Opinion issued November 2, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00687-CV

GUADALUPE MARIA ZERMENO, MARIA G. ZERMENO, AND ILDEFONZO ZERMENO, Appellants

V.

CAROLYN STONE, Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Case No. 2020-09693

MEMORANDUM OPINION

Appellants Guadalupe Maria Zermeno, Maria G. Zermeno, and Ildefonzo Zermeno bring a restricted appeal challenging a default judgment rendered against Guadalupe Maria Zermeno and Ildefonzo Zermeno in a lawsuit filed by appellee Carolyn Stone. They argue Carolyn Stone lacks standing to sue them and the trial

court erred in rendering a default judgment against them because they filed answers and the error is apparent on the face of the record.

We dismiss Maria G. Zermeno's appeal for lack of jurisdiction and affirm the trial court's judgment as to Guadalupe Maria Zermeno and Ildefonzo Zermeno.

Background

Carolyn Stone ("Stone") bought a home in the Lakeview Homes Addition, a deed-restricted community, in 1988. In 2008, Guadalupe and Ildefonso Zermeno (the "Zermenos") purchased a lot at 322 Lakeside Dr., Channelview, Texas (the "Property"), located two lots away from Stone's property. In 2018, the Zermenos submitted an application to the City of Houston Planning Commission ("City") seeking a replat for the Property, which the City approved in 2019.

In February 2020, Stone sued the Zermenos for alleged violations of the deed restrictions applicable to the Lakeview Homes Addition (the "Restrictions"). The Restrictions include covenants that lots, including the Zermenos' property, cannot be used for any purpose other than single-family residential use. According to Stone, the Zermenos' use of the property deviates from this one single-family residence restriction. Stone contends the Zermenos demolished the single-family residence on the lot, erected an unpermitted steel beam structure, installed a 10' corrugated metal fence, and are maintaining the lot as an unpermitted junkyard, creating an unauthorized nuisance in the neighborhood.

Along with the Zermenos, Stone sued representatives of Harris County and the City of Houston in their official capacity for their approval of a replat for the Property, asserting claims for writ of mandamus and injunctive relief. According to Stone, the officials approved the replat even though they knew the Zermenos intended to use the replatted Property for commercial purposes and that the Restrictions prohibited commercial development of the lot.

The Zermenos, who were served with the petition by a process server on March 29, 2020, failed to file an answer by the due date. *See* TEX. R. CIV. P. 502.5(d). On June 10, 2020, Stone moved for default judgment against the Zermenos, who still had not filed an answer. Stone attached declarations from her and her attorney supporting her claim for unliquidated damages and attorney's fees. Pursuant to Harris County local rules, Stone set her motion for submission on Monday, June 22, 2020, at 8:00 a.m. and notified the Zermenos of the setting by priority mail and certified mail return receipt requested. *See* LOC. R. CIV. DIV. HARRIS CNTY. CIV. DIST. CT. 3.3.3 ("Motions may be heard by written submission. Motions shall state Monday at 8:00 a.m. as the date for written submission. This date shall be at least 10 days from filing, except on leave of court."). The Zermenos do not dispute receiving notice of the setting, nor do they dispute their failure to file a response to the motion for default judgment at least two working days before the

June 22 submission date, as required. *See id*. ("Responses shall be filed at least two working days before the date of submission, except on leave of court.").

The Zermenos and their daughter, Maria Guadalupe Zermeno ("Maria"), each filed answers on June 22, 2020, the date on which Stone's motion for default judgment was set for submission. The record reflects all three answers were hand-filed rather than filed electronically. While the clerk's stamp reflects that the answers were filed on June 22, 2020, neither the stamp nor the record reflects what time of day the Zermenos and Maria filed the answers. The answers each state in their entirety:

> Ildefonso Zermeno: "We have [to] follow the Harris County Engineering Division protocol to obtain [a] new survey and plat to continue [with] the developing of site plans, that have been approved by Harris County."
>
> Guadalupe Zermeno: "We have [to] follow the Harris County Engineering Division protocol to obtain [a] new survey and plat to continue [with] the developing of site plans, that have been approved by Harris County."
>
> Maria G. Zermeno: "Hi how are you, I am not the property owner nor [do] I have my name on the title of 322 Lakeside Dr. So please stop investigating me. I am [their] daughter and that is about it."

On June 22, 2020, the trial court granted Stone's motion for default judgment. In the order, the trial court noted that "[t]he Ze[r]meno Defendants, although having been duly and legally cited to appear and answer, failed to appear and answer, and

wholly made default" and "[t]he Court has read the pleadings and the papers on file, and is of the opinion that the allegations of plaintiff's petition have been admitted."

In August 2020, the trial court severed Stone's claims against the Zermenos into a new cause number, Cause No. 2020-09693-A. On October 7, 2020, the Zermenos and Maria filed a notice of restricted appeal challenging the June 22, 2020 judgment.

Stone's Standing

The Zermenos argue Stone lacks standing to sue them because Harris County and the City of Houston approved their application to replat the Property, and they are merely "abiding by the decisions of [the] governmental authority." Standing is a component of subject-matter jurisdiction and a constitutional prerequisite to maintaining suit under Texas law. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it. *Id.* To plead standing, a plaintiff must allege the (1) plaintiff suffered a personal injury, (2) injury is fairly traceable to the defendant's unlawful conduct, and (3) injury is likely to be redressed by the requested relief. *See id.* at 154. To meet the injury requirement, the plaintiff must plead facts showing the plaintiff, rather than a third party or the public at large, suffered the injury. *Id.* at 155 (citing *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007) (per curiam)).

Stone sued the Zermenos for violating the Restrictions. She alleged the Zermenos' Property is subject to the Restrictions, which prohibit multiple residences on a single lot, as well as forbidding commercial uses. According to Stone, the Zermenos demolished the existing residential home on the lot after they acquired the Property in 2008, and they made several attempts to start commercial-related construction on the Property between 2013 and 2017, including unsuccessfully applying for a permit to operate a mobile home park in 2013, constructing an unpermitted steel beam structure in 2016, storing a shipping container on the Property in 2016, and installing a 10' corrugated metal fence in 2017. According to Stone, the Zermenos' attempts to use the Property for a commercial purpose deviate from and violate the residential-use-only provisions in the Restrictions.

Stone alleged her property decreased in value because of the Zermenos' ongoing and future violations of the Restrictions, and that her injury would be redressed by the injunctive relief and damages she sought against the Zermenos. She alleged:

> The Zermenos' failure to comply with the Restrictions undermines the general plan and scheme of the restrictions and infringes upon the rights of other property owners and residents of the Subdivision. In addition, unless the Zermenos are compelled to comply, the Restrictions will become ineffective, thus adversely affecting the rights of all the present and future property owners and residents of lots within the Subdivision.
>
> . . .

> The Zermeno Defendants' violation of the Restrictions in the Lakeview Homes Addition has damaged Stone by decreasing the value of her real property and the value of the other properties in the Subdivision. Significantly, Stone's property has decreased in value due to the Zermeno Defendants' current and planned improvements to build a mobile home park and/or conduct other commercial activities on the Property in violation of the residential-use only restrictions. Further, their activities to obtain a fraudulent replat have clouded the title on property in the Subdivision by resulting in a replat being filed that expressly deviates from the Restrictions.

Based on the above allegations, we conclude Stone has standing. She pleaded a personalized injury by alleging a decrease in her property value fairly traceable to the Zermenos' alleged violations of the Restrictions, and that her injury likely would be redressed by the damages and injunctive relief she requested.

Furthermore, the Restrictions expressly authorize Stone, as a property owner, to enforce the Restrictions. Paragraph 19 of the Restrictions states: "upon any violation or attempted violation of any of the stipulations, restrictions, covenants and conditions . . . it shall be lawful for . . . any person or persons owning any real property situated in said subdivision to institute and prosecute any proceedings at law or in equity against the person or persons violating or attempting to violate any such stipulation, restriction, covenant and/or condition . . . ." Because she owns real property in the same subdivision as the Zermenos, Stone has the contractual authority to sue the Zermenos for violation of the Restrictions. *See generally Baywood Ests. Prop. Owners Ass'n, Inc. v. Caolo*, 392 S.W.3d 776, 782 (Tex. App.—Tyler 2012, no pet.) (stating restrictive covenant is contractual agreement).

The Zermenos' reliance on Texas Property Code Section 203.003(a) does not carry the day. According to the Zermenos, "TEX. PROP. CODE § 203.003(a) mandates that the Harris County Attorney is the official to enforce alleged violations of property restrictions." Section 203.003(a) states, "The county attorney *may* sue in a court of competent jurisdiction to enjoin or abate violations of a restriction contained or incorporated by reference in a properly recorded plan, plat, replat, or other instrument affecting a real property subdivision located in the county, regardless of the date on which the instrument was recorded." TEX. PROP. CODE § 203.003(a) (emphasis added). By its express terms, Section 203.003(a) authorizes the county attorney to enforce property restrictions, but it does not vest that authority exclusively on the county attorney nor does it prohibit other parties with standing from enforcing restrictions.

Restricted Appeal

Rule 30 of the Texas Rules of Appellate Procedure, dealing with restrictive appeals, provides:

> A party who did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of and who did not timely file a postjudgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c).

TEX. R. APP. P. 30. A restricted appeal is available to provide a party that did not participate at trial with the opportunity to correct an erroneous judgment. *In re*

E.K.N., 24 S.W.3d 586, 590 (Tex. App.—Fort Worth 2000, no pet.) (citing TEX. R. APP. P. 30). To prevail on a restricted appeal, an appellant must show that (1) he filed the notice of restricted appeal within six months of the date of the judgment or order; (2) he was a party to the suit; (3) he did not participate in the hearing that led to the judgment complained of and did not timely file (i) a post-judgment motion, (ii) a request for findings of facts and conclusions of law, or (iii) a notice of appeal; and (4) error is apparent on the face of the record. *See* TEX. R. APP. P. 30; *Ex parte E.H.*, 602 S.W.3d 486, 495 (Tex. 2020). Although the first three requirements for a restricted appeal are jurisdictional, the fourth requirement—error on the face of the record—is not. *Id.* at 497. An appellant who satisfies the first three requirements establishes the court's jurisdiction. But the inquiry does not end there. The appellant also must establish error from the face of the record to prevail in the restricted appeal. *Id.*

A. Notice of Restricted Appeal

To meet the first requirement for a restricted appeal, an appellant's notice of appeal must be timely. Stone argues we lack jurisdiction over the appeal because the Zermenos filed their notice of restricted appeal in the wrong trial court cause number and the notice does not comply with Rule 25.1(d)(7) of the Texas Rules of Appellate Procedure. Stone argues it is too late for the Zermenos to file their notice of appeal in the correct trial court cause number.

1. Standard of Review and Applicable Law

The filing of a timely notice of restricted appeal is a prerequisite to appellate jurisdiction. *Ex parte E.H.*, 602 S.W.3d at 497. Texas Rule of Appellate Procedure 25.1 identifies the requirements for all notices of appeal. TEX. R. APP. P. 25.1(d). Rule 25.1(d) states in pertinent part that notices of appeal must:

> (1) identify the trial court and state the case's trial court number and style
>
> (2) state the date of the judgment or order appealed from
>
> (3) state that the party desires to appeal
>
> (4) state the court to which the appeal is taken unless the appeal is to either the First or Fourteenth Court of Appeals, in which case the notice must state that the appeal is to either of those courts
>
> (5) state the name of each party filing the notice

TEX. R. APP. P. 25.1(d)(1)–(5). Rule 25.1(d)(7) also requires a notice of restricted appeal to:

> (A) state that the appellant is a party affected by the trial court's judgment but did not participate—either in person or through counsel—in the hearing that resulted in the judgment complained of;
>
> (B) state that the appellant did not timely file either a postjudgment motion, request for findings of fact and conclusions of law, or notice of appeal; and
>
> (C) be verified by the appellant if the appellant does not have counsel.

TEX. R. APP. P. 25.1(d)(7).

Although the filing of a notice of appeal is a prerequisite to appellate jurisdiction, the lack of strict compliance with Rule 25.1 does not deprive an appellate court of jurisdiction, so long as the appellant makes a "bona fide attempt to invoke appellate jurisdiction." *City of San Antonio v. Rodriguez*, 828 S.W.2d 417, 418 (Tex. 1992) (quoting *Grand Prairie Indep. Sch. Dist. v. S. Parts Imports, Inc.*, 813 S.W.2d 499, 500 (Tex. 1991) (per curiam)); *see also* TEX. R. APP. P. 25.1(b) ("Any party's failure to take any other step required by these rules, including the failure of another party to perfect an appeal under (c), does not deprive the appellate court of jurisdiction but is ground only for the appellate court to act appropriately, including dismissing the appeal."). The same applies to notices of restricted appeal. *See Approximately $58,641.00 v. State*, 331 S.W.3d 579, 582 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (holding notice of restricted appeal that did not comply with requirements for notice of restricted appeal constituted bona fide attempt to invoke appellate court jurisdiction). Thus, for example, even if an appellant incorrectly denotes a case number on his notice of appeal, the notice of appeal may still constitute a "bona fide attempt to invoke appellate jurisdiction," especially where there is "no suggestion of confusion" about the judgment from which the appellant seeks to appeal or to what court the appellant seeks to appeal. *See Rodriguez*, 813 S.W.2d at 418.

2. Analysis

Stone argues the Zermenos' notice of restricted appeal identifies the wrong trial court case number and violates Rule 25.1(d)(7)(A) and (B) because the notice does not state (1) the Zermenos are parties affected by the trial court's judgment who did not participate in the hearing resulting in the default judgment, or (2) that the Zermenos did not file a timely "postjudgment motion, request for findings of fact and conclusions of law or notice of appeal." TEX. R. APP. P. 25.1(d)(7)(A)–(B).

Stone relies on *Stubblefield v. Courtland Village Townhomes Homeowner's Association*, No. 01-00-01328-CV, 2002 WL 1340296 (Tex. App.—Houston [1st Dist.] June 20, 2002, no pet.) (mem. op., not designated for publication) to support her argument that the appeal should be dismissed for lack of jurisdiction. Stone argues this appeal is factually identical to *Stubblefield* and therefore, we must dismiss the Zermenos' appeal. We disagree.

In *Stubblefield*, Stubblefield incorrectly identified the trial court cause number as the original rather than severed cause number and he did not identify the date of the final judgment he was seeking to appeal or the court to which the appeal was taken. *Id.* at *2. It was also Stubblefield's fourth appeal concerning the same issues. *Id.* Here, the Zermenos' notice of restricted of appeal correctly identities the trial court, the date of the judgment being appealed, the identity of the parties filing the appeal, and the courts to which the appeal is being taken (either the First or

Fourteenth Court of Appeals). TEX. R. APP. P. 25.1(d)(1)–(5). Stone does not allege she was confused about which judgment the Zermenos were appealing, nor do we perceive any reason for potential confusion given that there is only one appealable judgment. *See Rodriguez*, 813 S.W.2d at 418. We conclude the Zermenos made a bona fide attempt to invoke appellate jurisdiction with their notice of appeal, and dismissal is inappropriate. *See id.*; *see also Approximately $58,641.00*, 331 S.W.3d at 582.

The notice of restricted appeal was also timely because it was filed within six months after the trial court signed the default judgment. *See* TEX. R. APP. P. 26.1(c) (stating notice of restricted appeal "must be filed within six months after the judgment or order is signed"). Thus, we conclude the Zermenos met the first requirement for a restricted appeal. TEX. R. APP. P. 30; *Ex parte E.H.*, 602 S.W.3d at 495.

B. Party to the Suit

Stone argues we must dismiss Maria's appeal because Maria is neither a party to the underlying suit nor subject to the default judgment. There is no dispute that Maria's parents, the Zermenos, are parties to the underlying suit, and therefore, they satisfy the second element required for a restricted appeal. Maria, however, is not a party. Thus, she cannot satisfy the second requirement for a restricted appeal. *See*

TEX. R. APP. P. 30; *Ex parte E.H.*, 602 S.W.3d at 495. Because this requirement is jurisdictional, we dismiss Maria's appeal for lack of jurisdiction. *See id.* at 497.

C. Participation in the Default Judgment Hearing

The Zermenos did not participate in the default judgment hearing or file any timely post-judgment motions or requests for findings of fact and conclusions of law—a point which Stone does not dispute. Because the Zermenos satisfy this third and final jurisdictional requirement for a restricted appeal, we now consider whether the Zermenos have satisfied the fourth requirement by establishing error from the face of the record. *See id.*

D. Error on the Face of the Record

The Zermenos argue there is error on the face of the record because they filed their answers the same day the trial court rendered the default judgment against them, and also because they have been unable to obtain a copy of the court reporter's record from the default judgment hearing. A trial court errs if it renders a default judgment after the defendant files an answer. *See Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989) ("A default judgment may not be rendered after the defendant has filed an answer."). An appellant is entitled to a new trial if the record affirmatively reflects this occurred. *See Halm v. Halm*, No. 14-05-00123-CV, 2006 WL 239852, at *1 (Tex. App.—Houston [14th Dist.] Feb. 2, 2006, no pet.) (mem. op.) (holding error apparent on face of record where record reflected defendant filed

answer day before trial court entered default judgment); *see also Rosillo Creek Apartments, LLC v. Austin*, No. 04-11-00884-CV, 2012 WL 2914995 (Tex. App.—San Antonio July 18, 2012, no pet.) (mem. op.).

In *Rosillo Creek Apartments, LLC v. Austin*, No. 04-11-00884-CV, 2012 WL 2914995 (Tex. App.—San Antonio July 18, 2012, no pet.) (mem. op.), the trial court granted a default judgment against Rosillo Creek Apartments after it failed to file an answer in the case. Rosillo Creek Apartments filed a restricted appeal. The court of appeals held the trial court erred by granting the default judgment because Rosillo Creek Apartments had filed an answer prior to the entry of default judgment, and the error was apparent on the face of the record. *Id.* at *2. The record demonstrated that the answer, which had been mailed for filing on July 15, 2011, was file-stamped by the district clerk's office at 2:28 p.m. on July 18, 2011. The plaintiffs filed a motion for default judgment at 4:10 p.m. on July 18, 2011, and the trial court signed an order granting the motion later that same day. Thus, the record reflected Rosillo Creek Apartments had filed its answer before the trial court rendered its judgment.

Unlike in *Rosillo Creek Apartments*, the record before us does not reflect the time the Zermenos filed their answers or the time the trial court rendered the default judgment on June 22, 2020. While the Zermenos filed their answers the same day the trial court granted the default judgment, that issue is not dispositive because the trial court would not have erred by granting the default judgment before the answers

were filed. The record reflects that Stone's default judgment motion was set for submission at 8:00 a.m. on June 22, 2020. The courthouse did not open for business until 8:00 a.m. on June 22, 2020.[1] The trial court's order granting the motion for default judgment states that the trial "Court has read the pleadings and the papers on file" and further that "[t]he Ze[r]meno Defendants, although having been duly and legally cited to appear and answer, failed to appear and answer, and wholly made default." There is nothing in the record that refutes these statements.[2] *See generally Date v. RSL Funding, LLC*, No. 01-12-00697-CV, 2013 WL 2146718, at *1 (Tex. App.—Houston [1st Dist.] May 16, 2013, no pet.) (mem. op.) (holding appellant did not show error on face of record negating trial court's recital that he was properly served). Thus, we conclude the record before us does not affirmatively demonstrate error.

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1 This Court may take judicial notice of the Harris County District Court's general hours of operation as Monday - Friday, 8:00 a.m. - 4:30 p.m., published at https://www.hcdistrictclerk.com/Common/About/Hours_Locations.aspx. *See* TEX. R. EVID. 201.

2 In *Davis v. Jefferies*, 764 S.W.2d 559, 560 (Tex. 1989), which does not involve a restricted appeal, the defendant's answer was delivered to the district clerk's office at 11:10 a.m. Unaware that an answer had been filed, the trial court rendered a default judgment against the defendant at 1:30 p.m. the same day. The Texas Supreme Court held that the lower appellate court correctly reversed the trial court's order granting a default judgment because the defendant's answer was on file when the default judgment was granted. Here, nothing in the record reflects the Zermenos filed their answers before the trial court entered the default judgment.

The Zermenos' inability to obtain a record of the default judgment hearing also does not establish error from the face of the record. In a no-answer default context, a judgment can be entered on the pleadings alone, and all facts properly pled are considered admitted. *See Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 732 (Tex. 1984) (stating that in no-answer default context, judgment can be entered on pleadings alone, and all facts properly pled are deemed admitted).

Unlike no-answer default judgments, a post-answer default judgment cannot be entered on the pleadings. Instead, a plaintiff must offer evidence and prove his case as in a judgment on trial. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979); *Sharif v. Par Tech, Inc.*, 135 S.W.3d 869, 873 (Tex. App.—Houston [1st Dist.] 2004, no pet.). "If the judgment is rendered after presentation of evidence to the court in the absence of the appellant and his attorney, the failure to have the court reporter present to make a record constitutes reversible error." *Sharif*, 135 S.W.3d at 873 (quoting *Chase Bank v. Harris Cnty. Water Control & Improvement Dist.*, 36 S.W.3d 654, 655 (Tex. App.—Houston [1st Dist.] 2000, no pet.)). "Such error is not harmless because, without a reporter's record, this Court is unable to determine if sufficient evidence was submitted to support the judgment." *Id.* at 873 (quoting *Chase Bank*, 36 S.W.3d at 655–56).

Whether a record was required, and therefore, the Zermenos can show error on the face of the record depends on whether the trial court rendered a no-answer

default judgment or a post-answer default judgment. *See generally Whitaker v. Rose*, 218 S.W.3d 216, 220–21 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (discussing differences between post-answer default judgments and no-answer default judgments). The record does not reflect the Zermenos' answers were on file when the trial court granted the default judgment. Thus, because the record does not affirmatively reflect this appeal involves a post-answer default judgment, the Zermenos' inability to obtain a record does not create error on the face of the record.

Conclusion

We affirm the trial court's judgment as to the Zermenos. We dismiss Maria's appeal for want of jurisdiction.

Veronica Rivas-Molloy
Justice

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.