

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT AT DALLAS

Brigetta D'Olivio a/k/a Brigetta Alix Anderson, Alix Brigetta v. Hilary Thompson Hutson

No. 05-20-00969-CV (Tex. App.—Dallas Feb. 12, 2021) · No. No. 05-20-00969-CV · Decided February 12, 2021

SUMMARY

The Texas Court of Appeals for the Fifth District of Dallas denied the appellee's motion to dismiss an appeal as untimely or for failure to prosecute. The court held that the appellant's mailed motion for new trial was timely under Texas Rule of Civil Procedure 5 and that the motion extended the appellate deadlines despite the delayed payment of the filing fee.

CASE DETAILS

COURT	Court of Appeals of Texas, Fifth District at Dallas
WRITING FOR THE COURT	Ken Molberg
JURISDICTION	Texas
DECIDED	February 12, 2021
DOCKET	No. 05-20-00969-CV
DISPOSITION	other
PROCEDURAL POSTURE	Appeal from the trial court's August 11, 2020 final order and judgment. The court of appeals questioned whether the notice of appeal was timely and considered the appellee's motion to dismiss for lack of appellate jurisdiction and failure to prosecute.
STANDARD OF REVIEW	Appellate jurisdiction is reviewed as a threshold matter; the court independently determines whether the notice of appeal was timely.
PRECEDENTIAL VALUE	published
PARTIES	Brigetta D'Olivio a/k/a Brigetta Alix Anderson, Alix Brigetta v. Hilary Thompson Hutson

TOPICS

[appellate jurisdiction](#)[appellate procedure](#)[motion for new trial](#)[civil procedure](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the motion for new trial was timely under Texas Rule of Civil Procedure 5 when it was mailed within the applicable filing period but received and date-stamped later.
2. Whether a motion for new trial conditionally filed without the required filing fee extends the deadline for filing the notice of appeal.
3. Whether the appeal should be dismissed for failure to prosecute because appellant delayed paying the fee for the clerk's record.

HOLDINGS

1. The motion for new trial was timely because it was mailed on September 9, within ten days of the September 10 deadline, and was therefore considered timely filed under Texas Rule of Civil Procedure 5.
2. A motion for new trial is conditionally filed and extends the appellate deadlines when presented to the trial court clerk, even if tendered without the required filing fee.
3. The notice of appeal was timely because the timely motion for new trial extended the appellate deadlines.
4. The appeal should not be dismissed for failure to prosecute based on appellant's delay in paying the clerk's-record fee while disputing the amount.

KEY QUOTATIONS

“As to appellant’s failure to pay the required motion fee, we note that a motion for new trial is conditionally filed, and extends the appellate deadlines, when presented to the trial court clerk even if it is tendered without the requisite fee.”

“Accordingly, the motion for new trial extended the appellate deadlines, and the notice of appeal is timely.”

FACTUAL BACKGROUND

The trial court entered a final order and judgment on August 11, 2020. Appellant mailed a motion for new trial on September 9, 2020, but the motion was not date-stamped by the clerk until September 14 and the required filing fee was not paid until November 10. Appellant filed the notice of appeal on November 9, and the parties disputed whether the motion for new trial extended the appellate deadline and whether appellant had failed to prosecute the appeal because of a dispute over the reporter's-record fee.

PROCEDURAL HISTORY

The trial court entered a final order and judgment on August 11, 2020. Appellant mailed a motion for new trial on September 9, 2020, the motion was date-stamped September 14, 2020, and appellant filed the notice of appeal on November 9, 2020. The court of appeals requested jurisdictional letter briefs, considered appellee's motion to dismiss, denied dismissal, and ordered the reporter's record to be filed by March 3, 2021.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand was ordered. The court ordered Janet L. Dugger, the official court reporter for the 296th Judicial District Court, to file the reporter's record no later than March 3, 2021, and directed the clerk to send the order to the court reporter and the parties.

CASES CITED

- Brashear v. Victoria Gardens of McKinney, L.L.C., 302 S.W.3d 542, 545 (Tex. App.—Dallas 2009, no pet.) (op. on reh'g)
- Garza v. Garcia, 137 S.W.3d 36, 38 (Tex. 2004)

OPINION

PER CURIAM.

Order entered February 12, 2021 In The Court of Appeals Fifth District of Texas at Dallas No. 05-20-00969-CV BRIGETTA D'OLIVIO A/K/A BRIGETTA ALIX ANDERSON, ALIX BRIGETTA, Appellant V. HILARY THOMPSON HUTSON, Appellee On Appeal from the 296th Judicial District Court Collin County, Texas Trial Court Cause No. 296-04855-2019 ORDER This is an appeal from the trial court's August 11, 2020 final order and judgment.

Appellant filed a motion for new trial that was date-stamped September 14, 2020 and the notice of appeal November 9, 2020. Because the motion for new trial appeared to have been filed outside the allowable thirty-day period, see TEX. R. CIV. P. 329b(a), it appeared the deadline for filing the notice of appeal was September 10, 2020 and not November 9th when it was filed, see TEX. R. APP.

P. 26.1, 26.1(a). We questioned our jurisdiction over the appeal based on timeliness and directed the parties to file letter briefs addressing our concern. See *Brashear v. Victoria Gardens of McKinney, L.L.C.*, 302 S.W.3d 542, 545 (Tex. App.—Dallas 2009, no pet.) (op. on reh'g) (timely filing of notice of appeal is jurisdictional). Separately, appellee challenged our jurisdiction by motion to dismiss.

Appellee asserted we lacked jurisdiction because appellant did not pay the required filing fee for the motion for new trial at the time the motion was filed but waited until November 10th. Appellee contended that without the concurrent payment, the motion for new trial could not extend the deadline for filing the notice of appeal to November 9th, and the notice of appeal was therefore untimely.

Additionally, appellee argued the appeal should be dismissed for want of prosecution because appellant delayed paying the fee for the clerk's record based on a dispute over the amount. Appellant has filed a response to appellee's motion, and appellee has filed a reply; both parties have filed the requested jurisdictional letter briefs.

We address our and appellee's concerns in turn. As to the timeliness of appellant's motion for new trial, appellant noted in her letter brief that she mailed the new trial motion on September 9th and attached proof of the date of mailing in support.

Under Texas Rule of Civil Procedure 5, the motion, received within ten days of the September 10th deadline, is considered timely filed. See TEX. R. CIV. P. 5. As to appellant's failure to pay the required motion fee, we note that a motion for new trial is conditionally filed, and extends the appellate deadlines, when presented to the trial court clerk even if it is tendered without the requisite fee.

See *Garza v. Garcia*, 137 S.W.3d 36, 38 (Tex. 2004). Accordingly, the motion for new trial extended the appellate deadlines, and the notice of appeal is timely. We DENY appellee's motion to dismiss to the extent it argues the notice of appeal is untimely.

We further DENY appellee's motion to dismiss to the extent it argues appellant has failed to prosecute the appeal. We note we suspended the deadline for the filing of the reporter's record pending determination of our jurisdiction over the appeal.

Having concluded we have jurisdiction over the appeal, we ORDER Janet L. Dugger, Official Court Reporter for the 296th Judicial District Court, to file the record no later than March 3, 2021. We DIRECT the Clerk of the Court to send a copy of this order to Ms. Dugger and the parties. /s/ KEN MOLBERG JUSTICE