

Affirmed and Memorandum Opinion filed January 26, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-00931-CV

KENNEDY GILES, Appellant

V.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellee

**On Appeal from the County Court at Law No. 2
Fort Bend County, Texas
Trial Court Cause No. 14-CCV-053505**

M E M O R A N D U M O P I N I O N

During a foreclosure proceeding, appellee, Federal National Mortgage Association (“Federal”), purchased certain property previously owned by appellant, Kennedy Giles, and his spouse. Federal then filed a forcible-detainer action against Giles, his spouse, and all occupants, seeking possession of the property. A justice court granted the requested relief. Giles appealed to the county court at law—the trial court underlying the present appeal—for a trial *de novo*. See Tex. R. Civ. P. 510.9, .10. The trial court rendered judgment awarding possession

to Federal. In his sole appellate issue, Giles contends he is entitled to a new trial because the trial court erred by not requiring the court reporter to make a record of the proceedings.¹ We affirm.

ANALYSIS

In support of his issue, Giles cites Texas Rule of Appellate Procedure 34.6(f) which outlines the situations under which a party is entitled to a new trial because the reporter's record has been lost or destroyed. *See* Tex. R. App. P. 34.6(f). That rule is inapplicable in this case because it is undisputed there was no record made of the proceedings in the first place. This case is not a situation in which a reporter's record was made but some or all of it was lost or destroyed. Giles acknowledges there was no record made because he complains that the trial court should have required the reporter to make a record.

Texas Rule of Appellate Procedure 13.1(a) provides that a court reporter must make a full record of the proceedings "unless excused by agreement of the parties." Tex. R. App. P. 13.1(a). However, Texas Government Code section 52.046(a), which prescribes the general duties of court reporters, provides that "[o]n request," the reporter shall make a record of proceedings. *See* Tex. Gov't Code Ann. § 52.046(a) (West 2013) (emphasis added). We need not resolve any conflicts between the rule and the statute regarding who bears the burden to ensure a record is made because under either, Giles failed to preserve his complaint for appellate review. *See* Tex. R. App. P. 33.1(a) (providing that to preserve complaint for appellate review, party must make a timely objection, request, or motion in the trial court and obtain a ruling); *see also Emesowum v. Morgan*, No.

¹ In his appellate brief, Giles refers only to the justice court's judgment and that court's alleged failure to require that a record be made, but Giles is appealing the county court's judgment. We liberally construe the brief as complaining about the lack of a reporter's record of the county-court proceedings.

14–13–00397–CV, 2014 WL 3587385, at *2 n.5 (Tex. App.—Houston [14th Dist.] July 22, 2014, pet. dismiss’d) (mem. op.) (declining to consider differences between Rule 13.1(a) and section 52.046(a) because appellant failed to preserve error under either).

Relative to rule 13.1(a), Federal asserts in its appellate brief that the parties agreed to excuse the making of a reporter’s record and that the reporter confirmed, when contacted by Federal, her notes indicated such an agreement. However, as Federal acknowledges, the clerk’s record does not include any such agreement. Nonetheless, the record does not reflect that Giles objected to the reporter’s failure to make a record, as required to preserve his complaint for appellate review. *See Emesowum*, 2014 WL 3587385, at *2; *Reyes v. Credit Based Asset Servicing & Securitization*, 190 S.W.3d 736, 740 (Tex. App.—San Antonio 2005, no pet.). We recognize that axiomatically there could be no reporter’s record of an oral objection to lack of a reporter’s record, but such an objection could have been made in writing and included in the clerk’s record. *See Emesowum*, 2014 WL 3587385, at *2 n.4; *Reyes*, 190 S.W.3d at 740. With respect to section 52.046(a), the clerk’s record does not reflect that Giles requested that a record be made or brought any such request to the trial court’s attention. *See Emesowum*, 2014 WL 3587385, at *2; *Nabelek v. Dist. Attorney of Harris Cnty.*, 290 S.W.3d 222, 231–32 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

In summary, because Giles did not preserve his complaint for appellate review, we overrule his sole issue and affirm the trial court’s judgment.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison, and Donovan.