In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00470-CV

LAKYN O'BRIEN, Appellant

V.

LINDA HERNANDEZ, PLACIDO HERNANDEZ, AND ASHLEY URBIETA, Appellees

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On Appeal from the 30th District Court
Wichita County, Texas
Trial Court No. 188,216-A

Before Birdwell, Bassel, and Wallach, JJ.
Memorandum Opinion by Justice Wallach

MEMORANDUM OPINION

This is a restricted appeal from the dismissal for want of prosecution of this case by the trial court when no one appeared for the plaintiff at a court-ordered status conference. Because no error appears on the face of the record, we affirm.

I. Procedural History

Appellant Lakyn O'Brien's original petition was filed on April 30, 2018, alleging that appellee Ashley Urbieta was negligent in driving her automobile, which caused the collision in question and injuries to O'Brien. Appellees Linda and Placido Hernandez were alleged to be the owners of the car driven by Urbieta, and State Farm Mutual Automobile Insurance was sued as the liability carrier for the Hernandez vehicle. State Farm was subsequently nonsuited on September 13, 2018 and is not a party to this appeal. Urbieta and the Hernandezes filed their answer on May 29, 2018, according to the recitations in the subsequent dismissal order, and the parties do not argue otherwise. On May 16, 2019, the trial court signed an order setting a June 26, 2019 status conference. The last sentence of the order provided: "Failure of any party seeking affirmative relief to appear at this hearing will result in this matter being dismissed for want of prosecution without further notice to the parties."

On June 27, 2019, the Court signed its dismissal order. As pertinent hereto, the Court's Order recites that the status conference scheduled for June 26, 2019 was heard and that:

> 4. On May 16, 2019, the Court entered an Order Setting Hearing setting the case for a status hearing.
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> 5. A copy of this Order was delivered to counsel for the Plaintiff and counsel for the Defendants on May 17, 2019 through the electronic filing manager. The electronic filing manager noted that counsel for Plaintiff and counsel for the Defendant opened the electronic envelope containing the Order Setting Hearing. Therefore the Court finds that Plaintiff had good and valid notice of the status hearing;
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> 6. The Order Setting Hearing stated: "Failure of a party seeking affirmative relief to appear at the hearing will result in this matter being dismissed for want of prosecution without further notice to the parties." Neither party, nor any attorney for the parties, appeared for the hearing.
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> The Order then dismissed the case with prejudice as to all parties and all claims.

O'Brien subsequently filed her notice of appeal on December 20, 2019.

II. Standard of Review

As noted by the Supreme Court in *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004):

> To prevail on its restricted appeal, Lynda's Boutique must establish that: (1) it filed notice of the restricted appeal within six months after the judgment was signed; (2) it was a party to the underlying lawsuit; (3) it 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.

See also Powers v. Morquecho, No. 09-13-00092-CV, 2014 WL 887242, at *1 (Tex. App.—Beaumont Mar. 6, 2014, pet. dism'd w.o.j.) (mem. op); *Woods v. Quorum Hotels & Resorts, LTD*, No. 02-12-00043-CV, 2013 WL 362734, at *1 (Tex. App.—Fort Worth Jan. 31, 2013, no pet.) (mem. op.). Error must affirmatively appear on the face of the record. An absence of proof on the face of the record is not sufficient. *Alexander*, 134

S.W.3d at 849–50; *Powers*, 2014 WL 887242 at *1; *Woods*, 2013 WL 362734, at *2. Likewise, it is not enough that error may be inferred from the record; it must be apparent on the face of the record. *Woods*, 2013 WL 362734, at *2.

III. Analysis

The only criterion for a restricted appeal at issue in this case is the alleged failure of the trial court to conduct a hearing before dismissing the case. We must therefore look to the face of the record to see if error is apparent. The "face of the record" for purposes of a restricted appeal consists of all the papers on file in the appeal that were before the trial court at the time the judgment was rendered. *Alexander*, 134 S.W.3d at 848–49; *Convergence Aviation, Inc. v. Onala Aviation, LLC*, No. 05-19-00067-CV, 2020 WL 29716, at *2 (Tex. App.—Dallas Jan. 2, 2020, no pet.) (mem. op); *Redding v. Dick Thompson Enters., Inc.*, No. 2-02-142-CV, 2003 WL 69561, at *1 (Tex. App.—Fort Worth Jan. 9, 2003, no pet.) (per curiam) (mem. op).

The only reference on the face of the record regarding whether the trial court conducted a hearing is the dismissal order, which specifically says: "On the 26th day of June, 2019, the court held a hearing regarding the status of the case." The court then found, inter alia, that "[n]either party, nor any attorney for the parties, appeared for the hearing." There is nothing on the face of the record that says the court did not appropriately notify O'Brien of the possible dismissal or failed to conduct a hearing. Thus, the face of the record does not reflect that the trial court did not conduct a hearing. The notice of the hearing, which the face of the record reveals was sent to

counsel for both parties through the established electronic means and was opened by both counsel, clearly advised counsel that failure to appear by any party seeking affirmative relief could result in dismissal. Under well-established precedent, O'Brien has failed to establish error on the face of the record. *See Alexander*, 134 S.W.3d at 849–50; *Power*s, 2014 WL 887242 at *1; *Woods*, 2013 WL 362734 at *2.

IV. Conclusion

O'Brien's sole issue is overruled, and the judgment of the trial court is affirmed.

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: August 13, 2020