



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00334-CV

DONOVAN DWIGHT SIMMS, APPELLANT

V.

JOHN R. GONZALES, APPELLEE

On Appeal from the County Court at Law No. 2
Potter County, Texas
Trial Court No. 101846-00-2, Honorable Pamela Cook Sirmon, Presiding

March 29, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Appellant, Donovan Dwight Simms, is appealing the trial court's order dismissing his suit against John R. Gonzales. We will reverse.

Factual and Procedural Background

Simms filed suit against Gonzales in the Justice of the Peace Court for Precinct 3 of Potter County, alleging an action for tort. Simms was unable to ascertain an address to serve Gonzales and, ultimately, his suit was dismissed by the Justice of the Peace for

Precinct 3. Simms appealed the dismissal to the County Court at Law No. 2 of Potter County on October 29, 2013. The matter languished in the trial court until May 18, 2015, when the trial court advised Simms that his suit was set on the dismissal docket for want of prosecution on July 15, 2015. By this letter, the trial court notified Simms that his case would be dismissed on the stated date “[u]nless written request for a setting is received or good cause is shown for maintaining the case on the docket.” The trial court dismissed the case on July 15, 2015. The clerk’s record reveals that Simms mailed a request for a setting to the trial court on July 15, 2015. Further, the envelope containing the request indicates that it was received on July 16, 2015.

As a result of the dismissal, Simms has appealed to this Court. Simms alleges two issues to support his appeal. The second issue contends that the trial court erred in dismissing his suit because his request for a setting was mailed on July 13, 2015. We will reverse and remand to the trial court.

Analysis

Disposition of this matter is determined by reference to the “mailbox rule.” See TEX. R. CIV. P. 5. Rule 5 provides, in pertinent part, as follows:

If any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and deemed filed in time. A legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

In this matter, the record demonstrates that Simms's request for setting was postmarked July 15, 2015. Further, the envelope carries the stamped notation that the same was received on July 16, 2015. The clerk of the court subsequently filed the request for a setting on July 23, 2015. Accordingly, Simms is entitled to have his request for a setting deemed timely filed. TEX. R. CIV. P. 5; *Wilson v. State*, 366 S.W.3d 335, 338 (Tex. App.—Houston [1st Dist.] 2012, no pet.). We therefore sustain Simms's second issue.

Conclusion

Having sustained Simms's second issue, we reverse the dismissal of suit and remand this matter to the trial court for further proceedings.

Mackey K. Hancock
Justice