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

No. 02-24-00090-CV

NEAL RAUHAUSER, Appellant

V.

JAMES MCGIBNEY AND VIAVIEW, INC., Appellees

On Appeal from the 67th District Court
Tarrant County, Texas
Trial Court No. 067-270669-14

Before Womack, Wallach, and Walker, JJ.
Memorandum Opinion by Justice Walker

MEMORANDUM OPINION

In a previous appeal, we sustained James McGibney and ViaView, Inc.'s challenges to the trial court's award of attorney's fees and imposition of certain sanctions following Neal Rauhauser's successful motion to dismiss their defamation claim under the Texas Citizens Participation Act (TCPA). *See McGibney v. Rauhauser*, 549 S.W.3d 816, 839 (Tex. App.—Fort Worth 2018, pet. denied). We remanded the case to the trial court for a new hearing on attorney's fees. *See id.*

Upon remand, the trial court set a final hearing on attorney's fees for November 16, 2023. This hearing was to take place via Zoom. Because neither Rauhauser nor his counsel were present via Zoom when the case was called on November 16, 2023, the trial court dismissed the case for want of prosecution.

That same morning, Rauhauser's attorney filed a verified motion to reinstate[1] in which he explained that he had experienced technical difficulties that had prevented

[1]Although Rauhauser styled his motion as a motion for new trial, not a motion to reinstate, there is no "practical distinction between the two motions in the context of a dismissal for want of prosecution; whether labelled a motion to reinstate or a motion for new trial, the relief requested is basically the same—to reinstate the case and then to proceed to trial." *City of McAllen v. Ramirez*, 875 S.W.2d 702, 704 (Tex. App.—Corpus Christi–Edinburg 1994, orig. proceeding); *see Sierra Club v. Tex. Comm. on Env't Quality*, 188 S.W.3d 220, 222 (Tex. App.—Austin, 2005, no pet.) ("Although the dismissal and reinstatement procedures described in the rules of civil procedure are cumulative of other rules and laws . . . , a motion for reinstatement is the only remedy available to a party whose case is dismissed for want of prosecution."); *see also Brumley v. McDuff*, 616 S.W.3d 826, 833 (Tex. 2021) (stressing that courts should acknowledge the substance of the relief sought despite the formal styling of the pleading). Because Rauhauser's verified motion for new trial was the functional equivalent of a motion to reinstate under Rule 165a(3), we will refer to it as such.

him from being able to appear at the Zoom hearing on time. But the trial court never set a hearing on Rauhauser's motion to reinstate,[2] and it was ultimately denied by operation of law. *See* Tex. R. Civ. P. 165a(3) (providing that a motion to reinstate "shall be deemed overruled by operation of law" if it "is not decided by signed written order within seventy-five days after the judgment is signed"). Rauhauser appealed from the denial of his motion to reinstate.

Because the trial court's error in failing to hold a hearing[3] prevented the proper presentation of this case on appeal and the trial court could correct that error, we abated the appeal and remanded the case to the trial court to conduct an oral hearing on Rauhauser's motion to reinstate. *See* Tex. R. App. P. 44.4; *Roush v. Metro. Life Ins.*, 551 S.W.3d 903, 905 (Tex. App.—Amarillo 2018, order) (per curiam) (abating appeal

---

[2]The trial court explained that it took no action on the motion because it was styled as a motion for new trial, not a motion to reinstate. Because of the trial court's busy docket, it typically (and understandably) does not consider a motion for new trial unless and until the moving party sets it for hearing. However, because Rauhauser's verified motion for new trial was, in substance, a motion to reinstate, *see supra* note 1, it was incumbent on the trial court to set a hearing on the motion, *see infra* note 3.

[3]When a party files a verified motion to reinstate, the trial-court clerk must deliver a copy to the judge, "who shall set a hearing on the motion as soon as practicable." Tex. R. Civ. P. 165a(3). Additionally, the court is required to "notify all parties or their attorneys of record of the date, time and place of the hearing." *Id.* Consequently, a trial court must conduct an oral hearing on any timely filed motion to reinstate under Rule 165a. *See Thordson v. City of Houston*, 815 S.W.2d 550, 550 (Tex. 1991); *Gulf Coast Inv. Corp. v. NASA 1 Bus. Ctr.*, 754 S.W.2d 152, 153 (Tex. 1988). "It is not within the discretion of the trial court to fail to hold an oral hearing on a timely-filed, properly verified motion to reinstate [under Rule 165a]." *Smith v. McKee*, 145 S.W.3d 299, 305 (Tex. App.—Fort Worth 2004, no pet.).

under Rule 44.4 for mandatory hearing on motion to reinstate under Rule 165a). In accordance with our abatement order, the trial court heard Rauhauser's motion to reinstate. Following the hearing, the trial court signed an order granting the motion and returning the case to its active docket.

After the appeal was automatically reinstated upon the filing of supplemental clerk's and reporter's records, we informed the parties that it appeared that the trial court's granting Rauhauser's motion to reinstate rendered this appeal moot. We warned the parties that the appeal would be dismissed as moot unless any party desiring to continue the appeal filed a response showing grounds for doing so.

Appellees filed a response in which they expressed their dissatisfaction with the trial court's decision to grant Rauhauser's reinstatement motion and requested that we "continue the appeal and issue [our] own opinion as to whether [Rauhauser's] case should be reinstated." But Appellees cited no authority to support the continuation of the appeal.[4] Rauhauser also filed a response in which he expressed his opposition to Appellees' request to continue this appeal and asked that we dismiss it as moot. Rauhauser contends that Appellees' request to continue the appeal "is procedurally irregular and improper" because Appellees have not filed a notice of appeal. We agree with Rauhauser that this appeal should be dismissed as moot.

[4]The only basis Appellees provided for the continuation of this appeal is that it would serve "the interest of judicial economy" because "Appellees have already expressed their intent to appeal this groundless reinstatement." But as we explain below, Appellees cannot appeal the reinstatement order.

Unlike an order *denying* a reinstatement motion, an order *granting* a motion for reinstatement under Rule 165a(3) is neither a final judgment nor an appealable interlocutory order. *See Blair v. Hutchison*, No. 02-21-00132-CV, 2021 WL 2586615, at *1 (Tex. App.—Fort Worth June 24, 2021, no pet.) (mem. op.). Thus, an order reinstating a case is unappealable until the trial court signs a final judgment. *See id.* Accordingly, even if Appellees were to file a notice of appeal challenging the trial court's reinstatement order, we would be required to dismiss the appeal for want of jurisdiction because the trial court has not rendered a final judgment.[5] *See id.*; *see also Copeland v. Lujan*, No. 02-21-00200-CV, 2021 WL 3679237, at *1 (Tex. App.—Fort Worth Aug. 19, 2021, no pet.) (per curiam) (mem. op.).

Because Appellees have not provided a valid basis for continuing this appeal, on this court's own motion, we dismiss it as moot. *See* Tex. R. App. P. 42.3(a), 43.2(f); *Mortell v. Pruett*, No. 02-19-00123-CV, 2019 WL 5608236, at *1 (Tex. App.—Fort Worth Oct. 31, 2019, no pet.) (mem. op.) (dismissing appeal as moot after trial court granted appellant's motion to reinstate); *Chancellor v. JPMorgan Chase Bank, N.A.*,

[5]Appellees might be able to challenge the reinstatement order through other avenues. *See, e.g.*, *Est. of Howley v. Haberman*, 878 S.W.2d 139, 140 (Tex. 1994) (orig. proceeding); *cf. Ingram v. Ingram*, No. 02-14-00063-CV, 2014 WL 1510049, at *1 (Tex. App.—Fort Worth Apr. 17, 2014, no pet.) (per curiam) (mem. op.) (noting that an order "that does not purport to be a final, appealable judgment is properly challenged through a petition for writ of mandamus, not through an appeal"). But we note that in the context of a reinstatement motion, a trial court has a great deal of discretion in determining whether a party acted with conscious indifference. *See, e.g.*, *Clark v. Yarbrough*, 900 S.W.2d 406, 409 (Tex. App.—Texarkana 1995, writ denied).

No. 02-10-00394-CV, 2010 WL 4676927, at *1 (Tex. App.—Fort Worth Nov. 18, 2010, no pet.) (mem. op.) (same).

/s/ Brian Walker

Brian Walker
Justice

Delivered: August 30, 2024