Walsh v. Woundkair Concepts, Inc.

Court of Appeals of Texas, Second District, Fort Worth

February 5, 2015, Delivered; February 5, 2015, Opinion Filed

NO. 02-14-00395-CV

Reporter
2015 Tex. App. LEXIS 1147

RICHARD F. WALSH, MEDICA-RENTS CO., LTD., AND MED-RCO, INC., APPELLANTS v. WOUNDKAIR CONCEPTS, INC., DAN ANDERSON, AND KIM ANDERSON, APPELLEES

Prior History: [*1] FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY. TRIAL COURT NO. 017-217058-06. TRIAL COURT JUDGE: HON. MELODY WILKINSON. *Woundkair Concepts, Inc. v. Walsh, 2012 Tex. App. LEXIS 2331 (Tex. App. Fort Worth, Mar. 22, 2012)*

Core Terms

invoke, trial court, bona fide attempt, notice of appeal, perfected, post judgment motion, appellate court's jurisdiction, motion for a new trial, appellate jurisdiction, notice, court of appeals

Case Summary

Overview

HOLDINGS: [1]-Appellants' request for a copy of the reporter's record was not a bona fide attempt to invoke the appellate court's jurisdiction; [2]-Nothing in the postjudgment motions filed by appellants represented a bona fide attempt to invoke the jurisdiction; [3]-Appellants did not timely perfect the appeal by filing a certificate of written discovery and by serving responses to postjudgment discovery requests; [4]-The December 5, 2014 letter was nothing more than an attempt to convince the trial court to grant appellants' postjudgment motions and was not a bona fide attempt to invoke appellate jurisdiction.

Outcome

Motion denied and appeal dismissed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

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HN1 Consistent with the policy of applying rules of procedure liberally to reach the merits of the appeal whenever possible, a court of appeals has jurisdiction over an appeal if the appellant timely files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

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HN2 Filing a motion for new trial may not be considered a bona fide attempt to invoke the appellate court's jurisdiction.

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WORTH, TEXAS AND DOUGLAS W. ALEXANDER, AMY WARR; ALEXANDER DUBOSE JEFFERSON & TOWNSEND LLP, AUSTIN, TEXAS.

FOR APPELLEES: JOHN H. CAYCE, JR.; KELLY HART & HALLMAN LLP, FORT WORTH, TEXAS AND MACK ED SWINDLE, BRENT SHELLHORSE; WHITAKER CHALK SWINDLE & SCHWARTZ PLLC, FORT WORTH, TEXAS.

Judges: PANEL: MEIER, GABRIEL, AND SUDDERTH, JJ.

Opinion by: BILL MEIER

Opinion

MEMORANDUM OPINION[1]

On December 18, 2014, we notified Appellants Richard F. Walsh, Medica-Rents Co., Ltd., and MED-RCO, Inc. of our concern that we lack jurisdiction over this appeal because the notice of appeal was due November 26, 2014, but was not filed until December 18, 2014. *See* Tex. R. App. P. 25.1(b), 26.1(a). Appellants admitted in their response that they had miscalculated the due date for the notice of appeal,[2] but they argued that we have jurisdiction over this appeal because, as demonstrated by a number of actions that they had taken and communications that they had made after the trial court [*2] signed the final judgment, they had clearly expressed an intent to appeal.[3] In light of a letter that Appellants filed with the trial court on December 5, 2014, a date that was within rule 26.3's fifteen-day extension window, they moved that we extend the time to file their notice of appeal and that their December 18, 2014 notice serve to amend the December 5, 2014 letter. *See* Tex. R. App. P. 26.3; Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997). Appellees Woundkair Concepts, Inc., Dan Anderson, and Kim Anderson replied that this appeal should be dismissed because Appellants did not timely file any document in a bona fide attempt to invoke this court's jurisdiction. We agree with Appellees.

HN1 Consistent with the policy of applying rules of procedure liberally to reach the merits of the appeal whenever possible, a court of appeals has jurisdiction over an appeal if the appellant timely [*3] files an instrument in a bona fide attempt to invoke the appellate court's jurisdiction. Warwick Towers Council of Co-Owners v. Park Warwick, L.P., 244 S.W.3d 838, 839 (Tex. 2008); *see* In re J.M., 396 S.W.3d 528, 530-31 (Tex. 2013).

Appellants argue that they timely perfected this appeal by requesting a copy of the reporter's record. The notice is directed to counsel for Appellants and states, among other things, that "you are hereby notified that request has been made for a transcript." If anything, the notice evidenced Appellants' desire to obtain the reporter's record; nothing therein evidenced a bona fide attempt to invoke our appellate jurisdiction. *See* Tex. Animal Health Comm'n v. Nunley, 598 S.W.2d 233, 234 (Tex. 1980); *see also* Park Warwick, L.P., 244 S.W.3d at 839.

Appellants argue that they timely perfected this appeal by filing a motion for judgment notwithstanding the verdict, a motion for new trial, and a supplement to those motions "in order to preserve error and identify the issues [that they] intended to raise on appeal." However, preserving error does not simultaneously perfect an appeal, and unlike in *J.M.*, in which the appellant filed a

[1] *See* Tex. R. App. P. 47.4.

[2] Appellants acknowledged that "counsel mistakenly believed that the formal notice of appeal was due 15 days after the trial court lost its plenary power on December 11, 2014 and had prepared to file the formal notice by December 26, 2014."

[3] According to Appellants, "[Appellees] and the trial court knew long before the formal notice of appeal was due that [Appellants] intended to appeal."

"Motion for New Trial or, in the Alternative, Notice of Appeal," which in part indicated an attempt to invoke the appellate court's jurisdiction, nothing in the postjudgment motions filed by Appellants represented a bona fide attempt to invoke our jurisdiction. [*4] *See* J.M., 396 S.W.3d at 529-30. This case instead falls under the rule elaborated in *In re K.A.F.*, in which the supreme court concluded that ***HN2*** "filing a motion for new trial may not be considered a bona fide attempt to invoke the appellate court's jurisdiction." 160 S.W.3d 923, 924 (Tex. 2005).

Appellants further argue that they timely perfected this appeal by filing a certificate of written discovery and by serving responses to postjudgment discovery requests that, among other things, indicated both a willingness and the ability to post a supersedeas bond "if the [trial court] denies" their postjudgment motions. Appellants rely on *Gregorian v. Ewell*, a case in which we held that the appellants had invoked the jurisdiction of this court by filing a cash deposit in lieu of a supersedeas bond within the period required for perfecting their appeal. 106 S.W.3d 257, 260 (Tex. App.—Fort Worth 2003, no pet.). However, unlike in Gregorian, Appellants did not somehow suspend the judgment during the time for filing the notice of appeal, and we decline to over-extend *Gregorian*'s limited holding to everyday situations, such as this one, in which one party merely notifies another party of its willingness to supersede a judgment if the trial court denies its postjudgment motions.[4] Appellants direct us to nothing [*5] in their discovery-related documents that constitutes a bona fide attempt to invoke our appellate jurisdiction. *See* Park Warwick, L.P., 244 S.W.3d at 839.

On a similar note, Appellants point to statements that were made at a hearing in the trial court on November 25, 2014, and that "repeatedly referred to the appeal that [Appellants] would seek if the trial court denied" their postjudgment motions. But an oral statement is not a filed document, *see* Sweed v. Nye, 323 S.W.3d 873, 875 ("[T]his Court has consistently held that a timely *filed* document, even if defective, invokes the court of appeals' jurisdiction." (emphasis added)), and Appellants' conditional statements that indicated the potential for an appeal in the future were insufficient to invoke this court's appellate jurisdiction. *See, e.g.*, Southerland v. Wright, No. 07-06-00147-CV, 2006 Tex. App. LEXIS 5241, 2006 WL 1680858, at *1-2 (Tex. App.—Amarillo June 15, 2006, pet. denied); Yancy v. Wolfe, 523 S.W.2d 516, 517-18 (Tex. App.—Fort Worth 1975, writ ref'd n.r.e.).

Appellants additionally argue that they perfected this appeal by sending a letter to the trial [*6] court that, among other things, "address[ed] some procedural and appellate questions that the Court posed after the hearing [on Appellants' postjudgment motions] had concluded." After (1) correcting several instances in which Appellees had purportedly misconstrued the record and (2) addressing Appellees' "new arguments" about lost profits, Appellants (3) explained in the letter that "[t]he Court now has three options":

> 1. The Court can enter an order denying the Motion;2. The Court can do nothing. After December 11, 2014, the Court's plenary power will expire, and *the judgment previously entered will become final and appealable*; or
>
> 3. The Court can grant the motion for JNOV.
>
> If the Court chooses options 1 or 2 above, then Defendants will be forced to appeal and incur unnecessary expenses. In the event the Court of Appeals holds that the

[4] Appellants' other arguments mirroring our reasoning in *Gregorian*—that Appellees knew that Appellants intended to appeal, that Appellees would not suffer any surprise or prejudice if the appeal proceeded, and that granting the extension would not alter the time period for perfecting appeal—are consequently unpersuasive. *See* 106 S.W.3d at 260.

> Court erred in denying the Motion, the case will likely be remanded for a new trial. [Emphasis added.]

Construed in its entirety, the December 5, 2014 letter is nothing more than a further attempt to convince the trial court to grant Appellants' postjudgment motions. This includes Appellants' unambiguous, conditional statement that they ″will be forced to appeal″ *if* their [*7] motion is not granted. By advising the trial court of the specific action that they would take if the trial court did not grant their postjudgment motion, Appellants did not concurrently make any bona fide attempt to invoke this court's appellate jurisdiction. *See* *Southerland, 2006 Tex. App. LEXIS 5241, 2006 WL 1680858, at *2* (″[Appellant] used the January 19th letter to threaten appeal as a means of securing relief from the trial court. The document was a trial tactic made to avoid appeal, not a *bona fide* attempt to invoke our jurisdiction.″).

Arguing that they perfected this appeal, Appellants direct us to an unfiled letter that Appellees drafted and is dated December 15, 2014, and to discussions—or ″active negotiations″—between the parties that occurred that same week, both of which regarded suspension or enforcement of the judgment. However, among other problems, the letter and negotiations occurred after the window for a rule-26.3 extension had already closed (December 11, 2014), and neither the letter nor the negotiations between the parties constituted a bona fide attempt to invoke this court's appellate jurisdiction. *See* *Park Warwick, L.P., 244 S.W.3d at 839*.

Appellants rely heavily on *J.M.*, but it is readily distinguishable. There, the ″Motion for New Trial or, in the Alternative, [*8] Notice of Appeal″ that the petitioner filed in the trial court constituted a bona fide attempt *to invoke* the appellate court's jurisdiction because (1) it stated that the appellant ″wishes to appeal this case to″ the court of appeals, (2) it was partly entitled a notice of appeal, and (3) the notice of appeal portion specifically addressed the appellate court. *J.M., 396 S.W.3d at 530*. Here, Appellants' December 5, 2014 letter (1) contains no language, however worded, demonstrating, in any way, that Appellants ″wish[] to appeal this case to″ the court of appeals, (2) it is not partly entitled a notice of appeal, and (3) there is no portion that addresses this court. Unlike in *J.M.*, in which the petitioner there attempted to invoke the appellate court's jurisdiction, Appellants, by their December 5, 2014 letter, attempted merely to *persuade* the trial court to grant their postjudgment motions by explaining that a costly appeal, and potential reversal and remand, would follow if the motions were denied.

Appellants argue that like the petitioner in *J.M.*, who advanced her notice of appeal ″in the alternative″ to her motion for new trial, Appellants ″gave, in substance, an identical statement of intent: it would [*9] appeal if the trial court denied its postjudgment motions.″ The petitioner in *J.M.* may have advanced her notice of appeal in the alternative to her motion for new trial, but she did not state in her filing that she *would* appeal *if* the trial court denied her motion for new trial; she flat out communicated that *she appeals*—an unambiguous attempt to invoke the appellate court's jurisdiction. Appellants did no such thing.

Finally, Appellants place a considerable amount of emphasis on the language in *J.M.* stating that the petitioner in that case ″expressed an intent to appeal to the court of appeals.″ *Id. at 531*. They contend that they perfected this appeal because they too ″expressed an intent to appeal.″ Appellants did not express an intent to appeal like the petitioner in *J.M.* expressed an intent to appeal. Appellants' expressions demonstrated only that they *possessed* an intent to appeal if their postjudgment motions were denied; the petitioner's expressions in *J.M.* actually *manifested* her intent to appeal through the timely filing of a document in a bona fide attempt to invoke the appellate court's jurisdiction. The latter expression perfected

an appeal; the former did not.[5] To the extent that [*10] Appellants urge us to apply a standard other than the clearly defined, workable, and well-established bona-fide-attempt-to-invoke standard that we are bound by, we decline to do so.

Because Appellants failed to timely file any instrument in a bona fide attempt to invoke this court's appellate jurisdiction, including the December 5, 2014 letter upon which they rely for purposes of obtaining an extension to file the notice of appeal, we have no choice but to deny Appellants' motion for extension of time and to dismiss this appeal for want of jurisdiction. See *Tex. R. App. P. 43.2(f)*.

/s/ Bill Meier

BILL MEIER

JUSTICE

PANEL: MEIER, GABRIEL, AND SUDDERTH, JJ.

DELIVERED: February 5, 2015

[5] And for good reason—a party can possess an intent to appeal all day and night long, but until it actually manifests that intent by timely filing a document in a bona fide attempt to invoke an appellate court's jurisdiction, it is meaningless. *See* ***Tex. R. App. P. 25.1(a)*** (stating that ″[a]n appeal is perfected when a written notice of appeal is filed with the trial court clerk,″ not when a party merely possesses an intent to appeal).