

**Motion Granted, Appeal Dismissed, and Memorandum Opinion filed
December 7, 2017.**



In The

Fourteenth Court of Appeals

NO. 14-17-00602-CV

JERRY LEE GENTRY, II, Appellant

V.

SIEMENS FINANCIAL SERVICES, INC., Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2015-68003**

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

Plaintiff/appellee Siemens Financial Services, Inc. filed a motion to dismiss this appeal for lack of jurisdiction, contending defendant/appellant Jerry Lee Gentry, II filed his notice of appeal more than a year past the deadline. Gentry has not filed a response to the motion. We conclude we lack jurisdiction and, therefore, grant the motion.

BACKGROUND

A. Proceedings before Judge Lunceford

Judge Erin Lunceford of the 61st District Court granted summary judgment for Siemens on March 21, 2106 (“the 2016 Judgment”) with respect to its claims arising out of Gentry’s alleged default on two medical equipment leases. Gentry timely filed a motion for new trial. Judge Lunceford held a hearing on the motion on May 27, 2016. The transcript of the hearing includes the following exchange between Judge Lunceford and Gentry’s counsel:

THE COURT: . . . But see — okay. The order is Defendant’s Motion for Reconsideration or for a New Trial.

[COUNSEL]: It’s denied.

THE COURT: It’s denied.

[COUNSEL]: I think that’s what he’s asking the Court to do.

THE COURT: Okay. Well, and I think that you have an understanding and that’s what I understand it to be; we will deny the motion.

The same day, Judge Lunceford signed an order on Gentry’s motion for new trial (“the New Trial Order”). She used the form of order Gentry had submitted, which contained language granting the motion for new trial. The order as signed by Judge Lunceford, though, contains strikeouts of and additions to the preprinted language. The words “GRANTED” and “GRANTS” are crossed out, and “DENIED” and “DENIES,” respectively, are typed above them. However, the following passages are unchanged: “the Court finds that the motion has merit” and “orders a new trial in the interest of justice and fairness”:

**ORDER ON
DEFENDANT'S MOTION FOR RECONSIDERATION OR FOR NEW TRIAL**

On the 27th day of May, 2016, the Court considered *Defendant's Motion for Reconsideration or for New Trial*. After considering the evidence contained within the motion and the arguments of counsel, the Court finds that the motion has merit and therefore should be ~~GRANTED~~. The Court ~~GRANTS~~ the motion and orders a new trial in the interest of justice and fairness.

Signed: 
5/27/2016
JUDGE PRESIDING

Thus, the New Trial Order reads as follows:

On the 27th day of May, 2016, the Court considered *Defendant's Motion for Reconsideration or for New Trial*. After considering the evidence contained within the motion and the arguments of counsel, the Court finds that the motion has merit and therefore should be DENIED. The Court DENIES the motion and orders a new trial in the interest of justice and fairness.

(italics in original).

Because Gentry timely filed a motion for new trial, he had ninety days from the date the 2016 Judgment was signed to file a notice of appeal. Tex. R. App. P. 26.1(a). The ninetieth day following the 2016 Judgment was June 20, 2016. Gentry did not file a notice of appeal from the 2016 Judgment.

In September 2016, Siemens filed a motion to compel under Texas Rule of Civil Procedure 621a for post-judgment discovery in aid of enforcing the 2016 Judgment. Gentry opposed the motion to compel, but he did not suggest in his opposition that he had been granted a new trial. Based on those filings, it appears

both parties agreed the motion for new trial was denied, and the 2016 Judgment was final and enforceable.

B. Proceedings before Judge Phillips

On January 1, 2017, Judge Fredericka Phillips took the bench of the trial court. She held a hearing on May 10, 2017. The record does not contain a transcript of that hearing.

Judge Phillips signed another judgment following the hearing (“the 2017 Judgment”). The 2017 Judgment: (1) reconsiders the New Trial Order, which is described as “granting” a new trial; (2) sets aside the New Trial Order; (3) “ungrants” the new trial, (4) withdraws two orders on post-judgment discovery; and (5) renders final judgment for Siemens in the same amounts as the 2016 Judgment.

Each party timely filed a post-judgment motion regarding the 2017 Judgment. Gentry contended Judge Lunceford granted a new trial, and Judge Phillips did not have the power to “ungrant” it. Siemens contended Judge Lunceford denied the motion for new trial, such that the trial court’s plenary power to modify or vacate the 2016 Judgment expired thirty days after the New Trial Order was signed. In sum, Gentry thought the 2017 Judgment was wrong, and Siemens thought it was void. Judge Phillips denied both motions.

Gentry filed a notice of appeal regarding the 2017 Judgment on July 24, 2017, which is within ninety days after that judgment was signed. Siemens has moved to dismiss the appeal for lack of jurisdiction, contending the 2017 Judgment is void because it was signed after the trial court lost plenary power, and Gentry is long past the deadline to appeal the 2016 Judgment.

ANALYSIS

The jurisdictional question before us is straightforward. We must determine

if the 2017 Judgment is void due to the fact that it was signed after the trial court's plenary power expired. If it is void, then Gentry's notice of appeal is ineffective with respect to the 2017 Judgment and irreparably late with respect to the 2016 Judgment. In that situation, we lack jurisdiction, and Gentry's appeal must be dismissed.¹ If the 2017 Judgment is not void, then Gentry's notice of appeal is timely, we have jurisdiction, and the appeal may proceed.

I. Law on plenary power

Plenary power refers to that period of time in which a trial court may vacate its judgment by granting a new trial, or in which it may modify or correct its judgment. *In re Gillespie*, 124 S.W.3d 699, 702 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). By default, a trial court's plenary power expires thirty days after the final judgment is signed. Tex. R. Civ. P. 329b(d).

If any party files a motion for new trial, the trial court has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first. *See* Tex. R. Civ. P. 329b(e). A motion for new trial is overruled by operation of law if the trial court does not sign an order ruling on the motion within seventy-five days after the judgment is signed. Tex. R. Civ. P. 329b(c).

Generally, a trial court lacks power to act in a case after plenary power expires. *Custom Corps., Inc. v. Sec. Storage, Inc.*, 207 S.W.3d 835, 839 (Tex. App.—

¹ A void order may be challenged by a petition for writ of mandamus. *See In re Sw. Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam). Had Gentry not appealed the 2017 Judgment, Siemens could seek mandamus relief. *See id.* (conditionally granting petition for writ of mandamus from order signed after trial court's plenary power expired). Because Gentry appealed, though, Siemens can achieve the same relief—a conclusion that the 2017 Judgment is void—through a dismissal of this appeal for lack of jurisdiction.

Houston [14th Dist.] 2006, no pet.). Once plenary power expires, the court may not modify, correct, or reform the judgment. Tex. R. Civ. P. 329b(e). Likewise, the court may not set aside the judgment after plenary power expires except by a timely bill of review. Tex. R. Civ. P. 329b(f). A judicial action taken after plenary power expires is void. *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 486 (Tex. 1995).

II. 2017 Judgment is void because signed after plenary power expired

A. Motion for new trial denied on May 27, 2016

Because Gentry timely filed a motion for new trial from the 2016 Judgment, the trial court's plenary power was extended until thirty days after denial of the motion for new trial. Tex. R. Civ. P. 329b(e). Therefore, we must determine whether the motion for new trial was denied.

1. Legal standards

The same rules of interpretation apply in construing the meaning of a court order as in ascertaining the meaning of other written instruments. *See Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404–05 (Tex. 1971). We examine and consider the entire order so that none of the provisions will be rendered meaningless, if possible. *See Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 422 (Tex. 2000). An order legitimately susceptible of more than one reasonable interpretation is ambiguous. *Hemyari v. Stephens*, 355 S.W.3d 623, 626 (Tex. 2011) (per curiam). If an order is ambiguous, we are to focus on the order's language and consider the record and the context in which the trial court made the order. *See Hatfield v. Solomon*, 316 S.W.3d 50, 58 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

2. New Trial Order is unambiguous

If Judge Lunceford wanted to grant a new trial, she could have signed Gentry's proposed order as it was printed, without alteration. She would have no need to

change any part of the order. But crucial parts of the order are changed: “granted” and “grants” are crossed out and replaced with their opposites, “denied” and “denies.” These alternations unambiguously demonstrate the trial court’s intent to deny the motion.

3. Even if New Trial Order is ambiguous, record is clear Judge Lunceford denied motion for new trial

Assuming for the sake of argument that the failure to omit “the Court finds that the motion has merit” and “orders a new trial in the interest of justice and fairness” renders the order ambiguous, we turn to the record and context in which the order was made. *Hatfield*, 316 S.W.3d at 58.

Judge Lunceford and Gentry’s counsel had the following exchange at the hearing on the motion for new trial:

THE COURT: . . . But see — okay. The order is Defendant’s Motion for Reconsideration or for a New Trial.

[COUNSEL]: It’s denied.

THE COURT: It’s denied.

[COUNSEL]: I think that’s what he’s asking the Court to do.

THE COURT: Okay. Well, and I think that you have an understanding and that’s what I understand it to be; we will deny the motion.

Those statements leave no doubt that Judge Lunceford intended to deny Gentry’s motion for new trial.

We conclude Gentry’s motion for new trial was denied on May 27, 2016.

B. Plenary power expired on June 27, 2016

Plenary power expired thirty days after Gentry’s motion for new trial was denied, whether by written order or operation of law. *See* Tex. R. Civ. P. 329b(e). A

motion for new trial is overruled by operation of law if the trial court does not sign an order ruling on the motion within seventy-five days after the judgment is signed. Tex. R. Civ. P. 329b(c).

The New Trial Order was signed May 27, 2016, which was sixty-seven days after the 2016 Judgment was signed. Thirty days after May 27, 2016, was Sunday, June 26, 2016. Therefore, plenary power expired on Monday, June 27, 2016, because that was the next day following June 26, 2016, that was not a Saturday, Sunday, or legal holiday. Tex. R. Civ. P. 4; *see Long John Silver's Inc. v. Martinez*, 850 S.W.2d 773, 776–77 (Tex. App.—San Antonio 1993, writ dism'd w.o.j.) (per curiam) (applying Rule 4 in calculation of plenary power); *Keeper v. First Care, Inc.*, 794 S.W.2d 879, 881 (Tex. App.—Tyler 1990, no writ) (same).

C. Rule 621a post-judgment discovery proceedings did not resurrect plenary power

We next consider if the post-judgment discovery proceedings under Texas Rule of Civil Procedure 621a operated to resurrect the trial court's plenary power after it expired.

Exceptions exist to the general rule that a trial court lacks power to act after plenary power expires. One exception is the power to correct a clerical error in the judgment. *See id.* Another exception is the power to supervise post-judgment discovery conducted to aid in the enforcement of the judgment. *See* Tex. R. Civ. P. 621a; *Custom Corps.*, 207 S.W.3d at 839. That supervisory power aligns with the rule that a court always has inherent power to enforce its own judgments. *Arndt v. Farris*, 633 S.W.2d 497, 500 (Tex. 1982).

We have found no authority to suggest the trial court's supervision of discovery in aid of enforcement of the judgment resurrects its plenary power with respect to that judgment. To the contrary, cases about post-judgment discovery

contrast a trial court’s jurisdiction to vacate or modify its judgment, which ends once plenary power expires, with a trial court’s jurisdiction to enforce its judgment, which never ends. *See id.*; *cf. In re Smith*, 192 S.W.3d 564, 568 (Tex. 2006) (orig. proceeding) (per curiam) (alter-ego finding made for first time in post-judgment discovery proceedings under Rule 621a could not be used to enforce judgment against entity not named in judgment); *Butler v. Stonewall Bank*, 569 S.W.2d 542, 544 (Tex. App.—Corpus Christi 1978, no writ) (“Neither post-judgment discovery procedure can be used as a vehicle to re-open the main case or to independently join additional claims or parties.”).

Accordingly, we conclude the post-judgment discovery proceedings under Rule 621a had no effect on the trial court’s plenary power with respect to the 2016 Judgment.

D. 2017 Judgment is void

The 2017 Judgment purports to, among other things, set aside the New Trial Order, “ungrant” the new trial, and render final judgment for Siemens. None of those acts is permissible after plenary power expires. *See* Tex. R. Civ. P. 329b(f). Accordingly, the 2017 Judgment is void, and Gentry’s notice of appeal from the 2017 Judgment is of no effect.

III. Gentry did not timely appeal from 2016 Judgment

As stated above, the deadline to file a notice of appeal from the 2016 Judgment was June 20, 2016. Gentry did not file a notice of appeal by that date. A timely notice of appeal is necessary to invoke our jurisdiction. When the court lacks jurisdiction, we must dismiss the appeal. *See Baker v. Baker*, 469 S.W.3d 269, 272 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

CONCLUSION

We grant Siemens' motion to dismiss and dismiss the appeal.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Jamison, and Brown.