



NUMBER 13-17-00240-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

MANUEL MONTEMAYOR,

Appellant,

v.

**CAMERON COUNTY AND LOS
FRESNOS CONSOLIDATED
INDEPENDENT SCHOOL DISTRICT,**

Appellees.

**On appeal from the 138th District Court
of Cameron County, Texas.**

MEMORANDUM OPINION

**Before Justices Rodriguez, Contreras, and Benavides
Memorandum Opinion by Justice Rodriguez**

Appellant Manuel Montemayor attempted to perfect an appeal from a judgment entered by the 138th District Court of Cameron County, Texas in cause number 2015-DCL-2012-B. The judgment in this cause was signed on March 10, 2017. Appellant did not file a motion for new trial and did not file his notice of appeal until May 2, 2017. Appellant's notice of appeal states he did not receive notice of the judgment until April 6,

2017. We conclude that the notice of appeal was not timely filed and we dismiss the appeal for lack of jurisdiction.

Texas Rule of Appellate Procedure 26.1 provides that an appeal is perfected when notice of appeal is filed within thirty days after the judgment is signed, unless a motion for new trial is timely filed. TEX. R. APP. P. 26.1(a)(1). Where a timely motion for new trial has been filed, the notice of appeal shall be filed within ninety days after the judgment is signed. *See id.* A motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by rule 26.1, but within the fifteen-day grace period provided by Rule 26.3 for filing a motion for extension of time. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617–19 (1997) (construing the predecessor to Rule 26). However, the appellant must provide a reasonable explanation for the late filing: it is not enough to simply file a notice of appeal. *Id.*; *Woodard v. Higgins*, 140 S.W.3d 462, 462 (Tex. App.—Amarillo 2004, no pet.); *In re B.G.*, 104 S.W.3d 565, 567 (Tex. App.—Waco 2002, no pet.).

Pursuant to Texas Rule of Appellate Procedure 26.1, appellant’s notice of appeal was due on April 10, 2017¹, but was not filed until May 2, 2017. On May 5, 2017, the Clerk of this Court notified appellant of this defect so that steps could be taken to correct the defect, if it could be done. Appellant was advised that, if the defect was not corrected within ten days from the date of receipt of this Court’s letter, the appeal would be dismissed. In response, Appellant has filed an amended notice of appeal which contains similar language to his original notice of appeal stating he “invokes Rule 306a 4 of the

¹ Because the thirtieth day fell on a Sunday, appellant had until the following Monday, April 10, 2017 to file the notice of appeal. *See* TEX. R. APP. P. 4.1.

Texas Rules of Civil Procedure” and received notice and obtained knowledge of the judgment on April 6, 2017.

Texas Rule of Civil Procedure 306a(3) requires a trial court clerk immediately to notify the parties or their attorneys, by first class mail, of the signing of an appealable order. See TEX. R. CIV. P. 306a(3). When more than twenty days have passed between the date that the trial court signs the order and the date that a party receives notice or acquires actual knowledge of the signing, the period for filing a notice of appeal may be extended to the earlier of the date the party received notice or acquired actual knowledge of the signing. TEX. R. APP. P. 4.2(a)(1); see *Pilot Travel Ctrs., LLC v. McCray*, 416 S.W.3d 168, 176 (Tex. App.—Dallas 2013, no pet.). To benefit from this extended time period, appellant must have proven, in the trial court on sworn motion and notice, the date on which he first received notice or acquired actual knowledge of the December 15, 2016 judgment and that the date was more than twenty days after the date the order was signed. See TEX. R. CIV. P. 306a(5); TEX. R. APP. P. 4.2(a)(1),(b). Further, the trial court must have signed a written order finding the date when appellant first received notice or acquired actual knowledge that the judgment was signed. See TEX. R. APP. P. 4.2(c); *Moore Landrey, L.L.P. v. Hirsch & Westheimer, P.C.*, 126 S.W.3d 536, 540 (Tex. App.—Houston [1st Dist.] 2003, no pet.); see also *Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994).

Based on the notice of appeal and the appellant’s response to this Court’s notice regarding the defect, appellant has not obtained the trial court order and finding required by Texas Rule of Appellate Procedure 4.2(c). Without that order and finding, the time for filing a notice of appeal of the judgment was not extended. See *Nedd–Johnson v.*

Wells Fargo Bank, N.A., 338 S.W.3d 612, 613 (Tex. App.—Dallas 2010, no pet.); see also *Johnson v. Linebarger Goggan Blair & Sampson, LLP*, No. 01-15-00950-CV, 2017 WL 1173886, at *3 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet. h.) (mem. op.). Because appellant did not follow the procedures required by Texas Rule of Civil Procedure 306a and Texas Rule of Appellate Procedure 4.2 to gain additional time to perfect his appeal, we lack jurisdiction over his attempted appeal. See *Mem'l Hosp. v. Gillis*, 741 S.W.2d 364, 365 (Tex. 1987) (per curiam).

The Court, having examined and fully considered the documents on file and appellant's failure to timely perfect his appeal, is of the opinion that the appeal should be dismissed for want of jurisdiction. Accordingly, the appeal is hereby DISMISSED FOR WANT OF JURISDICTION. See TEX. R. APP. P. 42.3(a).

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
13th day of July, 2017.