NUMBER 13-18-00650-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

LIDIA ELIZARDI MARTINEZ, **Appellant,**

v.

RALPH OLMOS, **Appellee.**

On appeal from the 103rd District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Perkes

Appellant Lidia Elizardi Martinez appeals from the trial court's default judgment in favor of appellee Ralph Olmos. In three issues, Martinez contends that the trial court erred in (1) denying her motion for new trial because she was never served with citation in accordance with the Texas Rules of Civil Procedure; (2) assessing damages "against the

recitations of the lease agreement" between Martinez and Olmos; and (3) issuing an amended default judgment outside its plenary power. We dismiss the appeal for want of jurisdiction.

I. BACKGROUND

On August 7, 2017, Martinez and Olmos entered into a commercial lease agreement, wherein Olmos agreed to lease a property "shell" requiring extensive repairs. The parties dispute who was required to pay for repairs.

On February 12, 2018, Martinez initiated eviction proceedings in the justice court, alleging Olmos failed to pay rent for the preceding two months. The justice court ruled in favor of Olmos and dismissed Martinez's petition with prejudice on March 20, 2018. Olmos voluntarily vacated the premises, and on April 6, 2018, Olmos filed suit against Martinez, alleging breach of contract, Deceptive Trade Practices Act claims, statutory fraud, breach of implied and express warranty of suitability, and wrongful/constructive eviction, among others. On April 11, 2018, Martinez was served with citation at her known residence.[1] Martinez failed to respond, and on May 17, 2018, Olmos filed a motion for default judgment.

On June 26, 2018, following a brief hearing, the trial court orally granted default judgment and damages in favor of Olmos and signed the judgment on August 3, 2018. For reasons unclear on the face of the record and discussed *infra*, on August 29, 2018, the trial court issued an order setting a "hearing on the default judgment," scheduled for

[1] Return of service was filed on April 16, 2018. The document indicated that the original citation was "delivered to Lidia Elizardi Martinez, on the 11 day of April, 2018" to her home address. It was signed by Amadeo Rodriguez, Jr., a civil processor, under penalty of perjury. The officer's return stated he received the citation "on the 10[th] day of April, at 4:00 o'clock p.m. and [sic] Cameron County, Texas."

September 11, 2018. On September 11, 2018, the trial court signed an "Amended Default Judgment," which was filed two days later on September 13th.

On September 19, 2018, Martinez filed a motion for new trial, arguing in part: (1) she never received proper service of citation and legal process in this matter;[2] and (2) the trial court improperly entered a default judgment against her on September 11, 2018, despite pending bankruptcy proceedings which required an automatic stay. *See* 11 U.S.C.A. § 362(a)(1). Olmos, in response, argued (1) Martinez was properly served in-person at her known address and submitted an affidavit signed and sworn by the possessor;[3] and (2) the pertinent action in this case occurred prior to the initiation of any

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[2] Via affidavit attached to her motion for new trial, Martinez claimed she was "never served with citation and legal process in this lawsuit[,]" and the "first time that [she] received notice . . . was when [she] received a copy of the Amended Default Judgment by First Class Mail on September 18, 2018."

On cross-examination during the hearing on Martinez's motion for new trial, however, she denied receiving notice of the amended default judgment.

> Q. Okay. In your affidavit, Defendant's Exhibit 6, you state that you received a copy of the amended default judgment by First Class Mail on September 18, 2018. Is that true?
>
> A. No, I didn't get anything.
>
> Q. Okay. So you're saying that your sworn affidavit is wrong?
>
> A. Yes.

On redirect, Martinez clarified she had received notice of the amended default judgment. Martinez further confirmed that her address was the same as was listed on all mailings in the case but maintained, albeit conflictedly, she had not received any notices prior to the amended default judgment. Martinez provided similarly conflicting responses regarding receipt of service and her affidavit during questioning by her counsel.

[3] Rodriguez identified Martinez in the court room as the woman he served. According to Rodriguez, he went to Martinez's listed residence and observed a woman, who identified herself as "Lidia Martinez," sweeping the porch. The following dialogue ensued:

> . . . I said, "Well, I'm here on behalf of the attorney." And she said, "Well, what is it about?" "I don't have no idea, ma'am." "Is it about Olmos?" I said, "Yes." "No, que he wants for me to fix this, fix that, and"—"Ma'am, I cannot discuss nothing. It's up to the attorney and the Court." "Well, I'm not going to get it." Well, we made contact, eye contact, and we were talking to each other.

Rodriguez said he ultimately told Martinez, "Well, if you don't want to accept it, . . . I'm going to leave it here." He left a copy of the citation on a table near Martinez and left the premises.

bankruptcy proceedings, and the case remains unaffected by the stay because what occurred post-petition was ministerial.[4]

At the hearing on Martinez's motion for new trial, arguments from each party dealt exclusively with the disputed consequence of the pending bankruptcy proceedings, which Martinez does not raise on appeal. The trial court took the case under advisement, and on October 23, 2018, the trial court denied Martinez's motion. Martinez filed her notice of appeal on November 14, 2018.

II. JURISDICTION

Martinez contends that the amended default judgment is void because it was rendered after the trial court lost plenary power in this action, and "there was no motion filed as required by Rule 329b of the Texas Rules of Civil Procedure in order to extend the plenary power of the court." *See* TEX. R. CIV. P. 329b. Olmos counters that the alterations to the judgment were clerical in nature, therefore, Rule 329 is inapplicable. *See id.* R. 316, 329b(f). We address this issue first as it is dispositive.

A. Standard of Review and Applicable Law

"The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty

[4] Pursuant to § 362, a stay created by the filing of a bankruptcy petition is automatic and immediate and precludes "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C.A. § 362(a)(1). However, Texas courts, as well as many other state and federal circuits, have provided for an exception to the automatic stay provision where the post-petition act at-issue is determined to be ministerial. *See In re Jones*, 573 B.R. 665, 675–76 (Bankr. N.D. Tex. 2017); *see also In re Miglia*, 345 B.R. 919, 923 (Bankr. N.D. Iowa 2006) (observing that "[m]any, if not all, circuits have recognized a "ministerial act" exception to the requirements of the automatic stay"); *see, e.g.*, *Phillips v. Phillips*, No. 14-12-00897-CV, 2013 WL 6726819, at *1 (Tex. App.—Houston [14th Dist.] Dec. 19, 2013, no pet.) (mem. op.) ("The ministerial act of entry of a judgment on June 22 does not constitute the continuation of judicial proceedings within the meaning of the bankruptcy stay provision, 11 U.S.C. § 362(a)(1), because the trial court determined and announced its judgment on the record on May 21—before James filed his bankruptcy petition.").

days after the judgment is signed." TEX. R. CIV. P. 329b(d). Any judgments vacated, modified, corrected, or reformed after that time are void.[5] *Id.*; *see Lane Bank Equip. Co. v. Smith S. Equip. Inc.*, 10 S.W.3d 308, 310 (Tex. 2000); *Propel Fin. Servs., LLC v. Conquer Land Utilities, LLC*, 579 S.W.3d 485, 491 (Tex. App.—Corpus Christi–Edinburg 2019, pet. denied); *see also Nueces Cty. Civil Serv. Comm'n v. Morrisey*, No. 13-18-00560-CV, 2020 WL 2079105, at *5 (Tex. App.—Corpus Christi–Edinburg Apr. 30, 2020, no pet. h.) (mem. op.). If an appropriate post-judgment motion is filed within that thirty-day period, the trial court's plenary power is extended for up to an additional seventy-five days. *See* TEX. R. CIV. P. 329b(g); *Lane Bank*, 10 S.W.3d at 310; *Propel Fin. Servs.*, 579 S.W.3d at 491. The filing of a motion for new trial or a motion to modify, correct, or reform the judgment within the initial thirty-day period also extends the time period for filing a notice of appeal of a regular appeal until ninety days after the judgment was signed. *See* TEX. R. APP. P. 26.1(a); TEX. R. CIV. P. 329b(h); *Lane Bank,* 10 S.W.3d at 310.

A motion to correct clerical errors, meanwhile, may be done outside the trial court's plenary power but does not extend the time for perfecting an appeal. *See* TEX. R. APP. P. 26.1(a); TEX. R. CIV. P. 316, 329b(h). "A clerical error is a discrepancy between the entry of a judgment in the record and the judgment that was actually rendered by the court and does not arise from judicial reasoning or determination." *In re A.M.C.*, 491 S.W.3d 62, 67 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Escobar v. Escobar*, 711 S.W.2d 230, 232 (Tex. 1986)); *see Wood v. Griffin & Brand of McAllen*, 671 S.W.2d 125, 131

[5] There are some exceptions to this rule, which are inapplicable here, such as: after expiration of plenary power, a trial court still may sign an order declaring a prior judgment or order to be void because the trial court signed the prior judgment or order after expiration of the court's plenary power. *See* TEX. R. CIV. P. 329b(f); *In re Martinez*, 478 S.W.3d 123, 126 (Tex. App.—Houston [14th Dist.] 2015, org. proceeding).

(Tex. App.—Corpus Christi–Edinburg 1984, no writ) ("[T]he critical inquiry is not what judgment might or ought to have been rendered, but only what judgment was actually rendered." (citing *Coleman v. Zapp*, 151 S.W. 1040, 1041 (Tex. 1912))); *see also Morrisey*, 2020 WL 2079105, at *5. "Examples of clerical errors include an incorrectly stated date or damages amount." *In re Marriage of Russell*, 556 S.W.3d 451, 455 (Tex. App.—Houston [14th Dist.] 2018, org. proceeding). To prevent the use of Rule 316 as a vehicle to circumvent the general rules regarding the trial court's plenary power, the proponent of a clerical error must show by clear and convincing evidence that the trial judge intended the requested result at the time the original judgment was entered. *In re Heritage Operating, L.P.*, 468 S.W.3d 240, 247 (Tex. App.—El Paso 2015, org. proceeding). Whether an error is clerical is a question of law. *Escobar*, 711 S.W.2d at 232; *In re A.M.R.*, 528 S.W.3d 119, 122–23 (Tex. App.—El Paso 2017, no pet.).

B. The Trial Court's Plenary Power

Neither party disputes that the trial court signed its "Amended Default Judgment" more than thirty days after signing its original judgment. Thus, we must first determine whether the changes to the amended default judgment were clerical or a substantive modification or correction, the latter requiring the filing of a proper post-judgment motion to extend the trial court's plenary power. *See* TEX. R. CIV. P. 329b(g); *Lane Bank,* 10 S.W.3d at 310.

We turn to an examination of the language and purpose of the amended judgment signed on September 13, 2018, as compared to the August 3, 2018 judgment. The August

judgment on damages came on the heels of the trial court's order "Order Granting Plaintiff's Motion for Default Judgment,"[6] and stated in full:

> On the 26th day of June, 2018 came on to be heard an evidentiary hearing on damages. After considering the documents presented in court, arguments, the pleadings and papers on file with the Court, and the evidence, the Court GRANTED Plaintiff's damages against Defendant, LIDIA ELIZARDI MARTINEZ.
>
> IT IS ORDERED, ADJUGED AND DECREED that Plaintiff have and recover of and from LIDIA ELIZARDI MARTINEZ the following: $117,882.60 in actual damages; $413.00 in court costs; $6,202.50 in reasonable and necessary attorneys' fees; and $5,000.00 in reasonable and necessary future attorneys' fees for collection on this judgment. Additionally, Plaintiff shall have and recover from Lidia Elizardi Martinez post-judgment interest of this amount at 5% per annum on all amounts until fully and finally paid.

The September "Amended" judgment read as follows:

> It is accordingly ADJUDGED, ORDERED, and DECREED that Ralph OLMOS recover from LIDIA ELIZARDI MARTINEZ, Defendant, judgment for–
>
> $117,882.60 in actual damages; and,
>
> $413.00 in court costs; and,
>
> $6,202.50 in reasonable and necessary attorney's fees if Defendant does not appeal this judgment to the Court of Appeals in time for appeal to that Court has expired, or if Defendant successfully appeals to the Court of Appeals, Plaintiff shall be entitled to $10,000.00 in reasonable and necessary attorney's fees; and, if Defendant does not appeal from the Court of Appeals to the Supreme Court. of Texas in time for that appeal has expired, or if Defendant successfully appeals to the Supreme Court of Texas, Plaintiff shall be entitled to reasonable and necessary attorney's fees of $20,000.00; and,
>
> $5,000.00 in reasonable and necessary future attorneys' fees for collection on this judgment; and,
> Interest rate of 5% per year on the total amount of the judgment from the date of Judgment until paid.

[6] In its "Order Granting Plaintiff's Motion for Default Judgment," signed prior to the hearing on damages, the trial court "GRANTED Plaintiff's Motion for Default Judgment against Defendant, LIDIA ELIZARDI MARTINEZ" and "further [found] that Plaintiff's damages are unliquidated[,] and a hearing is necessary."

> It is accordingly further ADJUDGED, ORDERED and DECREED that:
>
> The 103rd Judicial District Court has jurisdiction over LIDIA ELIZARDI MARTINEZ; and,
>
> The 103rd Judicial District Court is the proper venue for this cause of action; and,
>
> On or about April 6, 2018, Plaintiff filed his Original Petition; and,
>
> Defendant LIDIA ELIZARDI MARTINEZ was duly and properly served and a copy of citation was filed with the Court; and,
>
> Defendant LIDIA ELIZARDI MARTINEZ's answer was due no later than May 7, 2018[,] with citation and proof of service relating to service on Defendant had been on file with the Clerk longer than 10 days; and,
>
> Defendant LIDIA ELIZARDI MARTINEZ wholly failed to answer or any other pleading sufficient to constitute an answer, nor has Defendant otherwise entered an appearance to this action; and,
>
> The Certificate of Service of Last Known Address has been filed with the Clerk as required; and,
>
> It is lastly, ADJUDGED, ORDERED and DECREED that Plaintiff shall have all writs of execution and other process necessary to enforce this judgment. This Judgment finally disposes of all parties and all claims and is appealable. Plaintiff's Motion for Default Judgment is GRANTED.

It cannot be said that the amended default judgment's issuance served only a clerical purpose. The trial court made multiple substantive findings regarding jurisdiction, venue, citation and process, in addition to assessing additional attorney's fees that are otherwise absent from the court's August written judgment and June hearing proceedings from which the August judgment is based on. *See Lane Bank*, 10 S.W.3d at 310 (providing that an amendment to a judgment to assess an award of attorney's fees constitutes "a substantive modification to the former judgment" and was, therefore, a rule 329b(g) motion to modify, correct, or reform a judgment); *In re Catholic Diocese of El Paso (San Lorenzo Church)*, 465 S.W.3d 808, 815 (Tex. App.—El Paso 2015, org. proceeding)

(providing there must be "clear and convincing evidence that the trial judge *intended the requested result at the time the original judgment was entered*") (emphasis added); *Morrisey*, 2020 WL 2079105, at *5.

Olmos alternatively urges this Court to construe his e-filed proposed order titled "Order Setting Hearing on Default Judgment," filed on August 27 and signed by the trial court on August 29 as a "motion for clarification," a proper motion under Rule 329b. Olmos argues the trial court acknowledged it as such during its September 11 hearing.[7] However, Olmos presents no authority for such interpretation, and we find none. We cannot construe Olmos's claimed "motion for clarification" as an appropriate motion under Rule 329(g); the rule explicitly requires that a motion to modify, correct, or reform a judgment must be "in writing and signed by the party or his attorney and shall specify the respects in which the judgment should be modified, corrected, or reformed." TEX. R. CIV. P. 329b(g). Olmos's "motion" provides no such specifications, stating in its entirety: "The Court has considered the Default Judgment. The Court is of the opinion that a hearing should be set for the 11th date of September, 2018 at 9:00 o'clock a.m. at the 103rd Judicial Court. SIGNED this 29th day of August, 2018."

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[7] The record, in pertinent part, reads as follows:

THE COURT: August 3rd, so the thirty days have already passed [since the default judgment was signed]. When did you file the motion for clarification?

[COUNSEL]: The 27th, I believe, is the file stamp.

THE COURT: August 27th?

THE COURT COORDINATOR: Yes.

THE COURT: All right. So it was filed timely for me to clarify the order, so what I'm going to do is, I'll say, I will clarify the order and ask that an amended default to clarify it be filed. So just tag it as an amended and get it to me so we don't have two default judgments in there, or a clarified default judgment. Just give me a different title to it so that there's no confusion that there's two default judgments. So clarified default judgment will work; okay?

Because the "motion" filed by Olmos did not constitute an appropriate post-judgment motion, the trial court's plenary power began to run on August 3, 2018, when the final judgment was signed, and it expired on September 3, 2018 (the thirtieth day, September 2nd, was a Sunday). *See Lane Bank*, 10 S.W.3d at 314; TEX. R. CIV. P. 329b(g). Accordingly, the trial court was without plenary power to issue its "Amended Default Judgment" on September 13, and its order is void. *See Lane Bank*, 10 S.W.3d at 310; *Propel Fin. Servs.*, 579 S.W.3d at 491 (explaining that an order issued after the trial court's plenary power expires is void); *see also In re CIT Bank, N.A.*, No. 14-19-00884-CV, 2020 WL 1528162, at *2 (Tex. App.—Houston [14th Dist.] Mar. 31, 2020, orig. proceeding) (mem. op.); *Jefferson v. Unity Nat'l Bank*, No. 14-14-00197-CV, 2015 WL 1779254, at *1 (Tex. App.—Houston [14th Dist.] Apr. 16, 2015, no pet.) (mem. op.).

C. Perfection of Appeal[8]

Having concluded the trial court's plenary power expired on September 3rd, Martinez's motion for new trial was filed untimely on September 19th.[9] Moreover, absent a timely post-judgment motion extending the appellate timetable, Martinez's notice of

[8] Although not briefed by either party, we must *sua sponte* consider whether Martinez untimely perfected her appeal to this Court, an issue which affects our jurisdiction. *See State ex rel. Best v. Harper*, 562 S.W.3d 1, 7 (Tex. 2018); *Allstate Ins. Co. v. Barnet*, 589 S.W.3d 313, 317 (Tex. App.—El Paso 2019, no pet.).

[9] We further note that Martinez did not file a Rule 306a motion. TEX. R. CIV. P. 306a. This rule provides a procedure for extending the trial court's plenary power, and it applies when the movant and the movant's attorney did not receive notice of the signing of the judgment nor acquire actual knowledge of the judgment within twenty days after the signing of the judgment but did receive notice or acquire knowledge of the judgment within ninety days of the judgment. TEX. R. CIV. P. 306a(4), (5); *Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993) (per curiam); *see also In re Mikooz Mart*, No. 05-19-01355-CV, 2019 WL 6696035, at *2 (Tex. App.—Dallas Dec. 9, 2019, orig. proceeding) (mem. op.). Even assuming, without deciding, that Martinez's motion for new trial could be construed as a Rule 306a motion because she avers that she did not receive notice as to the date the judgment was signed, the trial court made no finding as to the date notice was actually received. We are unable to substitute our own finding, and therefore, there can be no extension of the appellate timetables. *See* TEX. R. APP. P. 4.2(c); *see Nedd-Johnson v. Wells Fargo Bank, N.A.*, 338 S.W.3d 612, 613 (Tex. App.—Dallas 2010, no pet.) (dismissing appellant's appeal for want of jurisdiction after first interpreting the appellant's motion for new trial as a Rule 306a motion but concluding "without a finding of the date notice was actually received [by the trial court], there can be no extension of the appellate timetables").

appeal was due thirty days after the judgment was signed on August 3, 2018. *See* TEX. R. APP. P. 26.1 (providing that the deadline for filing a notice of appeal runs from the date of judgment); *see also Cummings v. Billman*, No. 02-20-00034-CV, ___ S.W.3d ___, ___, 2020 WL 938172, at *3 (Tex. App.—Fort Worth Feb. 27, 2020, no pet.) (observing that where "trial court's plenary power is nullified, and the deadlines for plenary-power extension revert back as if no motion for new trial was ever filed"). Martinez filed a notice of appeal on November 14, 2018, and it is indisputably late. *See In re Thompson*, 569 S.W.3d 169, 173 (Tex. App.—Houston [1st Dist.] 2018, orig. proceeding) (holding that the defendant's method of directly attacking the earlier judgment in the underlying case via a motion to set aside the default judgment was no longer available to the defendant because the trial court's plenary power had expired); *Nedd-Johnson v. Wells Fargo Bank, N.A.*, 338 S.W.3d 612, 613 (Tex. App.—Dallas 2010, no pet.) (dismissing an appeal for want of jurisdiction where the appellant filed an untimely motion for new trial following a default judgment); *see also Hartley v. Esquire Deposition*, No. 01-17-00508-CV, 2018 WL 1720670, at *1 (Tex. App.—Houston [1st Dist.] Apr. 10, 2018, no pet.) (per curiam) (dismissing appeal for want of jurisdiction where motion for new trial was untimely filed and thus, did not extend appellant's deadline for filing a notice of appeal); *Coffee v. Coffee*, No. 03–16–00466–CV, 2016 WL 4272122, at *1 & n.1 (Tex. App.—Austin Aug. 11, 2016, no pet.) (per curiam) (mem. op.) (same).

Because Martinez failed to timely file a notice of appeal, this Court lacks jurisdiction. *See* TEX. R. APP. P. 25.1(b). Accordingly, we dismiss the appeal for want of jurisdiction. *See* TEX. R. APP. P. 42.3(a); *see also Reveles v. Germania Farm Mut. Ins. Ass'n*, No. 13-18-00605-CV, 2019 WL 613343, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 14, 2019, no pet.) (mem. op.) (providing that because "the trial court did

not make a finding as to the date appellants obtained notice of the judgment" in its order denying the motion for new trial, the time for filing a notice of appeal of the original judgment was not extended, and the Court lacked jurisdiction over the attempted appeal).

III. CONCLUSION

We dismiss the appeal for want of jurisdiction.

GREGORY T. PERKES
Justice

Delivered and filed the
9th day of July, 2020.