



NUMBER 13-19-00532-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**MING ZHE INC. D/B/A LIN'S GRAND
BUFFET AND MING ZHE INC. D/B/A
LIN'S CHINESE SUPER BUFFET,**

Appellant,

v.

ELISA ALVARADO,

Appellee.

**On appeal from the County Court at Law No. 1
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Longoria and Perkes
Memorandum Opinion by Justice Perkes**

This is a restricted appeal of a no-answer default judgment. See TEX. R. APP. P. 26.1(c), 30. By a single issue, appellant Ming Zhe Inc.¹ argues the trial court erred in granting appellee Elisa Alvarado's motion for default judgment because appellant was never properly served with citation and no return of service is on file.² We reverse and remand.

I. BACKGROUND

On June 8, 2017, appellee filed "Plaintiff's Original Petition, Request for Admissions, Request for Disclosure, Request for Production, and First Set of Interrogatories" against Fourth, LLC d/b/a Lin's Grand Buffet, asserting premises liability and gross negligence claims.³ Appellant was not named as a defendant.

On March 28, 2018, appellee filed a second amended petition, naming appellant as an additional defendant. The petition identified "Mr. Tian Chun Lin, 1170 Corporate Drive West[,] Suite 204, Arlington, Texas 76006" as appellant's registered agent for service of process. A citation directed to Lin was electronically prepared on April 9, 2018. There is, however, no return of service contained in the record.⁴ See TEX. R. CIV. P. 107.

On July 18, 2018, appellee filed a motion for default judgment, arguing appellant was served with citation and had nonetheless "failed to appear or file an answer within

¹ In the pleadings and judgment, appellant is identified as "Ming Zhe Inc. d/b/a Lin's Grand Buffet and Ming Zhe Inc. d/b/a Lin's Chinese Super Buffet."

² Appellee has not filed a brief to assist us in the disposition of this appeal.

³ Appellee alleged she "tripped and fell on the lifted carpet found in the entryway of the restaurant," and as a result of her fall, she "injured her arms, legs, knees[,] and back."

⁴ We observe that the record contains a "Declaration of Not Found (Due and Diligent Search)," stating appellee's civil processer was unable to effect personal service upon the registered agent for Fourth, LLC d/b/a Lin's Grand Buffet: "Mr. Kenney Lin, 6601 Avenue U, Apartment B, Lubbock, Texas 79412."

the time allowed by law and ha[d] wholly made default.” After a hearing, the trial court issued its default judgment order on June 17, 2019, finding appellant had been duly served with citation on April 12, 2018,⁵ and appellant failed to file a timely answer. The trial court granted appellee \$171,079.00 in requested damages plus costs and interest.⁶

Appellant timely filed notice of restricted appeal on October 17, 2019. See TEX. R. APP. P. 26.1(c), 30.

II. DEFAULT JUDGMENT

By its sole issue, appellant argues appellee never properly served appellant with citation and no proof of service is on file with the trial court.

A. Restricted Appeal

A restricted appeal is available for the limited purpose of providing a party who did not participate at trial with the opportunity to correct an erroneous judgment. *Propel Fin. Servs., LLC v. Conquer Land Utils., LLC*, 579 S.W.3d 485, 490 (Tex. App.—Corpus Christi—Edinburg 2019, pet. denied). To prevail in a restricted appeal, an appellant must show: (1) the notice of appeal was filed within six months of the complained-of judgment; (2) the appellant was a party to the suit who did not participate in the hearing that resulted in the judgment; (3) the appellant did not timely file a post-judgment motion, request findings of fact and conclusions of law, or file a notice of appeal within the time permitted under Rule 26.1(a); and (4) error is apparent from the face of the record. TEX. R. APP. P. 26.1(c), 30; see *Ex parte E.H.*, 602 S.W.3d 486, 495 (Tex. 2020); *Alexander v. Lynda’s*

⁵ The record is void of any evidence of service completed on this date.

⁶ The trial court assessed damages as follows: \$11,579.00 for past medical care expenses, \$9,500.00 for future medical care expenses, \$50,000.00 for physical pain and suffering, \$50,000.00 for mental anguish, and \$50,000.00 for loss of physical capacity.

Boutique, 134 S.W.3d 845, 848 (Tex. 2004). In a restricted appeal, the face of the record consists of all papers that were before the trial court when it rendered its judgment. *Alexander*, 134 S.W.3d at 848–49; *Propel Fin. Servs.*, 579 S.W.3d at 490.

The record here establishes that appellant filed its notice of restricted appeal within six months of the default judgment order, did not appear at the default judgment hearing, and did not file any post-judgment motions or request findings of fact and conclusions of law. In other words, only the fourth element is at issue. See *Alexander*, 134 S.W.3d at 848; *Propel Fin. Servs.*, 579 S.W.3d at 490.

B. Valid Return

“There are no presumptions in favor of a valid issuance, service, and return of citation in the face of an attack on a default judgment by restricted appeal.” *Propel Fin. Servs.*, 579 S.W.3d at 491 (citing *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam)). If the record fails to affirmatively show strict compliance with Texas Rule of Civil Procedure 107—which governs issuance, service, and return of citation—error is apparent on the face of the record, and attempted service of process is invalid and of no effect. See TEX. R. CIV. P. 107; *Hubicki v. Festina*, 226 S.W.3d 405, 480 (Tex. 2007) (per curiam); *Propel Fin. Servs.*, 579 S.W.3d at 491. Whether service or return of citation strictly complies with the rules is a question of law which we review de novo. *Martell v. Tex. Concrete Enter. Readymix, Inc.*, 595 S.W.3d 279, 282 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

To comply with Rule 107, the return of service must include, among other things, the “date and time the process was received for service” and “the date of service or attempted service.” TEX. R. CIV. P. 107(b)(4), (b)(7). In addition, the return and any

document to which it is attached must be filed with the court. *Id.* R. 107(g). The trial court may not grant a default judgment unless proof of service has been on file with the clerk of the court for ten days. *Id.* R. 107(h).

Here, the record fails to affirmatively show strict compliance with the rules of civil procedure governing issuance, service, and return of citation. Although there is evidence in the record that appellee prepared a citation addressed to appellant, there is no completed return of service or attempted service on file. *See id.* R. 107(g). Therefore, to the extent appellee attempted service of process, such attempt is invalid and of no effect, and the error is apparent on the face of the record. *See id.*; *Alexander*, 134 S.W.3d at 848; *Propel Fin. Servs.*, 579 S.W.3d at 491; *Eguia v. Eguia*, 367 S.W.3d 455, 461 (Tex. App.—Corpus Christi—Edinburg 2012, no pet.) (finding error apparent on the face of the record when the record did not affirmatively show a valid return of service was filed with the clerk and on file for ten days before the default judgment was taken). We sustain appellant’s sole issue.

III. CONCLUSION

We reverse the trial court’s default judgment and remand the case for further proceedings consistent with this memorandum opinion.

GREGORY T. PERKES
Justice

Delivered and filed the
24th day of November, 2020.