Dismissed and Opinion filed August 17, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00254-CV

SILVERTIP HOLDINGS, LLC, Appellant

V.

PREMIER ALLIANCE HOLDINGS, LLC AND PATRICK BROWN, Appellees

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 2020-54805

OPINION

In this dispute between a lender and a borrower, the lender argues that the trial court's judgment should be reversed because the trial court failed to render judgment in accordance with the terms of a settlement agreement. In response, the borrower argues that the lender's appeal should be dismissed without regard to the merits because this court lacks appellate jurisdiction.

The borrower's jurisdictional argument hinges on the timeliness of the lender's notice of appeal, which in turn depends on the trial court's ruling denying the lender's motion to extend the appellate timetables under Rule 306a of the Texas Rules of Civil Procedure. Because the lender has challenged that adverse ruling on appeal, the lender has the burden of conclusively establishing all vital facts in support of its motion. For the reasons explained below, we conclude that the lender has not satisfied that burden. This conclusion likewise means that the lender's notice of appeal was untimely, and that this appeal must be dismissed for want of appellate jurisdiction.

BACKGROUND

Silvertip Holdings, LLC (the "Lender") loaned $170,000 to Premier Alliance Holdings, LLC and Patrick Brown (collectively, the "Borrower"). The Borrower defaulted under the terms of the loan. Following the default, the Lender sued the Borrower for breach of contract. The Lender also asserted other causes of action against the Borrower, including fraud.

The parties entered into a settlement agreement, which required the Borrower to make a series of installment payments for a total of $200,000. As a condition of the settlement, the Borrower agreed that if it defaulted again on the installments, then the Lender could immediately accelerate all amounts due and move the trial court to render judgment for the full outstanding balance, plus interest, fees, and other costs. The Borrower made several installment payments, but the Borrower ultimately defaulted again.

Fearing that the Borrower might try to hide assets, the Lender filed a motion to compel discovery. Less than a month later, and before a hearing had been held on the motion to compel, the Lender moved for entry of judgment.

On November 10, 2021, a hearing was set on the motion to compel—rather than on the motion to enter—but during that hearing, the Lender requested the trial court to simply render judgment instead. In furtherance of that request, the Lender submitted a proposed final judgment awarding itself more than $254,000 in damages, plus pre-judgment and post-judgment interest of 18% and an undetermined amount of attorney's fees.

The Borrower advised the trial court that it wanted to resolve this case and pay off the debt, but the Borrower hoped to negotiate a new payment plan with the Lender. The Borrower accordingly requested the trial court to send the parties to mediation.

The trial court refused to send the parties to mediation. The trial court also expressed disapproval in the Lender's setting of the hearing on the motion to compel, which the court described as "a gotcha" and "something that [the Lender was] really not even interested in." Nevertheless, the trial court indicated that it would review the proposed judgment and "will make a ruling on this no later than a week from today, on the Final Judgment."

The very next day, on November 11, 2021, the Borrower filed an objection to the Lender's motion to enter, arguing primarily that the Lender's requested amount of damages was unreasonable. The Borrower asserted that the settlement amount was only $200,000 and that $42,000 in installments had already been paid. Therefore, the Borrower requested the trial court to only award the Lender $158,000 in damages. The Borrower also requested the trial court to assess the "minimum" amount of interest because of the unforeseen pandemic.

The trial court granted the Borrower's requests and signed a final judgment that same day, November 11, 2021. Where the Lender had originally proposed more than $254,000 in damages, the trial court scratched out that amount and replaced it

with just $158,000. And where the Lender had originally proposed 18% in pre-judgment and post-judgment interest, the trial court replaced that amount with just 5%. The trial court also deleted the Lender's undetermined award of attorney's fees, in effect providing for no such recovery at all.

Five days later, on November 16, 2021, the Lender filed a reply to the Borrower's objection, disputing the Borrower's calculations. Without ever acknowledging that the trial court had already signed a final judgment, the Lender asserted that the Borrower should be liable for more than $269,000 in damages, plus 12.36% pre-judgment and post-judgment interest and an undetermined amount of attorney's fees.

More than two months later, on January 31, 2022, the Lender filed a verified motion under Rule 306a of the Texas Rules of Civil Procedure. The Lender asserted in this motion that it first became aware of the trial court's final judgment on January 20, 2022, which was more than twenty days after that judgment had been signed. The Lender also attached evidence—primarily emails and affidavits—purporting to show that the Lender's counsel had been experiencing computer difficulties since October of 2021, and that counsel only became aware of the final judgment when he advised his assistant to contact the trial court and ask for an update regarding this case.

The Lender also filed a motion for new trial and set both motions for submission without a live hearing. On March 7, 2022, the trial court signed an order denying the Lender's motion under Rule 306a. One month later, the Lender filed its notice of appeal.

ANALYSIS

The Lender has filed a brief in this court raising several appellate issues. Separately, the Borrower has filed a motion to dismiss, challenging whether this court has appellate jurisdiction. Because we are duty-bound to determine questions of jurisdiction, we begin with the Borrower's motion to dismiss. *See In re City of Dallas*, 501 S.W.3d 71, 73 (Tex. 2016) (orig. proceeding) (per curiam).

The Borrower's motion focuses on the timing of the Lender's notice of appeal. As a general rule, a notice of appeal must be filed within thirty days of the trial court's final judgment to invoke this court's appellate jurisdiction. *See* Tex. R. App. P. 25.1(b); Tex. R. App. P. 26.1. The Lender filed its notice of appeal nearly five months after the date of the final judgment, which is well beyond the general thirty-day deadline. Thus, the Lender's notice of appeal was untimely under the general rule, and this court lacks appellate jurisdiction under that rule, unless there is an applicable exception.

There are a number of exceptions to the general rule, but the only one at issue in this case is Rule 306a of the Texas Rules of Civil Procedure. That rule provides that if a party adversely affected by a final judgment or the party's attorney has not received notice or actual knowledge of the judgment within twenty days that the judgment is signed, then the period for filing certain motions—including a notice of appeal—does not begin to run until the party or the party's attorney received such notice of actual knowledge, whichever occurred first, provided that no such period shall begin more than ninety days after the judgment was signed. *See* Tex. R. Civ. P. 306a(4); *Gilchrist Cmty. Ass'n v. Hill*, No. 14-21-00630-CV, — S.W.3d —, 2023 WL 3513200, at *2 (Tex. App.—Houston [14th Dist.] 2023, no pet. h.) ("The grant of additional time to file documents applies to a notice of appeal to an appellate court."). To establish the applicability of this rule, the party adversely affected has

the burden of proving in the trial court, on sworn motion and notice, the date on which the party or the party's attorney first either received notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed. *See* Tex. R. Civ. P. 306a(5).

The Lender invoked Rule 306a and sought in its verified motion to prove that it did not become aware of the trial court's final judgment until January 20, 2022, which was more than twenty days after the judgment was signed. The Lender's verified motion established a prima facie case that the Lender lacked timely notice and invoked the trial court's otherwise-expired jurisdiction for the limited purpose of holding an evidentiary hearing to determine the date on which the Lender or its counsel first received notice or acquired actual knowledge of the judgment. *See In re Lynd Co.*, 195 S.W.3d 682, 685 (Tex. 2006) (orig. proceeding).

But the Lender never requested a live evidentiary hearing in connection with its Rule 306a motion, and the trial court never conducted one either. Instead, at the Lender's request, the trial court decided the Rule 306a motion by submission.

Following the submission date, the trial court signed a written order denying the motion, and the recitals in that order state that the trial court considered all of the arguments presented in the motion, as well as "the evidence attached thereto." The Lender now challenges this ruling, arguing that there is legally insufficient evidence to support it.

A party may challenge the legal sufficiency of a trial court's ruling on a motion under Rule 306a. *See LDF Constr., Inc. v. Tex. Friends of Chabad Lubavitch, Inc.*, 459 S.W.3d 720, 724 (Tex. App.—Houston [14th Dist.] 2015, no pet.). In such a legal sufficiency challenge, we credit favorable evidence if a reasonable factfinder could do so, and we disregard contrary evidence unless a reasonable factfinder could not. *See Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017). When,

as here, the challenger is attacking the legal sufficiency of an adverse finding on an issue for which the challenger had the burden of proof, the challenger must demonstrate on appeal that "the record conclusively establishes all vital facts in support of the issue." *Id.*

The Lender argues that it conclusively established all vital facts in support of its motion under Rule 306a because the Borrower never filed a response, and thus, all of the evidence attached to the Lender's own motion was uncontroverted. This evidence included affidavit testimony from the Lender's counsel, who said that he had been experiencing computer difficulties for months, and that "January 20, 2022 was the first time [he] had actual knowledge of the Court's order." There was similar affidavit testimony from counsel's assistant and from the CEO of the Lender, who each asserted that they learned of the trial court's final judgment in January of 2022, more than twenty days after that judgment had been signed.

The Lender believes that the trial court was obliged to credit this uncontroverted affidavit testimony, citing cases from two other intermediate courts of appeals. Both courts follow a similarly worded rule, which is that when a movant raises his points by sworn pleadings or affidavit and requests a hearing, and no evidentiary hearing is held, then the trial court is bound to accept the sworn pleadings or affidavit as true. *See Thermex Energy Corp. v. Rantec Corp.*, 766 S.W.2d 402, 406 (Tex. App.—Dallas 1989, writ denied) ("When a movant for new trial properly raises his points by sworn pleadings or affidavit and requests a hearing, and no evidentiary hearing is held, the court is bound to accept the sworn pleadings or affidavit of the movant as being true."); *Van Der Veken v. Joffrion*, 740 S.W.2d 28, 31 (Tex. App.—Texarkana 1987, no writ) ("Thus, we conclude that when the movant properly raises his points by sworn pleadings or affidavit and requests a

hearing, as in the present case, and no evidentiary hearing is held, the court is bound to accept the sworn pleadings or affidavit of the movant as being true.").

The Lender has not cited to any authority from this court or from the Texas Supreme Court that similarly holds that a trial court is obliged to credit uncontroverted affidavit testimony in the absence of a hearing. And setting aside for a moment that the Lender never even requested an evidentiary hearing in this case, we do not agree with the Lender's suggestion that the trial court was obliged to credit the Lender's affidavit testimony simply because it was uncontroverted.

The Texas Supreme Court has explained that uncontroverted evidence is conclusive—and thus cannot be disregarded—only when the evidence permits one logical inference. *See City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005). Most often, this type of uncontroverted evidence concerns physical facts that cannot be denied, or a party's admissions against his own interest. *Id.* Uncontroverted evidence is not conclusive, however—and thus can be disbelieved—when a factfinder could reasonably determine that the evidence permits two inferences: either (1) the evidence is true, or (2) the evidence is not true. *Id.*

Here, the trial court could have reasonably determined that the Lender's affidavit testimony was not true. Even though the Lender consistently represented that it did not receive notice or acquire actual knowledge of the final judgment until January of 2022, the trial court could have recalled its own statement during the hearing in November of 2021, where the trial court specifically advised the Lender that a final judgment would be forthcoming within a week.

The trial court had an additional reason to doubt the Lender's affidavit testimony. Counsel for the Lender asserted in his affidavit that he had been experiencing multiple issues with his computer since October of 2021, but the exhibits attached to counsel's affidavit did not show a constant and continuous

network outage. Indeed, the exhibits showed that counsel continued to receive emails from others within his own organization. Counsel never explained whether his network was blocking emails from outside his organization—which might include an emailed notice of the final judgment. Nor did counsel ever indicate that, even with his network issues, such an email would have been irretrievably lost.

For all of these reasons, the trial court was free to disbelieve the Lender's self-serving affidavit testimony, despite it being uncontroverted. *See Texaco, Inc. v. Phan*, 137 S.W.3d 763, 766–68 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (rejecting a sufficiency challenge to a trial court's ruling denying a motion under Rule 306a, despite the movant's argument that its evidence in support of the motion had been uncontroverted); *see also Walker v. Tex. Dep't of Family & Protective Servs.*, 312 S.W.3d 608, 624 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("A trial court sitting as the trier of fact is not required to accept as true the statements made in an affidavit, even if that affidavit is uncontradicted."); *McCall v. AXA Equitable Life Ins. Co.*, No. 14-04-01111-CV, 2006 WL 17861, at *4 (Tex. App.—Houston [14th Dist.] Jan. 5, 2006, no pet.) (mem. op.) (holding that when a trial court renders an award of attorney's fees, the court is not bound to accept as true the assertions in an uncontroverted affidavit).

The Lender alternatively argues that the appeal should be abated because the trial court never made a written finding as to the date on which the Lender first received notice or acquired actual knowledge of the final judgment. The Lender correctly observes that such a finding is normally required when the trial court rules on a motion under Rule 306a. *See* Tex. R. App. P. 4.2(c) ("After hearing the motion, the trial court must sign a written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed."). Nevertheless, the Texas Supreme Court has held

that a written finding is not strictly necessary, and that a finding may be implied from the trial court's ruling, unless there is no evidence supporting the implied finding or that an alternate date is established as a matter of law. *See In re Lynd Co.*, 195 S.W.3d 682, 686 (Tex. 2006) (orig. proceeding).

By denying the Lender's motion, the trial court implicitly found that the Lender did not carry its burden of proving that it received notice or acquired actual knowledge of the final judgment more than twenty days after the judgment was signed. *See* Tex. R. Civ. P. 306a(5) (describing the movant's burden). The twentieth day after the date of the judgment was December 1, 2021. Thus, the trial court implicitly found that the Lender had notice or acquired actual knowledge of the judgment no later than December 1, 2021. That implied finding is supported by the trial court's comment during the hearing on the motion to compel that the trial court would rule on the final judgment within seven days, or by November 17, 2021. We therefore deny the Lender's request to abate the appeal.

For the foregoing reasons, we conclude that the Lender did not conclusively establish that the appellate timetables should be extended under Rule 306a. This conclusion also means that the Lender's notice of appeal was untimely, and that this court lacks appellate jurisdiction. We overrule the Lender's argument that we have jurisdiction, and we do not address the merits of the Lender's remaining arguments.

CONCLUSION

The appeal is dismissed for want of appellate jurisdiction.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Spain.