Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00194-CV

Helen H. **VO** and Danny T. Nguyen,
Appellants

v.

Hiep T. **VO**,
Appellee

From the 438th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CI06982
Honorable Richard Price, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: November 7, 2018

AFFIRMED

This is a restricted appeal of a default judgment entered against appellants Helen H. Vo and Danny T. Nguyen. The sole issue presented on appeal is whether the trial court erred in granting the default judgment because appellee Hiep T. Vo failed to give appellants notice of the hearing on appellee's motion for default judgment. The appellants contend they were entitled to notice because they entered an appearance at a prior hearing on the motion. We affirm the trial court's judgment.

RESTRICTED APPEAL REQUIREMENTS

"To sustain a proper restricted appeal, the filing party must prove: (1) she filed notice of the restricted appeal within six months after the judgment was signed; (2) she was a party to the underlying lawsuit; (3) she did not participate in the hearing that resulted in the judgment complained of, and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record." *Pike-Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014). The face of the record includes all papers on file in the appeal, including the clerk's record and any reporter's record. *See Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *In re D.M.B.*, 467 S.W.3d 100, 103 (Tex. App.—San Antonio 2015, pet. denied). In this case, the record consists only of the clerk's record.

DISCUSSION

The record clearly establishes the appellants satisfy the first three requirements necessary to prevail on restricted appeal. The only issue before this court is whether error is apparent on the face of the record.

Before we further address that issue, however, we note the appellants' brief contains numerous references to documents that do not appear on the face of the record, including references to notices of settings and a default judgment analysis by a staff attorney. We further note both briefs refer to the judge's notes from a hearing held on July 13, 2017. This court, however, has expressly held "'[a] judge's handwritten notes are for his or her own convenience and form no part of the record.'" *In re S.L.M.*, No. 04-16-00456-CV, 2016 WL 4537664, at *1 (Tex. App.—San Antonio Aug. 31, 2016, no pet.) (mem. op.) (quoting *In re L.H.*, No. 04-13-00174-CV, 2013 WL 3804585, at *1 (Tex. App.—San Antonio July 17, 2013, no pet.) (mem. op.)). Similarly, docket entries are not part of the record to be considered on appeal. *Farrow v. Gamma Medica, Inc.*, No. 03-16-00747-CV, 2017 WL 3471065, at *2 (Tex. App.—Austin Aug.

8, 2017, no pet.) (mem. op.); *In re E.H.G.*, No. 04-08-00579-CV, 2009 WL 1406246, at *3 n.2 (Tex. App.—San Antonio May 20, 2009, no pet.) (mem. op.). Therefore, we do not consider the judge's notes, docket entries, or any reference to a document not contained in the clerk's record.

As previously noted, appellants contend the default judgment was erroneously granted because they made an appearance but did not receive notice of the default judgment hearing. A defendant, who has filed a timely answer or otherwise made an appearance, is deprived of his due process rights if he does not receive notice of a default judgment hearing. *In re K.M.L.*, 443 S.W.3d 101, 118–19 (Tex. 2014); *Ward v. McCaskill*, No. 03-17-00543-CV, 2018 WL 3404172, at *1 (Tex. App.—Austin July 13, 2018, no pet.) (mem. op.). "If the record affirmatively shows a defendant did not receive notice of such a setting, error is apparent on the face of the record." *Moreno v. Moreno*, No. 04-17-00586-CV, 2018 WL 3440713, at *2 (Tex. App.—San Antonio July 18, 2018, no pet.) (mem. op.).

In this case, appellants did not timely file an answer but rely on the judge's notes from the July 13, 2017 hearing to assert they made a general appearance at that hearing. As previously noted, however, "[a] judge's handwritten notes are for his or her own convenience and form no part of the record." *In re S.L.M.*, 2016 WL 4537664, at *1. Accordingly, there is nothing on the face of the record to prove appellants made an appearance at the July 13, 2017 hearing. Because appellants fail to establish the fourth requirement necessary to prevail on restricted appeal, we overrule the only issue presented on appeal.[1]

[1] Even if we could consider the judge's notes, it does not appear that the reference in the judge's notes to the defendants being present would satisfy the required showing of an appearance. *See In re D.M.B.*, 467 S.W.3d at 103 (noting "mere presence by a party or his attorney does not constitute a general appearance"); *see also Seals v. Upper Trinity Reg'l Water Dist.*, 145 S.W.3d 291, 297 (Tex. App.—Fort Worth 2004, pet. dism'd) (noting "a party who is a silent figurehead in the courtroom, observing the proceedings without participating, has not" made an appearance); *Smith v. Amarillo Hosp. Dist.*, 672 S.W.2d 615, 617 (Tex. App.—Amarillo 1984, no writ) (noting mere presence of a party in the courtroom at the time of a hearing is not an appearance absent some participation in the prosecution or defense of the action).

CONCLUSION

The trial court's judgment is affirmed.

Karen Angelini, Justice