

TENTH COURT OF APPEALS OF TEXAS

7.02 Acres of Land and \$10,000 in United States Currency v. The State of Texas

No. Nos. 10-08-00262-CV and 10-08-00263-CV, Tenth Court of Appeals of Texas (October 1, 2008)

SUMMARY

The primary opinion is a per curiam memorandum decision from the Tenth Court of Appeals of Texas dismissing consolidated appeals concerning 7.02 acres of land and \$10,000 in United States currency pursuant to agreed motions to dismiss. The opinion was delivered and filed on October 1, 2008. The supplied text also contains an unrelated 1996 opinion concerning an untimely cash deposit and appellate jurisdiction.

OPINION

PER CURIAM.

IN THE TENTH COURT OF APPEALS No. 10-08-00262-CV No. 10-08-00263-CV 7.02 Acres of Land and \$10,000 in united states currency, Appellants v. The State of Texas, Appellee From the 220th District Court Bosque County, Texas Trial Court Nos. 07-07-19807-BCCV and 07-07-19707-BCCV MEMORANDUM Opinion The parties have filed agreed motions to dismiss these appeals.

Accordingly, the appeals are dismissed. See Tex. R. App. P. 42.1(a)(1). FELIPE REYNA Justice Before Chief Justice Gray, Justice Vance, and Justice Reyna Appeal dismissed Opinion delivered and filed October 1, 2008 [CV06] to appeal from a summary judgment granted in favor of Joe Jones in a breach of fiduciary duty and conversion case. She has filed a motion for extension of time to file her cost bond.

Because we have determined that we lack jurisdiction, we will deny her motion and dismiss this appeal. PROCEDURAL HISTORY The trial court signed the complained-of judgment in favor of Jones on September 21, 1995. Whatley timely filed her motion for new trial on Monday, October 23 which was heard and overruled by the court on November 27.

On December 27, 1995—thirty days after the motion for new trial was overruled, but ninety-seven days after the judgment was signed—Whatley filed a cash deposit in lieu of appeal bond and in lieu of supersedeas bond (hereinafter "cash deposit") in the trial court. Her cash deposit was seven days late. Tex. R. App. P. 41(a)(1). She filed a Request and Motion for Extension of Time for Late Filing of Cost Bond and Supersedeas Bond in this court on January 17, 1996, one-hundred and

eighteen days following the signing of the judgment, and twenty-eight days after the running of the ninety-day time limit to file the cost bond.

Id. DISPOSITION Whatley relies on the "Extension of Time" provision in Rule 41 to support her claim that this court may excuse her failure to timely file her cash deposit. Id. 41(a)(2). Her reliance is misplaced. Rule 41(a)(2) provides: An extension of time may be granted by the appellate court for late filing of a cost bond... if such bond... is filed not later than fifteen days after the last day allowed and, within the same period, a motion is filed in the appellate court reasonably explaining the need for such extension.

Id. (emphasis added). The time period for filing a cost bond is jurisdictional. *Davies v. Massey*, 561 S.W.2d 799, 800-01 (Tex. 1978); *El Paso Sharky's v. Amparan*, 831 S.W.2d 3, 5 (Tex. App.—El Paso 1992, writ denied). Whatley's cash deposit should have been filed by December 20—ninety days following the signing of the judgment. Tex. R. App. P. 41(a)(1). She did not file the cash deposit until December 27.

Although Rule 41(a)(2) would allow this court to grant a motion for extension to file a cash deposit in this case up to fifteen days after the ninety-day period's expiration, we can only do so if the motion seeking an extension is filed in the proper court within the same fifteen-day window. Id. 41(a)(2); *Miller v. Miller*, 848 S.W.2d 344, 344-45 (Tex. App.—Texarkana 1993, no writ); *Ludwig v. Enserch Corp.*, 845 S.W.2d 338, 339-40 (Tex.

App.—Houston [1st Dist.] 1992, no writ); *El Paso Sharky's*, 831 S.W.2d at 5. Because Whatley failed to file her cash deposit within the jurisdictional time period and failed to timely request an extension of time for late filing of the cost bond, we lack jurisdiction to entertain the appeal. Id.; *McDonald v. Newmeyer*, 775 S.W.2d 652, 653 (Tex. App.—Houston [1st Dist.]

1989, writ denied). Whatley argues that she had a "reasonable explanation," i.e., mistake of law, inadvertence, or negligence, to excuse her untimely filing the Motion for Extension of Time to File. Although Whatley is correct that a mistake of law can be a reasonable explanation under 41(a)(2), the "reasonable explanation" pertains to the failure to timely file the cost bond, not to an untimely motion for extension to file such bond.

Ludwig, 845 S.W.2d at 340; *El Paso Sharky's*, 831 S.W.2d at 5. Whatley's motion for extension to file a cost bond is untimely; therefore, we deny her motion and dismiss the appeal for want of jurisdiction. PER CURIAM Before Chief Justice Thomas, Justice Cummings, and Justice Vance Motion denied; dismissed for want of jurisdiction Opinion delivered and filed January 31, 1996
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