

NO. 14-19-00577-CV

**In the Court of Appeals
for the Fourteenth Judicial District of Texas
at Houston**

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
11/8/2019 5:05:12 PM
CHRISTOPHER A. PRINE
Clerk

**The Fell Clutch, LLC,
Appellant**

v.

**Cherokee Black Entertainment, Inc. And Jimmie D. Wheeler,
Appellees**

**Appeal from the 189th Judicial District
Harris County, Texas
Hon. Scot Dollinger**

**APPELLEES' MOTION TO DISMISS
FOR LACK OF JURISDICTION**

**Ira D. Joffe
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Counsel for Appellees
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I. THE CLERK’S ASSESSMENT THAT THERE IS NO APPEALABLE ORDER WAS CORRECT.

The Clerk’s October 8, 2019, letter said there was no appealable order in the record and gave until October 18, 2019, for “showing meritorious grounds for continuing the appeal.” Appellee’s Exhibit 1. The letter contained a correct analysis of the situation - there is no appealable order here.

Instead of responding though a letter or a motion, at 10:03 at night on the deadline day The Fell Clutch filed its Brief Identifying Appealable Order. That rambling document failed to identify an appealable order.

Even if there were an appealable order it would been subject to an accelerated appeal and the relevant deadlines to appeal were all missed.

Two very detailed letters were sent to The Fell Clutch’s counsel clearly outlining the jurisdictional defects starting two months before the Brief was filed. The first was sent on August 15, 2019, the day before mediation. Appellees’ Exhibit 2. The second was sent on October 4, 2019. Appellees’ Exhibit 3. They were both ignored by the October 18, 2019, Brief.

Those letters detailed that the order resolving the anti-SLAPP Motion was timely issued two days after the hearing and even if the order had not been issued by the statutory deadline the notice of appeal was untimely. It did not resolve all the

issues in this breach of contract case. This Court has no jurisdiction over the current appeal.

II. THERE IS NO APPEALABLE ORDER UNDER TEX CIV. PRAC. & REM. CODE §27.008 IN THIS CASE.

The hearing on the anti-SLAPP Motion filed under TEX. CIV. PRAC. & REM. CODE §27.003 was held and concluded on May 20, 2019. The deadline for the court to rule on such a motion is “not later than the 30th day following the date the hearing on the motion concludes.” TEX. CIV. PRAC. & REM. CODE §27.005.

The right to appeal such an order if there is not a timely ruling is statutorily set by TEX. CIV. PRAC. & REM. CODE §27.008.

Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.

The first Order granting the Motion was signed on May 20, 2019, the same day as the hearing, and entered two days later on May 22, 2019. CR.169. By definition there was no right to appeal under §27.008 because the court made a timely ruling some twenty-eight (28) days earlier than the statutory deadline set by §27.005.

This Court has no jurisdiction to hear the appeal based on an alleged violation of §27.008 because it was not violated. There was a timely ruling below.

III. THERE WAS NO RELEVANT STATUTE ALLOWING AN INTERLOCUTORY APPEAL IN THIS CASE.

The October 4, 2019, letter [Appellees' Exhibit 3] put the Fell Clutch on notice there was no jurisdiction over this interlocutory appeal where it was not authorized by statute, citing this Court's binding precedent from earlier in the year.

"The docketing statement further certifies that the order did not dispose of all parties and all issues and was not a final judgment. Without those conditions being met it is just an interlocutory appeal and the court has no jurisdiction to hear it at this time.

"The order therefore is interlocutory, and a party may not appeal an interlocutory order unless authorized by statute. See *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001)." *Nunu v. Risk*, 567 S.W.3d 462, 466 (Tex.App. - Houston [14th Dist.] 2019, rehearing denied)."

"*Nunu* was decided earlier this year by the 14th Court of Appeals, the same one your interlocutory appeal is now in. It denied a motion for rehearing. It is unlikely to reverse both itself and the Supreme Court of Texas on this issue.

"You could save your client money on the appeal and we can try to reach a settlement or I can reconfigure this letter into a motion to dismiss for the lack of jurisdiction. I see no point to that avoidable expense." Appellees' Exhibit 3.

Obviously the warnings were ignored, the inapplicable Brief was filed, and the Appellees have been forced to respond. It is difficult to see how the appeal is not frivolous as contemplated by TEX. R. APP P. 45. That issue was brought up to The Fell Clutch but was also ignored.

“Since you have this information before filing a brief there is also a possibility the court could find continuing with the case, after ignoring the statute, missing deadlines, and ignoring binding precedent, makes it a frivolous appeal. “If the court of appeals determines that an appeal is frivolous, it may – on motion of any party or on its own initiative, after notice and a reasonable opportunity for response — award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.” TEX. R. APP. P. 45. This letter will be filed with the court if a motion becomes necessary.”

The Record on Appeal and the documents filed in this Court show that the appeal is frivolous within the meaning of Rule 45.¹

IV. EVEN IF THERE WERE AN APPEALABLE ORDER ALL THE APPLICABLE DEADLINES FOR AN INTERLOCUTORY APPEAL HAVE BEEN MISSED.

The interlocutory order entered on May 22, 2019, [CR.169] was modified by one generated by the court that was signed on June 20, 2019. CR.200. Clearly it still had plenary power to do so.

The notice of appeal was filed on Saturday, July 20, 2019, at 11:57 PM, three minutes before the midnight expiration of thirty days from the June 20, 2019, signing date. CR.201. It includes “Plaintiff further notes that this notice is timely filed

¹Reading rules and paying attention to details are not the Appellant’s strengths. The cover page of the Brief misidentifies this Court as “The Court of Appeals of the Fourteenth Supreme Judicial District” with absolutely no mention of Texas or any other jurisdiction.

because thirty days have not yet elapsed since the issuance of the Court’s order. This is an interlocutory appeal as permitted by Tex. Civ. Prac. & Rem Code 27.008(a)...”

There was no need for the midnight drama. Where the last day of what The Fell Clutch incorrectly thought was a thirty day deadline to appeal was a Saturday, it was automatically extended “to the end of the next day that is not a Saturday, Sunday, or legal holiday.” TEX. R. APP. P. 4.1(a). This is the same language found in TEX. R. CIV. P. 4. If there were a thirty day deadline then the notice of appeal could have been filed any time on Monday, July 22, 2019. These are not new rules.

However, the perceived thirty day deadline was inapplicable. Even if there were an appealable order for the violation of §27.008, the language of the statute explicitly designates the appeal process as expedited.

(b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.

The “shall expedite” language makes such an appeal an accelerated appeal under TEX. R. APP. P. 28.1(a).

28.1. Accelerated Appeals

(a) *Types of Accelerated Appeals.* Appeals from interlocutory orders (when allowed by statute), appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected within less than 30 days after the date of

the order or judgment being appealed are accelerated appeals.

That reduces the deadline from thirty days to twenty. “In an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed.” TEX. R. APP. P. 26.1(b). The July 20, 2019, notice of appeal was untimely because it clearly certifies that it missed the twenty (20) day deadline that expired on July 10, 2019 by a full ten days.

That could have been saved, but it was not. The procedure for retroactively meeting the missed deadline is set by TEX. R. APP. P. 26.3 Extension of Time. It requires filing a motion in this Court “complying with Rule 10.5(b)” within fifteen days after the deadline expired. In this case, July 25, 2019. That was not done. There is no such motion on file, timely or otherwise.

Having failed to meet the original deadline and failed to apply for the extended deadline, even if an interlocutory appeal were possible the Court would still lack jurisdiction. The appeal should be dismissed as a matter of law.

PRAYER FOR RELIEF

For the reasons set forth above, Appellees request that the Court grant this Motion To Dismiss For Lack Of Jurisdiction, require the Appellant to respond to the apparent violation of TEX. R. APP. P. 45, and grant the Appellees any such further relief that they maybe required to at law and in equity.

Respectfully submitted,

/s/ Ira D. Joffe
Ira D. Joffe
State Bar No. 10669900
Attorney for Appellees
6750 West Loop South
Suite 920
Bellaire, TX 77401
(713) 661-9898
(888) 335-1060 Fax
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CERTIFICATE OF CONFERENCE

I hereby certify that in addition to the letters shown in Appellees' Exhibits 2 and 3 that were previously sent before the Brief was filed, on November 6, 2019, I sent an email to Appellant's counsel asking for his position but there was no response. It is presumed he is opposed.

/s/ Ira Joffe
Ira Joffe

CERTIFICATE OF SERVICE

I certify that a copy of the Motion was served by the ECF system on November 8, 2019.

/s/ Ira Joffe
Ira Joffe



Justices

TRACY CHRISTOPHER
KEN WISE
KEVIN JEWELL
FRANCES BOURLIOT
JERRY ZIMMERER
CHARLES A. SPAIN
MEAGAN HASSAN
MARGARET "MEG" POISSANT

Chief Justice

KEM THOMPSON FROST

Clerk

CHRISTOPHER A. PRINE
PHONE 713-274-2800

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, October 8, 2019

Evan Stone
624 W. University Dr., #386
Denton, TX 76201-4206
* DELIVERED VIA E-MAIL *

Ira D. Joffe
6750 West Loop South, Suite 920
Bellaire, TX 77401
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 14-19-00577-CV
Trial Court Case Number: 2017-81958

Style: Savir Productions LLC, et al.
v.
Cherokee Black Entertainment Inc., and Jimmie D. Wheeler

Counsel:

The record before this court contains no appealable order. The appeal will be dismissed unless any party files a response on or before October 18, 2019, showing meritorious grounds for continuing the appeal.

Sincerely,

/s/ Christopher A. Prine, Clerk

APPELLEE'S
EXHIBIT 1

IRA D. JOFFE

Attorney At Law

6750 WEST LOOP SOUTH # 920
BELLAIRE, TEXAS 77401

(713) 661-9898
FAX (888) 335 - 1060

August 15, 2019

Stone & Vaughan, PLLC
624 W. University Dr. #386
Denton, TX 76201

VIA email only to evan@stonevaughanlaw.com

Ms. Erin Rodgers, Esq.
Mr. Sergio Selvera, Esq.
Rodgers Selvera, PLLC
2450 Louisiana, Suite 400 #743
Houston, TX 77006

**VIA email only to erin@rodgersselvera.com and
sergio@rodgersselvera.com**

**RE: SAVIR PRODUCTIONS, LLC, SAVIR'S PIZZA JOINT MOVIE,
LLC, & THE FELL CLUTCH, LLC v. CHEROKEE BLACK
ENTERTAINMENT, INC. and JIMMIE D. WHEELER, CAUSE
NUMBER 201781958, 189TH JUDICIAL DISTRICT, HARRIS
COUNTY, TEXAS**

Dear Mr. Stone:

Whether intentional, to do it within three minutes of the perceived deadline, or out of desperation, hoping the system would work near midnight on a weekend, your filing the Notice of Appeal at 11:57 PM on Saturday, July 20, 2019, was probably very dramatic for you. However, it is was not necessary.

The anti-SLAPP motion was filed on May 1, 2019. The deadline for the court to rule on it was "not later than the 30th day following the date of the hearing on the motion." TEX. CIV. PRAC. & REM. CODE §27.005(a).

The Order on the Motion was signed on May 20, 2019, the date of the hearing, easily meeting the 30 day requirement. The Order revising that Order was entered on June 20, 2019.

SAVIR V. CBE - Defective Appeal - Page 1

APPELLEE'S
EXHIBIT 2

Your Notice of Appeal cites to TEX. CIV. PRAC. & REM. CODE §27.008(a), which provides that "If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal." That section obviously does not apply to this case because the first order was signed the day of the hearing. It is a frivolous appeal. TEX. R. APP. P. 45.

There is no statutory basis for the interlocutory appeal of the June 20, 2019, Order.

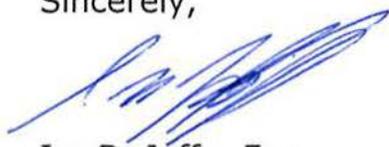
Regardless, §27.008(b) makes any such appeal, whether allowed or not, an accelerated appeal. TEX. R. APP. P. 26.1(b) sets the deadline for the Notice of Appeal in an accelerated appeal at "within 20 days after the judgment or order is signed."

The twenty day deadline after the June 20, 2019, Order you are complaining about was July 10, 2019, not July 20, 2019. It was missed. The almost midnight filing was pointless because it was already ten days late. I hope you did not work until just before midnight thinking it gave you a strategic advantage.

There was a fifteen day extension from July 10, 2019, to July 25, 2019, that was available under TEX. R. APP. P. 26.3 if you had filed a motion in the court of appeals, but you did not and that deadline was missed too.

Please withdraw the defective interlocutory appeal. There is no jurisdiction for it. It will not get your clients any leverage at the mediation tomorrow.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ira D. Joffe", with a stylized flourish at the end.

Ira D. Joffe, Esq.

IJ/ms

IRA D. JOFFE

Attorney At Law

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October 4, 2019

Mr. Evan Stone
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VIA email only to evan@stonevaughanlaw.com

RE: SAVIR PRODUCTIONS, LLC, SAVIR'S PIZZA JOINT MOVIE, LLC, & THE FELL CLUTCH, LLC v. CHEROKEE BLACK ENTERTAINMENT, INC. and JIMMIE D. WHEELER, CAUSE NUMBER 201781958, 189TH JUDICIAL DISTRICT, HARRIS COUNTY, TEXAS

**INTERLOCUTORY APPEAL IN CASE NO. 14-19-00577-CV,
14TH COURT OF APPEALS**

Dear Mr. Stone:

Please show this to your client. He will understand the logic of why the appeal will not be of any immediate value to him. Even if it had a statutory basis to be filed early, which it did not, the deadlines were missed. It is just an interlocutory appeal and the court has no jurisdiction to hear it until after a resolution of all the issues in the case.

The docketing statement certifies the appeal is of an order allegedly in violation of Civil Practice and Remedies Code §27.008(a), which says "Sec. 27.008. APPEAL. (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal."

The time limit in §27.005 for the court to issue an order is "not later than the 30th day following the date the hearing on the motion concludes."

That deadline was met. The hearing was held and concluded on May 20, 2019. The order says it was signed that day and it was entered two days later on May 22, 2019. That was a timely ruling. Your client may not like the order, but there was a timely ruling under the statute and therefore there was no statutory basis for an accelerated appeal for an alleged failure to rule.

Section 27.008(b) says "an appellate court shall expedite an appeal or other writ, whether interlocutory or not ... from a trial court's failure to rule on that motion in the time prescribed by Section 27.005." That makes it an accelerated appeal under TEX. R. APP. P. 28.1(a).

Even if there were a statutory basis, which, again, there was not, TEX. R. APP. P. 26.1(b) sets the time to file the notice of appeal in an accelerated appeal "within 20 days after the judgment or order is signed." Twenty days after June 20, 2019, was July 10, 2019. The notice of appeal was filed ten days late on July 20, 2019 and the deadline was missed. It could have been extended another fifteen days with a timely motion filed under TEX. R. APP. P. 26.3, but that deadline was also missed because of the failure to comply with both prongs of Rule 26.3; no timely notice of appeal was filed in the trial court and no motion complying with Rule 10.5(b) was filed in the appellate court.

The order you actually complain of was signed on June 20, 2019. That was the one that corrected the original May 20, 2019, order. There is no statutory basis for an accelerated appeal of the June 20, 2019, order.

The docketing statement further certifies that the order did not dispose of all parties and all issues and was not a final judgment. Without those conditions being met it is just an interlocutory appeal and the court has no jurisdiction to hear it at this time.

"The order therefore is interlocutory, and a party may not appeal an interlocutory order unless authorized by statute. See *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 352 (Tex. 2001)." *Nunu v. Risk*, 567 S.W.3d 462, 466 (Tex.App. - Houston [14th Dist.] 2019) Rehearing denied.

Nunu was decided earlier this year by the 14th Court of Appeals, the same one your interlocutory appeal is now in. It denied a motion for rehearing. It is unlikely to reverse both itself and the Supreme Court of Texas on this issue.

You could save your client money on the appeal and we can try to reach a settlement or I can reconfigure this letter into a motion to dismiss for the lack of jurisdiction. I see no point to that avoidable expense.

Since you have this information before filing a brief there is also a possibility the court could find continuing with the case, after ignoring the statute, missing deadlines, and ignoring binding precedent, makes it a frivolous appeal. "If the court of appeals determines that an appeal is frivolous, it may – on motion of any party or on its own initiative, after notice and a reasonable opportunity for response – award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals." TEX. R. APP. P. 45. This letter will be filed with the court if a motion becomes necessary.

Sincerely,



Ira D. Joffe, Esq.

IJ/ms

cc: erin@rodgersselvera.com and sergio@rodgersselvera.com