CONCUR; and Opinion Filed March 22, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-01464-CV

ELLEN R. HEGWER, AS TRUSTEE OF THE RAY HEGWER LIVING TRUST A/K/A HEGWER LIVING TRUST, Appellant
V.
HOLLY EDWARDS A/K/A HOLLY RUTH EDWARDS A/K/A HOLLY RUTH RAINES, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-14298

CONCURRING OPINION

Concurring Opinion by Justice Schenck

I fully concur with the Court's decision affirming the trial court's judgment and write separately only to discuss our standard of review where, as here, the appellant challenges the denial of a motion for default judgment in a case that is later decided on the merits.[1] This Court has previously held that a denial of a request for default judgment remains ripe for review on appeal from a subsequent judgment entered on the merits. *Crown Asset Mgmt., LLC v. Loring*, 294 S.W.3d 841, 843 (Tex. App.—Dallas 2009, pet. denied) (en banc). The panel correctly treats itself as bound by that holding. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 836 n.6 (Tex. 2010).

[1] As the panel notes, the motion at issue here alleged an appearance without answer. A default judgment may be entered against a defendant who has not timely appeared in the case or "*nihil dicit*" against a defendant who has generally appeared but not answered. *Rose v. Rose*, 117 S.W.3d 84, 88 (Tex. App.—Waco 2003, no pet.). Both operate as default judgments in that they dispose of the merits without regard to evidence. Thus, the same rules generally apply to each. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979).

As the panel notes, our standard of review following a trial court's denial of any request for default judgment, whether of the *nihil dicit* or no-answer variety, is abuse of discretion. *Padrino Mar. Inc. v. Rizo*, 130 S.W.3d 243, 247 (Tex. App.—Corpus Christi 2004, no pet.). Of course, even where a trial court has been shown to have erred (or abused its discretion), we will reverse the resulting judgment only where the appellant shows the error to be harmful. TEX. R. APP. P. 44.1(a); *European Crossroads' Shopping Ctr., Ltd. v. Criswell*, 910 S.W.2d 45, 54 (Tex. App.—Dallas 1995, writ denied). Thus, in cases like this we review not simply for error in denying the request for interlocutory default judgment but reversible error in the final judgment.

None of the Texas cases that have recognized the right to a post-merits judgment appeal from the denial of a default judgment motion has found harmful error or discussed what such error might be in this context.[2] I believe that reversible error, and indeed appeals like this, should be exceedingly rare.

I begin by observing that "default judgments are highly disfavored." *U.S. Nat'l Bank Ass'n v. Johnson*, No. 01-10-00837-CV, 2011 WL 6938507, at *4 (Tex. App.—Houston [1st Dist.] Dec. 30, 2011, no pet.) (mem. op.). For many and good reasons, it is not especially difficult to set a default judgment aside once it has been entered.[3] *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). In fact, a trial judge exercises discretion not only in connection with the initial request for entry of a default judgment but also in connection with any motion to set such a judgment aside. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984).

[2] I exclude cases involving judgment resulting from a dismissal for want of prosecution, which like default, is also not a merits resolution. *E.g.*, *Oliphant Fin., LLC v. Galaviz*, 299 S.W.3d 829, 839 (Tex. App.—Dallas 2009, no pet.); *Aguilar v. Livingston*, 154 S.W.3d 832, 833 (Tex. App.—Houston [14th Dist.] 2005, no pet.). In contests between two absent parties, the only one who has appeared at least twice (to file a pleading and to seek default), may well have the better argument to press.

[3] *See Evans v. Woodward*, 669 S.W.2d 154, 155 (Tex. App.—Dallas 1984, no writ) (applying the *Craddock* factors to a judgment *nihil dicit*).

Our reversible error analysis looks to whether the appellant suffered the "rendition of an improper judgment."[4] In the context of a requested, but denied, default judgment, I believe the resulting merits judgment would be shown to be "improper" only where the defendant could not have succeeded in having the default set aside had it been entered.[5] Thus, when the trial court is said to have erred in entering judgment on the merits as a result of denying an earlier request for default, our analysis should include two steps. *First,* appellant must show an abuse of discretion in denying the motion for default judgment based on the pleadings and file then before the court; and *second,* if there was such error, the later merits judgment will be improper if, viewing the record as a whole, the judge could not have set a default aside.

This standard would mirror our review, to the extent we permit it at all,[6] in other analogous contexts. For example, while a trial court might well err on day two of trial by denying a motion for directed verdict when one party closes its case-in-chief, we will not review that initial ruling at all unless it is renewed at the close of all of the evidence and, at that point, we would still look to the record as a whole—not as it stood on day two. *E.g.*, *Meek v. Onstad*, 430 S.W.3d 601, 610–11 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (no review at all without renewal); *Blackstone Med., Inc. v. Phoenix Surgical, L.L.C.*, 470 S.W.3d 636, 645 (Tex. App.—Dallas 2015, no pet.).

Judgment by default is an unfortunate practical necessity reserved for situations where the defendant either has acted with conscious indifference to the court's authority to resolve the

[4] To be sure, we will also find error to be reversible where it prevented the party bringing the appeal from properly presenting the case to us. TEX. R. APP. P. 44.1(a)(2). No one would argue that allowing a defendant to make a record consisting of proof that actually established his lack of liability would constitute such an error.

[5] For these purposes at least, it might equally be argued that the proper understanding of the word "judgment" in rule 44.1 could reach the final judgment at the end of the cause between the parties such that consideration of whether the "judgment" on the merits was "improper" would include consideration of whether the defendant might have prevailed on restricted appeal. *See* TEX. R. APP. P. 30. A final judgment for res judicata purposes might also encompass bill of review proceedings between the same parties. *E.g.*, *Caldwell v. Barnes*, 154 S.W.3d 93, 97 (Tex. 2004).

[6] While rule 166a(c) directs that summary judgment "shall be rendered forthwith if" the movant has shown its entitlement, we will not unwind a case tried on the merits to determine whether summary judgment was improperly denied. *Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980).

dispute or has arrived late and in hopes of litigating potentially groundless defenses. Once the parties have joined the issue and litigated a case to finality, in all but the most extraordinary circumstances, our focus is better directed to the merits.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

151464CF.P05