

Opinion issued June 8, 2021



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

NO. 01-20-00544-CV

**LARRY D. FORD, Appellant
V.
CASTLEROCK COMMUNITIES, Appellee**

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Case No. 2019-68684**

MEMORANDUM OPINION

Appellant, Larry D. Ford, filed a notice of appeal on July 25, 2020 attempting to appeal the trial court's final judgment signed on April 20, 2020. Appellee has filed a motion to dismiss the appeal for want of jurisdiction because Ford's notice of appeal was untimely. We grant the motion and dismiss the appeal.

Background

On February 19, 2020, the trial court granted appellee's motion to dismiss Ford's claims in the underlying suit as frivolous pursuant to Section 13.001 of the Texas Civil Practice & Remedies Code and Rule 91a of the Texas Rules of Civil Procedure. *See* TEX. CIV. PRAC. & REM. CODE § 13.001(a)(2) (authorizing dismissal of action on finding that "the action is frivolous or malicious"), (b)(2) ("in determining whether an action is frivolous or malicious, the court may consider whether . . . the claim has no arguable basis in law or in fact"); TEX. R. CIV. P. 91a (entitled "Dismissal of Baseless Causes of Action"). Appellee subsequently dismissed its counterclaims against Ford and moved for final judgment. The trial court signed its final judgment on April 20, 2020.

On May 6, 2020, sixteen days after the trial court rendered its final judgment, Ford filed a "Motion for Trial Setting Preference Jones Act Preferential Trial Setting." The motion requested that the trial court set the matter for an expedited trial setting in August 2020. On July 2, 2020, seventy-three days after the trial court rendered its final judgment, Ford filed a "Motion to Set Aside Judgement [sic]." On July 25, 2020, ninety-six days after the trial court rendered its final judgment, Ford filed his notice of appeal.

On August 24, 2020, appellee filed a motion to dismiss the appeal for want of jurisdiction, asserting that the notice of appeal was untimely.

Discussion

Absent a timely filed notice of appeal, an appellate court lacks jurisdiction over the appeal. TEX. R. APP. P. 25.1; *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 307 (Tex. 2010). Generally, a notice of appeal is due within thirty days after the judgment is signed. *See* TEX. R. APP. P. 26.1. The deadline to file a notice of appeal is extended to ninety days after the date the judgment is signed if, within thirty days after the judgment is signed, any party timely files a motion for new trial, motion to modify the judgment, motion to reinstate, or, under certain circumstances, a request for findings of fact and conclusions of law. *See* TEX. R. APP. P. 26.1(a); TEX. R. CIV. P. 329b(a), (g). The time to file a notice of appeal may also be extended if, within fifteen days after the deadline to file the notice of appeal, a party properly files a motion for extension. *See* TEX. R. APP. P. 10.5(b), 26.3. A motion for extension of time is necessarily implied 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, 617–18 (Tex. 1997).

Here, Ford's notice of appeal was filed on July 25, 2020, ninety-six days after the final judgment was signed on April 20, 2020. Under these facts, the notice of appeal could only be timely if (1) Ford timely filed a post-trial motion extending the notice of appeal deadline to ninety days after the judgment and (2) our court

presumes a ninety-day extension of time under Rule 26.3. We conclude that Ford did not timely file any post-judgment motion that would extend the notice of appeal deadline.

The deadline to file a notice of appeal is extended to ninety days after the date the judgment is signed if any party timely files a motion for new trial, motion to modify the judgment, motion to reinstate, or, under certain circumstances, a request for findings of fact and conclusions of law. *See* TEX. R. APP. P. 26.1(a); TEX. R. CIV. P. 329b(a), (g). Motions for new trial and motions to modify, correct, or reform judgments must be filed within thirty days after the judgment or order is signed. TEX. R. CIV. P. 329b(a), (g).

Ford’s July 2, 2020 “Motion to Set Aside Judgement [sic]” was filed seventy-three days after the trial court rendered its final judgment. Because the motion was filed more than thirty days after the trial court rendered judgment, the motion was untimely and does not extend the notice of appeal deadline. Thus, we consider whether Ford’s earlier “Motion for Trial Setting Preference” filed on May 6, 2020—within thirty days of the final judgment—can be considered as a timely post-trial motion extending the notice of appeal deadline under Rule 26.1(a). *See Gomez v. Tex. Dep’t of Crim. Justice, Institutional Div.*, 896 S.W.2d 176, 176–77 (Tex. 1995) (holding that motion that “assail[s] the trial court’s judgment” extends the appellate timetable).

The Motion for Trial Setting Preference requested that the trial court set the matter for an expedited trial setting in August 2020. Requesting a trial setting does not assail or seek any substantive change to the judgment. At most, the motion includes a note to the judge—located under the case caption but before the body of the motion—stating without any further discussion that Ford “motions to set aside previous dismissal dated for March 19, 2019 [sic].” But there is no previous dismissal in the case dated March 19, 2019—the trial court’s interlocutory order dismissing Ford’s claims was issued on February 19, 2020 and the final judgment was issued on April 20, 2020. Moreover, the majority of Ford’s motion consists of a section entitled “TCPA Does Not Apply,” suggesting that he is challenging a dismissal based upon the Texas Citizens Participation Act. But the dismissal in this case was not based upon the Texas Citizens Participation Act—Ford’s claims were dismissed as frivolous under Section 13.001 of the Texas Civil Practice & Remedies Code and Rule 91a of the Texas Rules of Civil Procedure. Accordingly, Ford’s motion for trial setting does not extend the notice of appeal deadline because it does not assail or seek substantive changes to either the final judgement signed on April 20, 2020 or any actual judgment in the case.¹

¹ Appellee argues that even if Ford’s May 6, 2020 motion could be considered as assailing the interlocutory dismissal on February 19, 2020, the motion would not extend appellate deadlines because it failed to assail the final judgment on April 20, 2020. We note that Rule 27.2 of the Texas Rules of Appellate Procedure permits appellate courts to “treat actions taken before an

Because no timely motion to modify the judgment was filed, Ford’s notice of appeal was due by May 20, 2020—thirty days after the final judgment was signed on April 20, 2020. *See* TEX. R. APP. P. 26.1. Ford’s July 25, 2020 notice of appeal was untimely filed two months after the Rule 26.1 deadline and well past the fifteen-day period in which Rule 26.3 authorizes us to grant an extension. Once the period for granting a motion for extension of time under Rule 26.3 has passed, a party can no longer invoke the appellate court’s jurisdiction. *See Verburgt*, 959 S.W.2d at 617; *Brown Mech. Servs., Inc. v. Mountbatten Sur. Co.*, 377 S.W.3d 40, 44 (Tex. App.—Houston [1st Dist.] 2012, no pet.). Without a timely filed notice of appeal, this Court lacks jurisdiction over the appeal. *See* TEX. R. APP. P. 25.1.

On August 24, 2020, appellee filed a motion to dismiss this appeal for want of jurisdiction due to the untimely notice of appeal. Ford failed to file an adequate response demonstrating our jurisdiction over the appeal.²

appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed.” TEX. R. APP. P. 27.2. These premature filing rules allow a premature motion for new trial assailing an interlocutory order to extend the notice of appeal deadline despite a final judgment not being entered until later. In this case, however, there was no premature motion for new trial — the final judgment had already been entered on April 20, 2020 when Ford filed his motion on May 6, 2020. Thus, the premature filing rules are not applicable and do not support treating Ford’s motion as assailing the final judgment in this case.

² Ford’s response argues that his untimely notice of appeal should be allowed because his failure to file by the deadline was “inadvertent” and cases should not be decided on “technicalities.” But the requirement of a timely notice of appeal is not a technicality, it is prerequisite for our jurisdiction. Nor are we

Conclusion

For the foregoing reasons, we grant appellee's motion and dismiss the appeal for want of jurisdiction. *See* TEX. R. APP. P. 42.3(a), 43.2(f). We dismiss any other pending motions as moot.

PER CURIAM

Panel consists of Justices Kelly, Landau, and Hightower.

at liberty to extend the notice of appeal deadline other than as provided in the appellate rules. *See* TEX. R. APP. P. 2 (stating that appellate courts may suspend rule's operation in particular case but may not "alter the time for perfecting an appeal in a civil case").