



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00009-CV

Ernest **BUSTOS**,
Appellant

v.

ENCINO PARK HOMEOWNERS ASSOCIATION
and Spectrum Association Management LP,
Appellees

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2018-CI-18828
Honorable Larry Noll, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: September 28, 2022

DISMISSED FOR WANT OF JURISDICTION

In this dispute between a homeowner and his HOA, the HOA sued the homeowner, and the homeowner counterclaimed against the HOA and a management company. The trial court granted summary judgment for the HOA and management company. The homeowner appealed, but his notice of appeal was late, and he did not take any available steps to make it timely.

We dismiss this appeal for want of jurisdiction.

BACKGROUND

A. Suit, Partial Summary Judgment, First Appeal

In 2019, the Encino Park Homeowners Association (HOA) sued Ernest Bustos, a homeowner, for breach of restrictive covenants. The HOA sought to recover allegedly unpaid assessments, late fees, interest, and costs associated with collection, including attorney's fees. *See Bustos v. Encino Park Homeowners Ass'n*, No. 04-19-00311-CV, 2020 WL 3441436, at *1 (Tex. App.—San Antonio June 24, 2020, no pet.) (mem. op.). Bustos, representing himself, answered and counterclaimed against the HOA and Spectrum Association Management LP. *Id.*

The trial court granted summary judgment for the HOA and Spectrum, and Bustos appealed. *Id.* Because Bustos's counterclaims were still live, we dismissed that appeal. *Id.* at *2.

B. Remand, Final Summary Judgment

On remand, the HOA and Spectrum (Appellees) moved for summary judgment on no-evidence grounds against Bustos's counterclaims. The trial court held a hearing on Appellees' motion on October 23, 2020. Bustos appeared pro se. After both sides presented their arguments, the trial court stated it was "going to grant the no evidence motion for summary judgment."

On November 11, 2020, Appellees' counsel e-mailed a proposed order to the trial court's representative, and Appellees copied Bustos on the e-mail. The order states it "finally disposes of all parties and all claims and is appealable." The trial court signed the order on November 12, 2020, and Bustos did not timely file any postjudgment motions.

C. Late Notice of Appeal

Bustos, acting pro se, filed his notice of appeal on January 11, 2021. His notice states he "was not noticed of the order until on December 15th 2020." He asked "this court to use its discretion to grant this appeal."

After the appellate record was filed, Appellees filed a motion to dismiss the appeal. They argued that Bustos’s notice of appeal was untimely, and we should reject his late-notice argument raised in his notice of appeal.

Bustos responded to Appellees’ motion with arguments about the merits of his appeal and the statement that “this Court has discretion to [accept] an Appeal under the circumstances which were outlined in the Notice of Appeal.”

D. Show Cause Order, Response

On August 22, 2022, we advised Bustos that his notice of appeal appears to be untimely, and we ordered him to show cause why this appeal should not be dismissed for want of jurisdiction.

Bustos timely filed a response. In it, he states that he was incapacitated by COVID-19 from December 16, 2020, until January 9, 2021, and he asks this court to allow his appeal to proceed because “dismissal of the appeal would cause [him] harm and would be unjust.”

We begin by reviewing the procedure to seek additional time to appeal if a party does not receive the required notice.

SEEKING ADDITIONAL TIME TO APPEAL

When a party does not receive notice of the trial court’s judgment in a civil case, the party may seek additional time to file a postjudgment motion:

If a party affected by a judgment or other appealable order has not—within 20 days after the judgment or order was signed—either received the notice required by Texas Rule of Civil Procedure 306a.3 or acquired actual knowledge of the signing, then a period that, under these rules, runs from the signing will begin for that party on the earlier of the date when the party receives notice or acquires actual knowledge of the signing. But in no event may the period begin more than 90 days after the judgment or order was signed.

TEX. R. APP. P. 4.2; *cf. John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 740 (Tex. 2001) (quoting Rule 306a of the Texas Rules of Civil Procedure).

“The procedure to gain additional time is governed by Texas Rule of Civil Procedure 306a.5.” TEX. R. APP. P. 4.2(b); *accord Olvera v. Olvera*, 705 S.W.2d 283, 284 (Tex. App.—San Antonio 1986, writ ref’d n.r.e.) (op. on reh’g) (per curiam). Rule 306a.5 reads as follows:

In order to establish the application of paragraph (4) of this rule, the party adversely affected is required to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a 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.

TEX. R. CIV. P. 306a.5; *accord Olvera*, 705 S.W.2d at 284; *see also Grondona v. Sutton*, 991 S.W.2d 90, 91 (Tex. App.—Austin 1998, pet. denied).

The party seeking additional time must file the sworn motion before the trial court’s plenary power expires—based on the date of the notice or actual knowledge of the signing, whichever was later. *See* TEX. R. CIV. P. 306a.4; *John*, 58 S.W.3d at 741; *Grondona*, 991 S.W.2d at 92. If a party fails to comply with Rule 306a.5’s requirements, the party “cannot avail himself of the provisions extending the time for perfecting the appeal.” *Olvera*, 705 S.W.2d at 284.

RULE 306A NOT INVOKED

Here, Bustos did not seek additional time to appeal under Rule 306a. On October 23, 2020, in open court with Bustos present, the trial court announced that it was “going to grant the [Appellees’] no evidence motion for summary judgment.” Bustos acknowledges that he received an e-mail from Appellees’ counsel on November 11, 2020, which included the unsigned draft order. But Bustos asserts he did not receive notice of the signed order until December 15, 2020.

Bustos does not assert, and the record does not show, that he made any effort to inquire about the trial court’s order from November 11, 2020—when he received a copy of the draft order—until December 15, 2020, when he received a copy of the signed order.

Notably, he received the signed copy one day *after* the notice of appeal was due—on December 14, 2020—which was fourteen days *before* a motion for extension of time to file a

notice of appeal was due—on December 29, 2020. *See* TEX. R. APP. P. 26.3; *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). Bustos admits he did not read the order to see when it was signed until January 9, 2021; he filed his notice of appeal two days later.

Under Rule 306a, Bustos could have timely filed a Rule 306a.5 motion until January 14, 2021, thirty days after his claimed date of notice, and three days after he filed his notice of appeal. *See* TEX. R. CIV. P. 306a.5; *Olvera*, 705 S.W.2d at 284. But Bustos did not file a Rule 306a.5 sworn motion, request or receive a hearing on the motion, or obtain “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.” *See* TEX. R. APP. P. 4.2(c); TEX. R. CIV. P. 306a.5; *Green v. Guidry*, 34 S.W.3d 669, 670–71 (Tex. App.—Waco 2000, no pet.); *Olvera*, 705 S.W.2d at 284.

Because he did not, and because no other postjudgment motions were filed, the trial court’s plenary power expired—and Bustos’s notice of appeal was due—on December 14, 2020. *See* TEX. R. APP. P. 26.1; TEX. R. CIV. P. 329b(d) (plenary power for thirty days); *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000). Belatedly, Bustos filed his notice of appeal on January 11, 2021. It was untimely. *See* TEX. R. APP. P. 4.2; *John*, 58 S.W.3d at 741; *Green*, 34 S.W.3d at 671.

Nevertheless, construing it liberally, we conclude that Bustos asked us to extend the deadline to file his notice of appeal under the Supreme Court of Texas’s emergency orders.

EMERGENCY ORDER AUTHORITY

In his notice of appeal, Bustos acknowledged that he received notice of the trial court’s signed order on December 15, 2020. His notice of appeal states that “[b]ecause of illness,” which illness he did not specify, he did not start drafting his notice of appeal until January 9, 2021. His notice of appeal also “asks this court to use its discretion to grant this appeal.”

Bustos's notice of appeal did not state that he was suffering from COVID-19, refer to any Emergency Order, or ask for an extension based on COVID-19. *Cf. Neurological Assocs. of San Antonio, P.A. v. Torres*, No. 04-21-00120-CV, 2022 WL 1559101, at *3 (Tex. App.—San Antonio May 18, 2022, no pet.) (mem. op.).

However, in his response to our August 22, 2022 show cause order, Bustos asserted that he was incapacitated by COVID-19 from December 16, 2020, until January 9, 2021, and thus he was prevented from timely filing his notice of appeal. Considering Bustos's statements together, and construing them liberally, we read them as Bustos's request for this court to use its authority under Emergency Order 29 to extend the deadline for filing his notice of appeal. *See Twenty-Ninth Emergency Order Regarding COVID-19 State of Disaster*, 629 S.W.3d 863 (Tex. 2020) (dated November 11, 2020).

Under then-effective Emergency Order 29, we have discretion to extend certain deadlines, but the facts here do not warrant our doing so. *See N. Cent. Baptist Hosp. v. Chavez*, No. 04-20-00590-CV, 2021 WL 983351, at *2 (Tex. App.—San Antonio Mar. 17, 2021, no pet.) (mem. op.).

Specifically, Bustos learned of the signed judgment on December 15, 2020.

On that date, which was before he became ill, he could have filed a notice of appeal, and we would have implied a motion for extension of time. *See Verburgt*, 959 S.W.2d at 617.

On that date, he could have timely filed a motion for extension of time to file his notice of appeal, but he did not. *See TEX. R. APP. P. 26.3; cf. Chavez*, 2021 WL 983351, at *2.

And until January 14, 2021—thirty days after his claimed date of notice—he also could have timely filed a Rule 306a.5 motion, but he did not. *See TEX. R. CIV. P. 306a.5; Green*, 34 S.W.3d at 670; *Grondona*, 991 S.W.2d at 92.

Bustos did not exercise any available option to make his January 11, 2020 notice of appeal timely, and we decline to exercise our discretion to do so now. *See Chavez*, 2021 WL 983351, at

*2; *Porch v. Daimler Trucks N. Am., LLC*, No. 03-20-00445-CV, 2020 WL 7063575, at *2 (Tex. App.—Austin Dec. 3, 2020, pet. denied) (mem. op.).

CONCLUSION

The record conclusively establishes that Bustos’s notice of appeal was late, but as we explained above, it did not have to be. Because Bustos failed to use any of the means available to him to make his notice of appeal timely, we will not now exercise our discretion to do so. We grant Appellees’ motion, and we dismiss this appeal for want of jurisdiction.

Patricia O. Alvarez, Justice