Dismissed and Opinion filed May 25, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00511-CV

PATRICIA McCARTY and
PSYCHOLOGICAL MANAGEMENT SERVICES, INC., Appellants

V.

MARY A. ROONEY, Appellee

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 666,133

O P I N I O N

This is a restricted appeal brought by appellants, Patricia McCarty and Psychological Management Services, Inc. (PMSI), pursuant to Texas Rule of Appellate Procedure 30 which permits certain parties to a proceeding to file a notice of appeal within six months after the judgment or order is signed. *See* TEX. R. APP. P. 30; 26.1(c). Rule 30 provides that appeals under that rule replace writ of error appeals to the court of appeals. *Id*. Thus, the standard of review for appeals brought by writ of error applies here. Because appellees have not satisfied all of the elements of a restricted appeal, we dismiss this appeal.

I.
Factual and Procedural Background

Mary A. Rooney, appellee, sued McCarty and PMSI on an account related to the performance of professional services. McCarty and PMSI retained attorney Douglas DeBakey to represent them. He filed an answer and responded to interrogatories and requests for production. Rooney then served DeBakey with several requests for admissions; however, he never responded. The ramifications of DeBakey's failure to respond and the trial court's entry of multiple summary judgments are the subjects of this appeal.

II.
Standard of Review

The four elements necessary for a review by writ of error are: (1) the notice must be filed within six months of the date of judgment; (2) by a party to the suit; (3) who did not participate at trial; and (4) the error complained of must be apparent from the face of the record. *See Withem v. Underwood*, 922 S.W.2d 956, 57 (Tex. 1996); s*ee also Stankiewicz v. Oca*, 991 S.W.2d 308, 310 n. 1 (Tex. App.—Fort Worth 1999, no pet.) (holding that the "four prerequisites to bringing a *restricted appeal*" include the requirement that the error complained of must be apparent from the face of the record) (emphasis added). Each element is mandatory and jurisdictional and cannot be waived. *See C & V Club v. Gonzales*, 953 S.W.2d 755, 757 (Tex. App.—Corpus Christi 1997, no writ) (citing *Serna v. Webster*, 908 S.W.2d 487, 491 (Tex. App—San Antonio 1995, no writ).

III.
Analysis of First Three Elements

Appellants satisfy the first element of a restricted appeal because they complain of the summary judgment entered against them on October 16, 1997, and their "Notice of Restricted Appeal" was filed with the trial court on April 14, 1998, within six months of the date of that judgment. Further, appellants also satisfy the second element because they were parties to the suit below. It is undisputed that McCarty and PMSI were the defendants below and that they filed a joint answer to plaintiff Rooney's petition,

qualifying them as parties to the suit. *See Gunn v. Cavanaugh*, 391 S.W.2d 723 724 (Tex. 1965) (the remedy of appeal by writ of error is available only to parties of record, or their legal representative).

Appellants also meet the third requirement of this appeal because it is apparent that the appellants did not participate at trial. This is an appeal from a summary judgment. The only pleading filed with the trial court and contained in the record before this court is defendants' original answer. Appellants neither filed a response to the motions for summary judgment filed by Rooney, nor appeared at the hearing on the motions. The mere filing of an answer does not cause a defendant to "participate at trial" thereby precluding an appeal by writ of error. *See First Dallas Petroleum, Inc. v. Hawkins*, 727 S.W.2d 640, 643 (Tex. App.—Dallas 1987, no writ); *see also Stubbs v. Stubbs*, 685 S.W.2d 643, 645 (Tex. 1985) (filing an answer is not participation). Moreover, where an appellant neither filed a response nor appeared at the hearing on a summary judgment motion, appeal by writ of error is permissible. *See Havens v. Ayers*, 886 S.W.2d 506. 509 (Tex. App.—Houston [1st Dist.] 1994, no writ). Under the rule in *Stubbs*, appellants did not participate at trial. Therefore, the only element at issue before this Court is the fourth element: whether there is error on the face of the record.

IV.
Error on The Face of the Record

In their appeal, appellants bring two points of error. To qualify them for relief, any error asserted by appellants must be apparent on the face of the record. Their first point of error concerns the alleged failure of appellee to provide them with notice of the proceedings below. Appellants' second point of error concerns the validity of the trial court's entry of a second, final judgment after a previous final judgment had been entered.

A. Notice

In their first point of error, appellants assert they had no notice of several important documents and proceedings below. First, appellants claim they were not aware appellee sent them a request for

admissions. Because they were not aware of appellee's request for admissions, appellants did not respond. Absent a response, appellee's requests were deemed admitted. *See* TEX. R. CIV. P. 198.2(c) (stating a request is considered admitted unless the responding party answers the request, in writing, within thirty days after service of the request). Second, appellants contend they did not receive notice of either appellee's motions for summary judgment or the hearings on those motions.

The crux of appellants' lack of notice argument is that their attorney, and not the parties themselves, was served with notice. This notice was ineffective, appellants claim, because their attorney ceased representing them after filing an answer and responding to "initial interrogatories and requests for production." Nevertheless, appellee continued serving the requisite notices only upon the "former" attorney. Appellants contend appellee failed to effectively serve appellants with notice of the request for admissions, the motions for summary judgment, and the subsequent hearings on those motions. Accordingly, appellants conclude their analysis with the following summary: because the summary judgments were granted based solely on the deemed admissions, and the deemed admissions were defective due to lack of notice, the granting of the resulting summary judgments was reversible error. We disagree.

Appellants' "Original Answer" was signed by their counsel below, Douglas DeBakey. By signing the answer, DeBakey became designated as the attorney in charge for the appellants. *See* TEX. R. CIV. P. 8.[1] Because DeBakey was appellants' attorney in charge, appellee was required to send all correspondence, including the request for admissions, the notices of the motions for summary judgment, and notices of the hearings on such motions, to DeBakey. *See id*. Indeed, as set out in note 1herein, Rule 8 specifically mandates that all communications from other counsel with respect to a suit shall be sent to the attorney in charge. The Texas Rules of Civil Procedure do not require service on the attorney in charge

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[1] Rule 8 provides as follows:

> On the occasion of a party's first appearance through counsel, the attorney whose signature first appears on the initial pleadings for any party shall be the attorney in charge, unless another attorney is specifically designated therein. Thereafter, *until such designation is changed by written notice to the court and all other parties in accordance with* Rule 21a, *said attorney in charge shall be responsible for the suit as to such party. All communications from the court or other counsel with respect to a suit shall be sent to the attorney in charge*. TEX. R. CIV. P. 8 (emphasis added).

and the represented party. Thus, because DeBakey had not withdrawn, counsel for appellee properly sent communications only to DeBakey.

Moreover, there is nothing in the record to indicate that either DeBakey withdrew from his representation of the appellants or that appellants discharged him.[2] *See Rogers v. Clinton*, 794 S.W.2d 9, 10 n.1 (Tex. 1990) (noting although a party may discharge his or her attorney at any time without cause . . . an attorney may withdraw from representation of a client only if he satisfies the requirements of Rule 10). Appellants allege that because their attorney never filed pleadings after filing appellants' answer, appellee was effectively put on notice by such inaction that DeBakey had withdrawn. However, the rules of civil procedure in Texas do not provide for notice by silence. It was DeBakey's duty to file a motion to withdraw under Rule 10. Because the record before this Court is devoid of such notice, DeBakey remained the attorney in charge for appellants and appellee did not err in continuing to serve DeBakey with communications concerning this cause. *See* TEX. R. CIV. P. 8.

Further, the trial court did not err in granting appellee's motions for summary judgment based on the deemed admissions. *See* TEX. R. CIV. P. 166a(c) (trial court shall render judgment if *admissions* show there is no genuine issue as to any material fact and movant is entitled to judgment as a matter of law). Appellee's request for admissions and motions for summary judgment each contain a certificate of service certifying service upon appellants' attorney, Douglas BeBakey, as required by Rule 21. *See* TEX. R. CIV. P. 21. A certificate of service, by a party or an attorney of record, constitutes prima facie evidence of the fact of service. *See* TEX. R. CIV. P. 21a. Thus, the record before this Court reflects appellants received proper notice of appellee's request for admissions and the motions for summary judgment. Appellants have not referred this Court to anything rebutting the prima facie proof in the record that DeBakey was in fact served with the admissions and motions for summary judgment. Therefore, we have not found any error on the face of the record involving notice to appellants. Accordingly, we overrule appellant's first point of error.

B. "Final" Judgments

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[2] Texas Rule of Civil Procedure 10 states, "[a]n attorney may withdraw from representing a party only upon written motion for good cause shown." TEX. R. CIV. P. 10.

In their second point of error, appellants argue the error is apparent on the face of the record because the trial court entered two "final" summary judgments. The sequence of proceedings below is as follows:

1. On June 27, 1997, appellee filed a motion for summary judgment against PMSI.

2. On July 30, 1997, the trial court granted appellee's motion against PMSI.

3. On August 8, 1997, appellee filed a motion for severance.

4. On August 27, 1997, the trial judge modified the July 30 summary judgment against PMSI. This judgment contains a Mother Hubbard clause.

5. On September 17, 1997, appellee filed a motion for summary judgment against both appellants, PMSI and Patricia McCarty.

6. On September 22, 1997, the trial court entered an order severing the actions against the appellants.

7. On October 16, 1997, the trial court granted appellee's summary judgment against both appellants, PMSI and McCarty.

Appellants argue it was error for the trial court to enter the October 16, 1997, judgment for two reasons: (1) the August 27 judgment was a final and appealable judgment over which the trial court lost plenary power thirty days after it was signed; and (2) because both judgments are final judgments, the trial court violated Civil Procedure Rule 301 which permits only one final judgment in a cause. Again, we disagree.

To understand the fallacy in appellants' arguments, the series of orders beginning with the July 30, 1997, summary judgment must be examined to determine the continuing validity of each individual order. The July 30, 1997, summary judgment was the first order entered by the trial court in this cause. It granted judgment for plaintiff Rooney only against PMSI. Thus, because all parties were not disposed of, this was not a final judgment. On August 27, 1997, the trial court again entered a summary judgment in favor of Rooney against PMSI. The August 27 judgment effectively vacated the July 30 judgment against PMSI.

The August 27 order contained a Mother Hubbard clause. The inclusion of a Mother Hubbard clause in an order granting summary judgment makes an otherwise partial summary judgment final for purposes of appeal. *See Bandera Elec. Co-Op., Inc. v. Gilchrist*, 946 S.W.2d 336, 337 (Tex. 1997). Thus, the judgment signed August 27, 1997, was final for purposes of appeal.

On September 22, 1997, the trial court entered an order severing Rooney's claims against defendant McCarty and assigning them to a separate cause. Because this judgment was entered within thirty days following the August 27, 1997 summary judgment, the trial court was within its plenary power to vacate, modify, correct or reform the earlier judgment. *See* TEX. R. CIV. P. 329b(d) This severance order, entered within the trial court's plenary power over the August 27 judgment, implicitly removed the Mother Hubbard clause from that August 27 judgment. The effect of the removal was to create a new final judgment in favor of Rooney against only PMSI as of September 22, the date of the severance. If a judgment is modified, corrected, or reformed in any respect, the time for appeal, and the court's thirty day plenary power, run from the correction date. *See Wang v. Hsu*, 899 S.W.2d 409, 411 (Tex. App.—Houston [14th Dist.] 1995, writ denied). Thus, modification of the August 27 judgment on September 22 extended the trial court's plenary power over PMSI for thirty days after September 22; Rooney's claims against McCarty were still pending. During this thirty day period, the trial court retained plenary power over both PMSI and McCarty, thus permitting the trial court to properly enter a new order on October 16, 1997, granting Rooney summary judgment against both defendants. This was a final judgment because it disposed of all parties and issues. The October 16 judgment against both defendants vacated the August 27 judgment, which became a nullity. *See id.* (stating rule that a second judgment becomes "the judgment" in a case; it is as if the first judgment was never entered).

We conclude from the foregoing that appellants' arguments supporting their contention that the trial court erred when it entered the October 16, 1997, judgment are untenable. Therefore, there is no error on the face of the record involving multiple final judgments, or judgments modifying earlier judgments over which the trial court had lost its plenary power. Accordingly, we overrule appellant's second point of error.

V.
Conclusion

The foregoing analysis demonstrates appellants have failed to show that the trial court's entry of the October 16 summary judgment was error. Appellants have also failed to prove they had no notice of the proceedings below. Therefore, appellants have not satisfied the fourth element of a restricted appeal, that error appear on the face of the record. Because each element is jurisdictional, we dismiss this appeal.

/s/ John S. Anderson
Justice

Dismissed and Opinion filed May 25, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).