Dismissed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-99-00806-CV

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KENBOB NEIGHBORHOOD SPORTS BAR I LTD., A TEXAS LTD. PARTNERSHIP, KENBOB NEIGHBORHOOD SPORTS BAR INC., IT'S GENERAL PARTNER, AND KENNETH FRASIER, LISA FRASIER, AND JEFFREY FRASIER, Appellants

V.

FUMDUCK'S NEIGHBORHOOD SPORTS BAR I LTD., Appellee

On Appeal from the 133rd District Court
HarrisCounty, Texas
Trial Court Cause No. 98-26727

O P I N I O N

This is an attempted appeal from a summary judgment, signed March 22, 1999. This judgment purported to be a final judgment and included Mother Hubbard language. Appellants filed a timely motion for new trial on April 21, 1999. On June 1, 1999, the trial court signed an order dismissing appellants counterclaim for want of prosecution. Appellants' notice of appeal was filed on July 7, 1999.

On November 4, 1999, this court notified appellants of its intention to dismiss the

appeal for lack of jurisdiction based on the untimely filing of the notice of appeal. Appellants filed a response on November 15, 1999, claiming that the summary judgment was interlocutory because it did not dispose of a counterclaim. Thus, appellants contend the notice of appeal is timely when calculating from the date of the dismissal of the counterclaim.

In *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993), the supreme court addressed the issue whether the inclusion of Mother Hubbard language or its equivalent renders an otherwise partial summary judgment final for purposes of appeal. In *Mafrige*, the motions for summary judgment did not address one or more causes of action asserted by the plaintiffs. *See id.* at 591. The supreme court held that, because the language in the summary judgment clearly evidenced the trial court's intent to dispose of all claims, the summary judgment order was final and appealable. *See id.* at 592.

In *Inglish v. Union State Bank*, 945 S.W.2d 810 (Tex. 1997), the supreme court applied *Mafrige* to a case presenting an issue similar to that presented here. In *Inglish*, the trial court granted a summary judgment on some, but not all, claims. *See id.* at 811. This summary judgment contained language purporting to make the judgment final. *See id.* The plaintiff did not appeal this order. *See id.* A few months later, the trial court rendered a second summary judgment addressing the plaintiff's remaining claims. *See id.* The plaintiff appealed the second judgment. *See id.* The supreme court held that, because the first judgment contained language purporting to make it final, it was a final judgment for purposes of appeal and plaintiff was required either to ask the trial court to correct the first judgment while the trial court retained plenary power or to perfect a timely appeal of that judgment. *See id.* Because the plaintiff did not ask the trial court to correct the judgment and did not timely appeal the first judgment, the supreme court held that the appeal was waived and the court of appeals had no jurisdiction to decide the merits of the appeal. *See id.*

Because the summary judgment in this case contained language purporting to make it final, the summary judgment was final for purposes of appeal. Although appellants filed a timely motion for new trial, their notice of appeal was due on June 21, 1999. An appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party files a notice of appeal and files a motion for extension

of time to file the notice of appeal. *See* TEX. R. APP. P. 26.3. In *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997), the supreme court held that, even if no motion for extension of time is filed, an implied extension will be granted when an appellant files his notice of appeal within the 15-day grace period allowed by Rule 26.3.

In this case, appellants did not file a notice of appeal within the 15-day period, which ended on July 6, 1999. Appellants filed their notice of appeal on July 7, 1999.

Appellants' response to this court's notice of intent to dismiss fails to demonstrate that this court has jurisdiction to entertain the appeal.

Accordingly, the appeal is ordered dismissed.

PER CURIAM

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Yates, Fowler, and Frost.

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