



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

No. 07-23-00155-CV

GREGORY LYNN ALEXANDER, APPELLANT

V.

WILLIAM SORIANO, INDIVIDUALLY, AND RUMOR MILL, LLC, APPELLEES

On Appeal from the 131st District Court
Comal County, Texas
Trial Court No. C2021-2004D, Honorable Stephanie Bascon, Presiding

August 25, 2023

MEMORANDUM OPINION

Before **QUINN, C.J.**, and **DOSS** and **YARBROUGH, JJ.**

This restricted appeal was filed by Appellant, Gregory Lynn Alexander, challenging a default judgment granted in favor of Appellees, William Soriano, individually, and Rumor Mill, LLC. Alexander raises four issues as follows: (1) lack of proper service of citation; (2) sufficiency of the evidence in support of damages; (3) propriety of the punitive

damages awarded; and (4) attorney's fees were not supported by the pleadings. Because we find error on the face of the record, we reverse and remand for further proceedings.¹

BACKGROUND

This appeal arises out of an oral agreement to lease a bar in a hotel located in Comal County. Soriano alleges Alexander and Wayne Paul Pace, who is not a party to this appeal, orally agreed to lease to him and Rumor Mill a public bar area within the hotel. Alexander and Pace also orally promised a written lease contract would be drafted memorializing the agreement. Under these promises, Soriano, using his solely owned company, Rumor Mill, LLC, proceeded to make substantial investments in improvements to the commercial space in preparation for opening his bar, including acquiring the proper licensing from the TABC. After undertaking these efforts, however, Soriano learned Alexander and Pace, instead of leasing the bar to him, decided to sell the hotel to a new owner. The new owner elected not to lease the premises to Soriano or Rumor Mill, and Soriano and Rumor Mill filed suit against Alexander and Pace.

After attempting to serve both Pace and Alexander several times, Soriano was able to serve both parties.² Neither Pace nor Alexander answered the lawsuit. Soriano and Rumor Mill moved for default judgment, and Pace and Alexander did not appear or participate in the default judgment hearing. The trial court heard evidence from Soriano

¹ Originally appealed to the Third Court of Appeals, this appeal was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. Should a conflict exist between precedent of the Third Court of Appeals and this Court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

² Alexander disputes he was actually served with citation and the veracity of the affidavit of service in the record. However, in a restricted appeal, only the record may be considered by the reviewing court. *Infra*.

and awarded him and Rumor Mill a default judgment against Alexander and Pace in the following:³

- Economic damages in the amount \$110,000.00;
- Punitive damages in the amount of \$220,000.00;
- Attorney's fees in the amount of \$4,500.00; and
- contingent attorney's fees of \$1,500.00 for responding to a motion for new trial, \$10,000.00 for responding to an appeal to the appellate courts, and \$15,000.00 for responding to an appeal to the Texas Supreme Court.

The only evidence heard at the default hearing was testimony from Soriano and his counsel. No other evidence was attached to Soriano and Rumor Mill's motion for default, and no additional documentary evidence was admitted at the hearing on the motion.

STANDARD OF REVIEW

A restricted appeal is a procedural device available to a party who did not participate, either in person or through counsel, in a proceeding that resulted in a judgment against the party and constitutes an attack on a default judgment. See TEX. R. APP. P. 30; *In re Marriage of Serbin*, No. 07-18-00349-CV, 2020 Tex. App. LEXIS 1477, at *2–3 (Tex. App.—Amarillo Feb. 20, 2020, no pet.) (mem. op.) (citations omitted). To successfully attack an order by restricted appeal, the appealing party must show: (1) he brought the appeal within six months after the trial court signed the complained-of judgment or order; (2) he was a party to the suit; (3) he did not participate in the hearing that resulted in the complained-of judgment or order and did not timely file any post-

³ Pace does not join Alexander in this restricted appeal.

judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent from the face of the record. *Mehl v. Stern*, No. 03-14-00697-CV, 2016 Tex. App. LEXIS 7979, at *4 (Tex. App.—Austin July 28, 2016, no pet.) (citing TEX. R. APP. P. 26.1(c), 30; *Alexander v. Lynda’s Boutique*, 134 S.W.3d 845, 848 (Tex. 2004)). The first three requirements for a restricted appeal are jurisdictional but the fourth is not. *Ex parte E.H.*, 602 S.W.3d 486, 497 (Tex. 2020).

The face of the record, for purposes of a restricted appeal, consists of all the papers that were before the trial court when it rendered its judgment. *Macut v. Cool Insulation Co.*, No. 03-18-00729-CV, 2019 Tex. App. LEXIS 7435, at *3 (Tex. App.—Austin Aug. 22, 2019, no pet.) (citing *Alexander*, 134 S.W.3d at 848–49; *General Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 944 (Tex. 1991)). In determining whether there is error apparent on the face of the record, we must review the legal and factual sufficiency of the claims at issue. *Norman Communs. v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (citations omitted). Review by restricted appeal affords an appellant the same scope of review as an ordinary appeal. *Ex parte E.H.*, 602 S.W.3d at 495 (citation omitted). The task of determining error on the face of the record ultimately requires an analysis of the merits of an appellant’s grounds for appeal. *Id.* Error may not be inferred from the record and must be demonstrated by the documents in the record, not from the absence of documents. *Gold v. Gold*, 145 S.W.3d 212, 213 (Tex. 2004), *overruled in part*, *Ex parte E.H.*, 602 S.W.3d at 497.

We review the granting of a default judgment for an abuse of discretion. *Patton Children’s Tr. v. Hamlin*, No. 07-07-00488-CV, 2008 Tex. App. LEXIS 6396, at *16–17 (Tex. App.—Amarillo Aug. 20, 2008, no pet.) (mem. op.) (citations omitted). We do not

indulge the usual presumption of the validity of the judgment, and every step of the proceeding from process to final judgment is open to examination. *Id.* In a no-answer default judgment, all allegations of fact set forth in the petition are deemed admitted, except the amount of damages. *Tex. Commerce Bank v. New*, 3 S.W.3d 515, 516 (Tex. 1999). The appropriate remedy when an appellant is entitled to a restricted appeal is to remand the matter for a new trial on the issue of unliquidated damages. *In re Marriage of Williams*, 646 S.W.3d 542, 545 (Tex. 2022).

There is no response from Soriano or Rumor Mill, and there is no challenge to this court's jurisdiction over the restricted appeal. Therefore, the only issue before us is whether there is error on the face of the record. Because this is a restricted appeal from a no-answer default judgment, Alexander's liability is admitted and not at issue. *Supra.*

ANALYSIS

RETURN OF SERVICE SUFFICIENT

Alexander argues the return of service in this case was defective because the process server did not fill out and sign the return of service form attached to the citation. The record contains an affidavit of service by a process server who swears he personally served Alexander at an address in San Antonio, Texas.

There are no presumptions in favor of valid issuance, service, and return of citation. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006) (citing *Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994)). Strict compliance with the rules governing service of citation is mandatory if a default judgment is to withstand an attack on appeal. *Ins. Co. v. Lejeune*, 297 S.W.3d 254, 256 (Tex. 2009)

(citing *Primate Constr.*, 884 S.W.2d at 152). Failure to comply with these rules constitutes error on the face of the record. *Id.* (citing *Primate Constr.*, 884 S.W.2d at 153).

Alexander's sole argument is the return form originally attached to the citation by the district clerk was not signed and returned. However, this argument misconstrues the rules and what constitutes a "return of service." An affidavit of service which contains the information required under Rule 107 constitutes a return under the rules. TEX. R. CIV. P. 107(b); *Propel Fin. Servs., LLC v. Conquer Land Utils., LLC*, 579 S.W.3d 485, 492 (Tex. App.—Corpus Christi 2019, pet. denied); see generally *Dean v. Hall*, No. 03-10-00090-CV, 2010 Tex. App. LEXIS 10342, at *2 (Tex. App.—Austin Dec. 31, 2010, no pet.) (mem. op.); *Giles v. Giles*, No. 01-20-00571-CV, 2022 Tex. App. LEXIS 4284, at *13–14 (Tex. App.—Houston [1st Dist.] June 23, 2022, no pet.) (mem. op.).

Alexander does not argue the affidavit of service is defective, and we find the affidavit is a sufficient return of service. TEX. R. CIV. P. 107. Alexander's first issue is overruled.

SUFFICIENCY OF THE EVIDENCE TO SUPPORT ECONOMIC DAMAGES

Alexander complains the evidence presented by Soriano was insufficient to support the damages awarded. He points out the damages testimony does not total the \$110,000 awarded by the trial court; it only adds up to \$86,565.

If damages are unliquidated or not proved by an instrument in writing, the court must hear evidence as to damages before it may grant a default judgment. TEX. R. CIV. P. 243. Soriano did not present any instrument in writing to the trial court, therefore the

court had to hear evidence before awarding damages. Soriano testified to the following damages at the default hearing:

- \$36,000 in “start up operational and licensing costs”;
- \$5,953 in “[a]dvertising and marketing” costs;
- \$5,212 in “materials and labor for the renovations”;
- \$22,000 in labor costs calculated at \$15 per hour for Soriano and \$12 per hour for his fiancé;
- \$5,000 in personal property confiscated by the new owners of the property;
- \$6,400 in utilities and move-out expenses; and
- \$6,000 in “[l]ost assets, interest loans, IOU, things I had to pawn and cars that I sold to make ends meet.”

There is no other evidence in the record regarding Soriano’s damages. Adding up the amounts above equals \$86,565, not the \$110,000 awarded. We find the trial court abused its discretion in awarding more damages than proved by Soriano’s evidence. Alexander’s second issue is sustained.⁴

PUNITIVE DAMAGES NOT AVAILABLE IN DEFAULT

By his third issue, Alexander challenges the award of punitive damages. The trial court awarded \$220,000 in “punitive” damages to Soriano at his request. Alexander

⁴ Alexander makes other arguments regarding the sufficiency of Soriano’s evidence, but we need not address them as the remedy is the same: to reverse and remand to the trial court for further proceedings on the issue of damages. TEX. R. APP. P. 47.1; *In re Marriage of Williams*, 646 S.W.3d at 545.

complains Soriano did not plead or prove his entitlement to exemplary damages. We agree.

In order to recover exemplary damages, a claimant must specifically plead them. TEX. R. CIV. P. 56; *Palacios v. Patel*, No. 02-18-00119-CV, 2018 Tex. App. LEXIS 4093, at *9 (Tex. App.—Fort Worth June 7, 2018, no pet.) (mem. op.); *In re Jacobs*, 300 S.W.3d 35, 43 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (exemplary damages are special damages); cf. *Brown v. Ogbolu*, 331 S.W.3d 530, 536 (Tex. App.—Dallas 2011, no pet.) (award in default cannot exceed damages specifically pleaded). Here, Soriano and Rumor Mill failed to specifically plead for exemplary damages, and therefore they were not entitled to receive them. The trial court had no authority to award exemplary damages, and it abused its discretion in doing so. Alexander's third issue is sustained.

AWARD OF ATTORNEY'S FEES

In his final issue, Alexander complains the trial court erred in granting attorney's fees. He argues, because punitive damages are only available in actions for fraud, by awarding punitive damages the trial court implicitly granted damages for Soriano and Rumor Mill's fraud claim only. He reasons since attorney's fees cannot be recovered for fraud, Soriano and Rumor Mill were not entitled to recover their attorney's fees.

Having already found the trial court's award of damages to be unsupported by sufficient evidence, we must necessarily also reverse any award of attorney's fees which are predicated upon an award of actual damages.⁵ Accordingly, we do not reach

⁵ "A party who prevails in a lawsuit is entitled to recover attorney's fees only if permitted by statute or by contract." *Hale v. Prud'Homme*, No. 03-06-00801-CV, 2009 Tex. App. LEXIS 1052, at *12 (Tex.

Alexander's fourth issue as it is not necessary to the disposition of this appeal. TEX. R. APP. P. 47.1.

CONCLUSION

Because Alexander demonstrated his right to bring this restricted appeal, we (1) affirm the default judgment granted by the trial court as to liability; (2) reverse the judgment awarding exemplary damages and render judgment that Soriano take nothing; and (3) reverse the award of compensatory damages, and remand for further proceedings in accordance with this opinion.

Alex Yarbrough
Justice

App.—Austin Feb. 11, 2009, no pet.) (mem. op.) (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006)).