

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-20-00010-CV**

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**North Burnet Gun Store, LLC, Appellant**

**v.**

**Sherry Tack, Trustee of the Harvey Donald Testamentary Family Trust, Appellee**

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**FROM THE 200TH DISTRICT COURT OF TRAVIS COUNTY  
NO. D-1-GN-18-007318, THE HONORABLE KARIN CRUMP, JUDGE PRESIDING**

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**OPINION**

North Burnet Gun Store (“North Burnet”) appeals the trial court’s order granting the motion for new trial filed by Sherry Tack, who is the trustee of the Harvey Donald Testamentary Family Trust. We will dismiss this appeal for want of jurisdiction. *See* Tex. R. App. P. 42.3.

**BACKGROUND**

North Burnet sued Tack for alleged property damage. On June 25, 2019, North Burnet obtained a default judgment against Tack. On September 19, 2019, Tack filed a motion for new trial asserting that she only became aware of the default judgment on August 20, 2019. Approximately one month later, North Burnet filed a motion for continuance asking the trial court to reschedule the hearing on the motion for new trial to allow North Burnet to depose Tack, and the trial court granted North Burnet’s motion. The motion for new trial was heard on

December 4, 2019, and the trial court granted the motion and signed its order granting new trial at the conclusion of the hearing.

North Burnet appeals the trial court's order granting the motion for new trial.

## **DISCUSSION**

In one issue on appeal, North Burnet asserts that the trial court erred by granting the motion for new trial. Although an order granting a motion for new trial is generally “not reviewable on appeal,” *see Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005) (noting that orders granting motion for new trial filed “within the period of the trial court’s plenary power” are generally “not reviewable on appeal”), North Burnet asserts that this Court may consider its appeal of the trial court’s order because the trial court lost plenary power over the case under the Rules of Civil Procedure before it made its ruling, *cf. Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (recognizing that appellate courts may reverse order granting new trial where order was void), *disapproved of on other grounds by In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P.*, 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding).

Under the Rules of Civil Procedure, the date a “judgment or order is signed as shown in the record shall determine the beginning of the periods prescribed by” the Rules “for the court’s plenary power to grant a new trial or to vacate, modify, correct or reform a judgment or order.” Tex. R. Civ. P. 306a(1). However, if a party has not received notice of the judgment or order from the clerk of the trial court within twenty days after the judgment or order is signed “nor acquired actual knowledge of the” judgment or order, then the beginning date for the trial court’s plenary power “shall begin on the date that such party or his attorney received such notice or acquired actual knowledge of the signing, whichever occurred first, but in no event

shall such periods begin more than ninety days after the original judgment or other appealable order was signed.” *Id.* R. 306a(4).

Regarding motions for new trial, the Rules explain that if a “motion for new trial . . . is not determined by written order within seventy-five days after the judgment is signed, it shall be considered overruled by operation of law on expiration of that period.” *Id.* R. 329b(c). Further, the Rules provide that if a motion for new trial is timely filed, a trial court “has plenary power to grant a new trial . . . until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.” *Id.* R. 329b(e). Moreover, the Rules explain that after the trial court loses its plenary power, “a judgment cannot be set aside by the trial court except by bill of review for sufficient cause.” *Id.* R. 329b(f). In other words, if a motion for new trial is ruled on by operation of law, “a trial court’s plenary power . . . continue[s] for 105 days after the signing of the judgment,” *see In re Timberlake*, 501 S.W.3d 105, 110 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding), or a subsequent date allowed under Rule 306a(4), *see* Tex. R. Civ. P. 306(a)(4), with 75 days being attributable to the denial of the motion by operation of law and 30 days being attributable to the plenary power period authorized under Rule 329b(e), *see In re Timberlake*, 501 S.W.3d at 110.

On appeal, North Burnet does not dispute that Tack did not receive actual knowledge of the default judgment until August 20, 2019, or dispute that this date serves as the start of the trial court’s plenary power in this case. Instead, North Burnet contends that, in light of the language of the Rules set out above, the trial court’s plenary power over this case ended December 3, 2019, because that date is 105 days after Tack learned about the default judgment. *See* Tex. R. Civ. P. 306a(4), 329b(c), (e). Accordingly, North Burnet asserts that this Court should

reverse the trial court's order granting the motion for new trial because the order was signed on December 4, 2019, which it urges is one day after the trial court lost plenary power in this case.

Although North Burnet correctly points to Rules setting out the deadlines pertaining to motions for new trial, there is another Rule of Civil Procedure bearing on trial court deadlines that must be considered when determining whether the trial court had plenary power in this case. Rule 4 specifies that for “*any* period of time prescribed or allowed by these rules, . . . [t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.” *Id.* R. 4. In this case, the parties both agree that Tack did not learn of the default judgment until August 20, 2019, and timely filed her motion for new trial on September 19, 2019. Because the trial court did not expressly rule on the motion, it was overruled by operation of law. Under Rule 329b(c), the motion was overruled 75 days after Tack learned of the default judgment. *Id.* R. 329b(c).

However, the 75th day fell on Sunday November 3, 2019, which under Rule 4 meant the motion was overruled by operation of law on Monday November 4, 2019. *Id.* R. 4; *see also In re Johnson*, No. 14-09-00782-CV, 2009 WL 3347563, at \*2 (Tex. App.—Houston [14th Dist.] Oct. 20, 2009, orig. proceeding) (mem. op.) (noting that although motion to set aside default judgment was overruled by operation of law, “[t]he seventy-fifth day, June 6, 2009, was a Saturday; therefore, the motion was overruled by operation of law on Monday, June 8, 2009”); *Long John Silver's Inc. v. Martinez*, 850 S.W.2d 773, 776 (Tex. App.—San Antonio 1993, writ dismissed w.o.j.) (explaining that “seventy-fifth day after the judgment was signed . . . fell on a Saturday,” meaning that “the motion for new trial was not overruled by operation of law until” following Monday); *Keeper v. First Care, Inc.*, 794 S.W.2d 879, 881 (Tex. App.—Tyler 1990,

no writ) (“conclud[ing] that appellees’ timely filed motion for new trial was overruled by operation of law” on Monday rather than preceding Sunday under Rule 4).

Moreover, under Rule 329b(e), the trial court had plenary power for an additional thirty days to grant a motion new trial. Tex. R. Civ. P. 329b(e); *see also Long John Silver’s*, 850 S.W.2d at 776 (determining that trial court had plenary power to grant new trial for 30 days following day on which motion was deemed to have been overruled by operation of law after applying Rule 4). Accordingly, we conclude that the trial court had plenary power to order a new trial when it signed its order on December 4, 2019. *See* Tex. R. Civ. P. 329b(e); *see also In re Johnson*, 2009 WL 3347563, at \*2 (explaining that because motion to set aside was overruled by operation of law under Rule 4 on Monday rather than previous Saturday and because trial court’s plenary power extended thirty days beyond that Monday, “the trial court timely signed its order setting aside the default judgment on . . . the last day of its plenary power”).

Having determined that the trial court had plenary power when it granted a new trial, we conclude that this Court does not have jurisdiction over this appeal because “[a]n order granting a new trial reinstates a case on the trial court’s docket ‘the same as though no trial had been had’” and “deprives an appellate court of jurisdiction over the appeal.” *In re J.Z.P.*, No. 07-13-00445-CV, 2016 WL 5785152, at \*1 (Tex. App.—Amarillo Sept. 28, 2016, no pet.) (mem. op.) (quoting *Wilkins*, 160 S.W.3d at 563). Therefore, we dismiss this appeal for want of jurisdiction. *See* Tex. R. App. P. 42.3.

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Thomas J. Baker, Justice

Before Chief Justice Rose, Justices Baker and Triana

Dismissed for Want of Jurisdiction

Filed: July 1, 2020