Opinion filed September 21, 2017

In The

Eleventh Court of Appeals

No. 11-16-00044-CV

MIDLAND FUNDING LLC, Appellant

V.

ROSA GONZALES, Appellee

On Appeal from the 32nd District Court
Nolan County, Texas
Trial Court Cause No. 19,523

MEMORANDUM OPINION

Midland Funding LLC appeals the trial court's denial of a motion for new trial, which Midland Funding filed after the trial court entered a post-answer, default judgment against it because it failed to appear at trial. Attached to Midland Funding's motion for new trial was the affidavit of Brian Staley, one of five attorneys listed as counsel for Midland Funding on its petition. In his affidavit, Staley stated that Midland Funding did not appear at trial because neither he nor his office

received the trial court's change of venue notice or a trial notice. Gonzales submitted two affidavits in response to Midland Funding's motion for new trial and Staley's original affidavit. During the hearing on the motion for new trial, the trial court found that Staley's affidavit was conclusory and struck it from the record. The trial court then found insufficient evidence to support Midland Funding's motion and denied it because Staley's affidavit was the only evidence that Midland Funding had attached to its motion; Midland Funding then appealed. We reverse and remand.

I. *Background Facts and Procedural History*

On September 8, 2014, Midland Funding sued Rosa Gonzales in the Nolan County Court at Law and alleged that she had an unpaid credit card account. After Gonzales received service of process, she timely filed an answer and a counterclaim that included discovery requests. Midland Funding never responded to the discovery, which included requests for admissions. In accordance with a standing order, on October 2, 2014, Pat McGowan, the Nolan County Clerk, transferred the case to the 32nd District Court and provided written notice to Staley.

Almost a year later, on September 14, 2015, Becky Stewart, the court administrator for the 32nd District Court, sent Staley a written notice by mail and sent an e-mail notice to Gonzales's attorney, Lance Hall, that a nonjury trial was set for November 6, 2015. On November 6, 2015, Gonzales and her counsel personally appeared and announced ready for trial, but neither Midland Funding nor its counsel were present. The trial court held that Midland Funding did not present any evidence in support of its claim against Gonzales and ordered that Midland Funding take nothing from her. The trial court also found that Midland Funding had deemed admissions, heard evidence from Gonzales on liability and damages, and heard from Hall on attorney's fees. The trial court then awarded Gonzales damages, as well as reasonable and necessary attorney's fees.

Midland Funding became aware of the judgment on December 1, 2015, and in response, on December 4, 2015, it served a motion for new trial and motion for reinstatement on all parties. The motion was file-stamped by the district clerk on December 30, 2015. Gonzales filed a response to the motion on February 2, 2016, and provided affidavits from Stewart and Hall. Stewart stated that, on September 14, 2015, she mailed notice of the nonjury trial setting for November 6, 2015, to Staley at the mailing address that he provided when he filed the suit and that he did not e-mail the notice because Staley did not provide an e-mail address to her. Hall stated that he received the trial notice on September 14, 2015, from Stewart via e-mail.[1]

On February 2, 2016, the trial court heard the motion for new trial; Hall appeared for Gonzales, and a lawyer from Lubbock, Joseph Aguilar, also appeared.[2] At the hearing, Hall objected to the affidavit of Staley, Midland Funding's lead counsel, because it was conclusory. The affidavit, the only evidence Midland Funding presented at the hearing, indicated that neither Staley nor his office received notice of the venue change, the trial setting, or the default judgment. The trial court agreed with Gonzales, found the affidavit to be conclusory, and struck it from the record. With no other evidence presented to it by Midland Funding, and in light of Stewart's and Hall's affidavits, the trial court denied the motion for new trial.

On February 3, 2016, Midland Funding appealed the trial court's denial of its motion for new trial. This court abated the appeal to permit Midland Funding to obtain a finding from the trial court that it acquired actual notice of the judgment on December 1, 2015. *See* TEX. R. CIV. P. 306a; TEX. R. APP. P. 4.2(a). As part of

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[1]Hall stated in his affidavit that Midland Funding had failed to appear for trial in another Nolan County justice court suit, Cause No. 5706, *Midland Funding, LLC v. Patricia Martin*, where Staley was its counsel and Hall represented Martin. Hall also explained that Midland Funding is a defendant in a suit filed by the Texas Attorney General that alleges unlawful practices, including filing thousands of false affidavits, Cause No. 2011-40626 in the 165th District Court of Harris County.

[2]Aguilar was retained by Midland Funding approximately three hours before the hearing and was not affiliated with Midland Funding's counsel from Houston, including Staley.

Midland Funding's Rule 306a motion, it filed additional affidavits from Midland Funding's staff counsel, including Staley and another lawyer, Tim Elder. In addition to addressing the date that they acquired actual notice of the judgment, Staley averred that he had checked the files at their office and did not find any misfiled notices or mail, and both Staley and Elder averred that they had never received notice from the court clerk of the venue change, the trial setting, or the default judgment.

II. *Standard of Review*

An appellate court reviews a motion for new trial for abuse of discretion. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). The requirements set forth in *Craddock v. Sunshine Bus Lines*,[3] governing the setting aside of no-answer default judgments, also apply to post-answer, default judgments. *Lopez v. Lopez*, 757 S.W.2d 721, 722 (Tex. 1988) (citing *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987); *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex. 1986)). "Due process requires 'notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.'" *Ibrahim v. Young*, 253 S.W.3d 790, 805 (Tex. App.—Eastland 2008, pet. denied) (quoting *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988)). Failure to give notice to a party of a trial setting violates the due process requirements of the United States Constitution. *Mabon Ltd. v. Afri-Carib Ents., Inc.*, 369 S.W.3d 809, 813 (Tex. 2012); *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390–91 (Tex. 1989); *Lopez*, 757 S.W.2d at 723 (citing *Peralta*, 485 U.S. at 84). It is also grounds for reversal of a default judgment. *See Trevino v. Gonzalez*, 749 S.W.2d 221, 223 (Tex. App.—San Antonio 1988, writ denied).

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[3]133 S.W.2d 124 (Tex. 1939).

III. *Analysis*

In a single issue on appeal, Midland Funding asserts that it is entitled to a new trial because the trial court deprived it of due process when it failed to send Midland Funding notice of the trial setting. *See Mabon Ltd.*, 369 S.W.3d at 812–13; *LBL Oil Co.*, 777 S.W.2d at 390–91; *Lopez*, 757 S.W.2d at 723. As a preliminary matter, we need to review what evidence was before the trial court at the motion for new trial hearing to determine if the trial court abused its discretion when it struck Staley's original affidavit from the record and denied the motion for new trial.

A. *Staley's subsequent affidavit and Elder's affidavit were not before the trial court, but Staley's original affidavit should have been because it was not conclusory.*

Gonzales asserted that Staley's and Elder's affidavits filed as part of Midland Funding's Rule 306a motion were not before the trial court when it heard the motion for new trial and also asserts that Staley's original affidavit was conclusory. We note that Staley's subsequent affidavit and the affidavit of Elder were filed nearly three weeks *after* the motion for new trial hearing and the trial court's denial of the motion. This court cannot consider evidence filed after the trial court's consideration and denial of a motion for new trial. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 82 (Tex. 1992); *Hernandez v. Saldivar*, No. 04-15-00691-CV, 2016 WL 2584657, at *3 n.3 (Tex. App.—San Antonio May 4, 2016, no pet.) (mem. op.) (holding that the trial court could not consider affidavits establishing the appellant's lack of conscious indifference because the evidence was not before the trial court during the time the motion for new trial was pending); *see also L.B. Foster Co. v. Glacier Energy, Inc.*, 714 S.W.2d 48, 49 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) (holding untimely filed amended motion and evidence could not be considered). As a result, we only need to decide whether Staley's original affidavit was conclusory.

As to Staley's original affidavit, Gonzales claims that Staley only stated conclusions without supporting facts. A conclusory statement is objectionable because it lacks supporting, underlying facts. *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 512 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *see Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). Staley's affidavit provided the following:

> My name is Brian Staley. I am of sound mind, over eighteen years of age, and competent to make this affidavit.
>
> I am staff counsel for MIDLAND FUNDING LLC, Plaintiff in this case. Our office did not receive notice of trial for November 6, 2015.
>
> I first became aware that the case had gone to trial on December 1st, 2015.
>
> Our office did not receive notice of the judgment from the clerk, nor any notice regarding the transfer of the case from County Court to District Court.

At the hearing on the motion for new trial, the following exchange occurred about Staley's affidavit:

> THE COURT: I mean it seems to jump to a conclusion, does it not?
>
> [PLAINTIFF'S COUNSEL]: Absolutely I would agree with that. I mean, like I said, I was just put on this case here last minute.
>
> THE COURT: I realize you're kind of behind the eight ball but --
>
> [PLAINTIFF'S COUNSEL]: I didn't draft the affidavit. Of course, I would have put more details in it. But, he said that his office didn't receive notice of the judgment.

We disagree that Staley's original affidavit is conclusory because Staley stated that neither he nor his office received the notice, which rebutted the presumption of service under Rule 21a. *See* TEX. R. CIV. P. 21a; *see also Cliff*, 724 S.W.2d at 780.

A presumption arises under Rule 21a "when notice of trial setting properly addressed and postage prepaid is mailed, that the notice was duly received by the addressee." *Cliff*, 724 S.W.2d at 780. However, that presumption may be rebutted with proof. *Id.* As Midland Funding's counsel at the motion for new trial hearing noted, Staley's original affidavit could have contained more facts, but nonetheless, Staley stated a factual matter in his affidavit—that he did not receive something. He did not merely state a legal conclusion about the effect of that nonreceipt. Accordingly, we hold that the trial court should have considered Staley's original affidavit.

> *B. The trial court abused its discretion when it denied the motion for new trial because Stewart's and Hall's affidavits failed to adduce evidence that Midland Funding actually received the venue change and trial notices.*

Midland Funding asserts that the trial court abused its discretion because Midland Funding established that it never received the trial notice. A person who is not notified of a trial setting and consequently suffers a default judgment need not establish a meritorious defense or lack of prejudice to the opposing party to be entitled to a new trial. *Lopez*, 757 S.W.2d at 723 (citing *Peralta*, 485 U.S. at 85); *Leon's Fine Foods of Tex., Inc. v. Merit Inv. Partners, L.P.*, 160 S.W.3d 148, 155 (Tex. App.—Eastland 2005, no pet.). To satisfy the first prong of *Craddock*, the defaulting party must establish that his failure to appear was due to a mistake or accident rather than the result of conscious indifference, which is defined as the failure to take some action that would seem obvious to a reasonable person under similar circumstances. *Tex. Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 650 (Tex. App.—San Antonio 2002, pet. denied). The historical trend in default judgment cases is toward the liberal granting of new trials. *Id.* Thus, where the elements of the *Craddock* test are satisfied, it is an abuse of discretion for the trial court to deny a motion for new trial. *Id.* (citing *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994)).

We note that a trial notice properly sent in accordance with Rule 21a raises a presumption that notice was received. *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005); *Cliff*, 724 S.W.2d at 780; *see* TEX. R. CIV. P. 21a. Staley's original affidavit rebutted the Rule 21a presumption because he stated that neither he nor his office received the notice of the venue change or trial date. In response, Stewart's and Hall's affidavits explained that notice of the trial setting was sent to the parties and received by Gonzales's counsel, Hall, via e-mail. The trial court may decide the motion for new trial even though the affidavits are not introduced into evidence. *See Evans*, 889 S.W.2d at 268 (citing *Strackbein*, 671 S.W.2d at 38–39). In addition, where no findings of fact or conclusions of law were requested or filed, as in this case, the judgment must be upheld on any legal theory that finds support in the evidence. *See Strackbein*, 671 S.W.2d at 38.

Stewart attested that she normally sends notices by e-mail but that she will use the United States postal service if no e-mail is provided. She also testified that she routinely used this method for service of notices and presumed that she did so in this case. Neither she nor Hall adduced evidence that Midland Funding had actually received the notices. We disagree with Gonzales's assertion that Stewart's and Hall's affidavits rebutted Staley's original affidavit because neither Stewart nor Hall provided evidence that Midland Funding had actually received the notice. Those affidavits simply established that Stewart sent the notices and that Hall received them. Staley averred that he and his office never received the notices. Due process concerns require reversal when a party never receives notice of the trial setting. *See Mathis*, 166 S.W.3d at 746; *Cliff*, 724 S.W.2d at 780. We sustain Midland Funding's sole issue on appeal.

IV. *This Court's Ruling*

We reverse the judgment of the trial court and remand the cause to the trial court for further proceedings consistent with this opinion.

MIKE WILLSON
JUSTICE

September 21, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.