Substitute Opinion issued August 1, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00441-CV

STUART N. WILSON AND STUART N. WILSON & ASSOCIATES, P.C., Appellants

V.

SILVIA TREVINO AND ELEAZER MALDONADO, Appellees

On Appeal from the 387th District Court
Fort Bend County, Texas
Trial Court Case No. 13-DCV-209723A

SUBSTITUTE MEMORANDUM OPINION

We withdraw our opinion and judgment issued on June 21, 2019 and issue this substitute opinion.[1] Appellants' motion for rehearing is denied.[2]

This is an attempted accelerated appeal from a trial court letter signed May 30, 2019. Appellee Eleazer Maldonado filed an emergency motion to dismiss this appeal for want of jurisdiction, claiming that the letter was not an appealable interlocutory order.[3] Appellee Sylvia Trevino subsequently filed her emergency motion to dismiss and joinder in Maldonado's motion. Appellants Stuart N. Wilson and Stuart N. Wilson and Associates, P.C. responded to the motions and opposed them. We dismiss the appeal for want of jurisdiction.

Background

The underlying case was a divorce action in which appellants represented Trevino, but their services were later terminated. Appellants intervened for

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[1] We are within our plenary power to withdraw our previous opinion and judgment *sua sponte* and issue a new opinion and judgment. *See* TEX. R. APP. P. 19.1(b) (court of appeals has plenary power over its judgment until 30 days after it overrules all timely filed motion for rehearing). The motion for rehearing in this case was timely filed six days after our opinion and judgment issued. *See* TEX. R. APP. P. 49.1 (motion for rehearing due within 15 days after court of appeal's judgment is rendered).

[2] Because we have withdrawn our original opinion and judgment and are issuing a new opinion and judgment, appellants' motion for en banc reconsideration is rendered moot. *See Poland v. Ott*, 278 S.W.3d 39, 41 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

[3] Maldonado asked for emergency dismissal, claiming that the trial court had until July 1 to rule on Maldonado's motion to dismiss under Section 27.003. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a).

attorney's fees and raised claims of breach of contract, fraud, wire fraud, civil conspiracy to commit fraud, unjust enrichment, business disparagement, and fraudulent inducement. These claims were severed from the divorce action into a separate case. Trevino and Maldonado subsequently sought dismissal of appellants' claims under the Texas Citizens' Participation Act, arguing that the claims related solely to the exercise of Trevino and Maldonado's right to petition. *See* TEX. CIV. PRAC. & REM. CODE § 27.003(a).

By letter dated May 30, 2019, the trial court granted Maldonado's motion to dismiss as to all causes of action and granted Trevino's motion as to all but two causes of action. The trial court further found that it had good cause to hold a hearing on the requests for attorney's fees and sanctions and set a hearing for June 17, 2019. Finally, the trial court stated: "Entry of orders in the above ruling is likewise scheduled for June 17, 2019 at 9:00 a.m."

Analysis

Appellees contend in their motions to dismiss this appeal that we lack jurisdiction because the trial court's letter ruling is neither a valid order nor appealable. Appellants disagree, claiming that the letter ruling constitutes a valid order, and that it is appealable under the Texas Supreme Court's decision in *D Magazine Partners, L.P. v. Rosenthal*, 529 S.W.3d 429 (Tex. 2017).

1. The language of the letter complies with the statute but does not indicate it is intended to be an order

Generally, a letter is not the type of document that constitutes a judgment or order. *See Goff v. Tuchsherer*, 627 S.W.2d 397, 398–99 (Tex. 1982). But, courts continue to grapple with the problem of determining whether a letter should be construed as an order. *See In re Johnson*, 557 S.W.3d 740, 743 (Tex. App.—Waco 2018, orig. proceeding). Some courts attempt to discern whether the trial court intended to issue a formal ruling or judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001); *Johnson*, 557 S.W.3d at 743. Other courts have developed a list of attributes that may indicate that a trial court's letter should be construed to be an order.[4] *See, e.g.*, *In re CAS Co., LP*, 422 S.W.3d 871, 875 (Tex. App.—Corpus Christi 2017, orig. proceeding).

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[4] The factors include:

> (1) whether it describes the decision with certainty as to parties and effect;
> (2) it requires no further action to memorialize the ruling;
> (3) it contains the name and cause number of the case;
> (4) the court's diction is affirmative rather than anticipatory of a future ruling;
> (5) it bears a date;
> (6) it was signed by the court; and
> (7) it was filed with the district clerk.

In re CAS Co., LP, 422 S.W.3d 871, 875 (Tex. App.—Corpus Christi–Edinburgh 2017, orig. proceeding).

Looking at the language used by the trial court as it endeavored to comply with the statutes governing motions to dismiss, we concluded that the trial court intended to rule on the motions to dismiss, but did not intend for the letter to be a valid, appealable order. The trial court's letter dated May 30, 2019, contains four sentences: (1) "The Motion to dismiss filed by Eleazer Maldonado on April 5, 2019 with a hearing on May 29, 2019 is granted as to all causes of action;" (2) "The Motion to Dismiss filed by Silvia Trevino (PKA Maldonado) on April 8, 2019 with a hearing on May 29, 2019 is granted as to all causes of action except the claim of Fraud and Fraudulent Inducement;" (3) "The court finds good cause based on the court's docket to conduct a hearing on the attorney fees and sanctions requested in the motions to dismiss on June 17, 2019 at 9:00 a.m.;" and (4) "Entry of the orders in the above ruling is likewise scheduled for June 17, 2019 at 9:00 a.m."

The first two sentences of the trial court's letter state affirmative rulings on the motions to dismiss. The trial court also indicates the date of the hearing on the motions to dismiss. This is significant because there is a statutory deadline for ruling on the motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE § 27.005(a). Section 27.005 requires a trial court to rule on a motion to dismiss within 30 days of holding the hearing. *See id.* If the trial court fails to rule on a motion to dismiss within this 30-day period, the motion is denied by operation of law. *See id.* § 27.008(a). By giving the date of the hearing (May 29), which was one day before the trial court

signed its letter ruling on the motions (May 30), the trial court indicates that its ruling on the motions complies with the statutory deadline.

But, the language of Section 27.005 is interesting for what it does not include. Section 27.005 does not state that the ruling on the motions must be in an order. Rather, the statute only states that the trial court must "rule" on the motions to dismiss within the 30-day period after the hearing. *See id.* § 27.005(a); *Kinney v. BCG Attorney Search, Inc.*, No. 03–12–00579–CV, 2014 WL 1432012, at *7 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (holding that Section 27.005(a) only requires ruling, not signed order, within 30 days after hearing on motions). Thus, there is no statutory requirement that the trial court issue an order ruling on the motions. This weighs in favor of holding that the trial court did not intend for its letter to be an order.

The remaining sentences reference future actions the trial court intends to take. The trial court states that it will hold a future hearing in the future on appellees' request for attorney's fees and sanctions and it will enter an order "on the above ruling" on the date of the hearing. Again, these sentences indicate the trial court's understanding of, and compliance with, the statutes governing motions to dismiss.

Section 27.009 requires the trial court to award attorney's fees, costs, and sanctions if it grants dismissal. *See* TEX. CIV. PRAC. & REM. CODE § 27.009(a).

Because the trial court was granting dismissal, the letter indicates the trial court's understanding that it needed to address attorney's fees and sanctions.

But, the language of Section 27.009, unlike the language of Section 27.005, uses the phrase "orders dismissal." *Id.* § 27.009(a). Section 27.009(a) states:

> If the court *orders* dismissal of a legal action under this chapter, the court shall award to the moving party:
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> > (1) court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require; and
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> > (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.

TEX. CIV. PRAC. & REM. CODE § 27.009(a) (emphasis added).

Thus, the statute contemplates the signing of an order to include the grant of dismissal and the award of attorney's fees and sanctions, unlike Section 27.005 which does not mention the term "order" and only states that the trial court "must rule." *Compare* TEX. CIV. PRAC. & REM. CODE § 27.005(a) *with* TEX. CIV. PRAC. & REM. CODE § 27.009(a). Because the trial court has a short deadline to rule on the motion to dismiss, a trial court may rule without a formal order and then later sign an order of dismissal including the determination about attorney's fees and sanctions. *See DeAngelis v. Protective Parents Coal.*, 556 S.W.3d 836, 859 (Tex.

App.—Fort Worth 2018, no pet.)[5] (nothing in statute requires trial court to rule on attorney's fees and sanctions within 30-day period for ruling on motion to dismiss). Thus, the trial court's language, which showed compliance with the applicable statutory requirements, indicates that the trial court intended to rule on the motions to dismiss, but it does not indicate that the trial court intended to issue a formal order of dismissal because the order of dismissal had to include the award of attorney's fees and sanctions. *See* TEX. CIV. PRAC. & REM. CODE § 27.009.

But, even if the trial court's letter could be construed to be an order, the result would be the same—we would have no jurisdiction to consider this appeal. *See, e.g.*, *Schaeffer Homes, Inc. v. Esterak*, 792 S.W.2d 567, 569 (Tex. App.—El Paso 1990, no pet.) (holding that same result produced whether letter is construed to be formal order or not).

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[5] Appellees sought emergency relief in this Court because they believed that the trial court's letter ruling was insufficient to comply with the statutory requirement that the trial court rule on the motions within 30 days. But as we have determined, the ruling complied with that requirement. And this 30-day deadline for ruling on the motions to dismiss need not include a ruling on the request for attorney's fees and sanctions. *See DeAngelis*, 556 S.W.3d at 859. The trial court apparently has not held a hearing and issued a ruling on the request for attorney's fees and sanctions because appellants' notice of appeal triggered the imposition of an automatic stay under Section 51.104(b).

2. Even if the letter were an order, it is interlocutory and unappealable

Appellants contend that we have jurisdiction, not only because the letter is a valid order, but also because it is appealable under the Texas Supreme Court's opinion in *D Magazine*. We disagree with appellants' interpretation of *D Magazine*.

Section 51.014(a)(12) permits appeal from interlocutory orders denying a motion to dismiss under Section 27.003. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(12). Despite this statutory provision, appellants argue that *D Magazine* permits appeal from the entire order when a portion of that order denies dismissal. We disagree that *D Magazine* creates an exception to Section 51.014(a)(12).

In *D Magazine*, the Texas Supreme Court concluded that Section 51.014(a)(12) permitted appellate consideration of an order that partially denied a motion to dismiss as to a defamation claim and partially granted a motion to dismiss as to other claims. *See* 529 S.W.3d at 431, 441. Because the trial court had denied the motion to dismiss as to defamation in a single order that also partially granted the motion as to other claims, the Texas Supreme Court decided that it had jurisdiction to consider the order, but the Court only considered that portion of the order that denied dismissal. *See id.* at 441. The Court did not hold that such an order gave it jurisdiction to address the portion of the order that granted dismissal.

Although the Court addressed the trial court's denial of attorney's fees, which are statutorily required when the trial court grants dismissal, the Court never held

that this gave it jurisdiction to consider the portion of the order granting the motion to dismiss. Instead, the Court held only that, because the "trial court issued a single order that partially denied D Magazine's motion to dismiss, including its request for attorney's fees," D Magazine could bring an interlocutory appeal under Section 51.014(a)(12) and, "in the interest of judicial economy," the Court would address the denial of attorney's fees. *Id.* at 442.[6] Thus, *D Magazine* does not permit us to consider the portion of an interlocutory order granting dismissal, even if the trial court also partially denies dismissal in the same order.

Regardless of whether the trial court's letter is a formal order, we have no jurisdiction because the order is interlocutory and unappealable. *See Leniek v. Evolution Well Serv., LLC*, No. 14-18-00954-CV, 2019 WL 438825 at *2 (Tex. App.—Houston [14th Dist.] Apr. 2, 2019, no pet.). In *Leniek*, the trial court had granted the appellee's motion to dismiss but had not ruled on the request for

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[6] Appellants also argue that this Court's holding in *Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881 (Tex. App.—Houston [1st Dist.] 2015, no pet.) is no longer good law after *D Magazine*. We disagree. In *Schlumberger*, a panel of this Court held that the Court had no jurisdiction to consider an appeal from the portion of an order granting a motion to dismiss when the order also partially denied the motion. 472 S.W.3d at 889–91. *D Magazine* held that, if a single order includes a partial denial and a partial grant of a motion to dismiss, a court has jurisdiction over the order only to consider the portion of the order that denied dismissal. *See D Magazine*, 529 S.W.3d at 441. *D Magazine* did not hold that a court has jurisdiction to address the portion of the order that grants dismissal. Thus, our prior precedent, *Schlumberger*, is still correct in holding that an appellate court has no jurisdiction to address the portion of an order granting a motion to dismiss, even if the order also partially denies dismissal. *See Schlumberger*, 472 S.W.3d at 890-91.

attorney's fees under Section 27.009. *See id.* at *1. The appellant filed a notice of appeal and the appellees sought dismissal of the appeal. *See id.* The court of appeals noted that there was no statutory authority for an interlocutory appeal from the grant of a motion to dismiss, but the appellant disagreed, arguing that the order was not interlocutory because the failure to rule on the request for attorney's fees within 30 days of the hearing resulted in denial of the request by operation of law. *See id*. at *2. In support of this argument, the appellant cited to *D Magazine*. *See Leniek*, 2019 WL 438825, at *2.

The court of appeals first observed that appellant had misread *D Magazine* because the request for attorney's fees in that case was not overruled by operation of law, but was denied by the trial court. *See id.* at *2 (citing *D Magazine*, 529 S.W.3d at 441). The court of appeals further explained that, under Section 27.009, the trial court was required to award attorney's fees to the moving party and the trial court had no discretion to allow the request to be overruled by operation of law. *See Leniek*, 2019 WL 438825, at *2.

Similarly, the trial court's letter ruling on Maldonado and Trevino's motions to dismiss may have been sufficient to comply with the Section 27.005(a) requirement that the trial court rule on the motion to dismiss within 30 days, but it did not grant dismissal as to all causes of action and it did not contain a ruling on their requests for attorney's fees and sanctions. The trial court expressly noted that

it would be addressing this in a future hearing and would enter an order at that hearing. Given that Section 27.009(a) contemplates an order granting dismissal that includes the award for attorney's fees and sanctions, the trial court's notation to address attorney's fees and sanctions in the future further supports our determination that the trial court did not intend for this letter to be a valid order, and even if it did, such an order would be interlocutory and unappealable. *See Leniek*, 2019 WL 438825, at *2.

Accordingly, we conclude that the trial court's letter is not a valid, appealable order, and therefore, we have no jurisdiction over this appeal. *See Schlumberger Ltd. v. Rutherford*, 472 S.W.3d 881, 895 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

We grant appellees' motions to dismiss and dismiss this appeal for lack of jurisdiction.[7] Any other pending motions are dismissed as moot.

PER CURIAM

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

[7] To expedite the trial court's ruling on attorney's fees and sanctions, and pursuant to Rule 18.6, the mandate will issue with this Court's judgment. *See* TEX. R. APP. P. 18.6.