.

PER CURIAM

Panel consists of Chief Justice Radack and Justices Keyes and Higley.