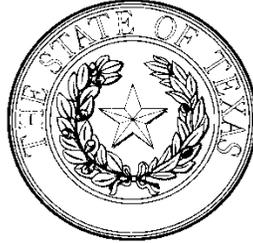


Opinion issued January 19, 2012.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00585-CV

DEMETRIO PENA RIVAS, Appellant
V.
MARIA OFELIA RIVAS, Appellee

On Appeal from the 308th District Court
Harris County, Texas
Trial Court Case No. 2009-03278

MEMORANDUM OPINION

In this appeal from of a no-answer default judgment of divorce, Demetrio Pena Rivas contends the trial court abused its discretion by (1) denying his motion to set aside the judgment and for new trial despite a showing that he satisfied the

three requirements for such a motion in that his failure to answer the divorce petition was unintentional, he has a meritorious defense, and granting the motion would not cause undue delay or injury to Maria Ofelia Rivas and (2) reconsidering its initial ruling granting a new trial. We affirm.

Background

Maria filed for divorce after more than eleven years of marriage to Demetrio, alleging that the marriage had become insupportable. Demetrio does not dispute that he was served with Maria's petition and the citation, which read:

YOU HAVE BEEN SUED. You may employ an attorney. If you or your attorney do not file a written answer with the District Clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of 20 days after you were served this citation and petition, a default judgment may be taken against you.

Demetrio never answered, and the trial court entered a default divorce decree.

Demetrio moved to set aside the decree and for a new trial. In his motion, Demetrio asserted that, after Maria filed for divorce, she and he agreed not to separate and continued living together as husband and wife until shortly before the trial court rendered the default judgment. This led Demetrio to believe that it was unnecessary to answer Maria's petition. The trial court conducted an evidentiary hearing on the motion and indicated its initial intent to grant a new trial. When Demetrio requested time for discovery before proceeding to a new trial, however,

the trial court changed its ruling and entered an order denying the new trial motion.¹ This appeal followed.

Standard of Review

A motion for new trial is addressed to the trial court's discretion, which will not be disturbed on appeal absent a showing of abuse of that discretion. *See Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984); *Harold-Elliott Co., Inc. v. K.P./Miller Realty Growth Fund I*, 853 S.W.2d 752, 755 (Tex. App.—Houston [1st Dist.] 1993, no writ). The trial court abuses its discretion if it acts without reference to any guiding rules or principles, or acts in an arbitrary or unreasonable manner. *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004); *Velasco v. Ayala*, 312 S.W.3d 783, 791 (Tex. App.—Houston [1st Dist.] 2009, no pet.). When, as here, there are no findings of fact and conclusions of law requested or filed, the trial court's decision must be upheld on any legal theory that finds support in the evidence. *Strackbein*, 671 S.W.2d at 38.

¹ We note that the trial court's order disposing of Demetrio's motion for new trial is less than clear. The trial court signed Demetrio's proposed order granting a new trial. Although the trial court altered the title of the proposed order by hand to note that it denied Demetrio's motion, the body of the order still provides that a new trial is "GRANTED." The court reporter's transcript of the new trial hearing, however, makes clear the trial court's intent to deny the motion. And, because Demetrio does not argue that the trial court actually ordered a new trial, we treat the order in the same manner as he treats it, i.e., as an order denying a new trial. Maria has not filed an appellee's brief, so she has no position on this matter.

Motion for New Trial

Demetrio first argues his entitlement to a new trial under *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). See *Velasco*, 312 S.W.3d at 791 (observing that to obtain new trial after default judgment, defaulting party must ordinarily satisfy *Craddock* test). *Craddock* sets forth a three-part test for determining whether a default judgment should be set aside and a new trial ordered. *Craddock*, 133 S.W.2d at 126. To prevail, Demetrio must show: (1) his failure to answer was not intentional or the result of conscious indifference; (2) he has a meritorious defense; and (3) the granting of a new trial will not operate to cause delay or injury to Maria. *Id.* at 126; *Lowe v. Lowe*, 971 S.W.2d 720, 723 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Conscious indifference must amount to more than mere negligence or mistake; it means “failing to take some action that would seem indicated to a person of reasonable sensibilities under the same circumstances.” *Harold-Elliott*, 853 S.W.2d at 756. We consider whether Demetrio knew he had been sued but did not care. See *Fid. & Guar. Ins. Co. v. Drewery Constr. Co., Inc.*, 186 S.W.3d 571, 575–76 (Tex. 2006).

While we are mindful that Demetrio’s excuse for defaulting “need not be a good one to suffice,” his appeal nevertheless fails under *Craddock*’s first prong. *Id.* at 576. He has alleged a single excuse for his failure to answer Maria’s divorce petition: he and Maria reconciled, leading him to believe the lawsuit would not

proceed. Demetrio testified that for nearly six months preceding the entry of the default judgment, he and Maria lived together as “husband and wife.”² Maria contradicted Demetrio’s testimony, stating that she and Demetrio never discussed the possibility of reconciliation; nor were they intimate in the months before the divorce became final. As the factfinder at the evidentiary hearing on the motion for new trial, the trial court could have believed some, all, or none of Demetrio’s and Maria’s testimony in determining whether Demetrio’s failure to answer was not intentional or the result of conscious indifference. *See Strackbein*, 671 S.W.2d at 38 (providing that such determination is question of fact for trial court). Based on Maria’s testimony, the record supports a finding that there was no agreement, or even discussion, regarding reconciliation that would excuse Demetrio’s default. Consequently, we will not disturb the trial court’s ruling. We hold instead that the trial court did not abuse its discretion in denying Demetrio’s motion for new trial.³

² Demetrio presented other evidence of cohabitation at the new trial hearing, including the testimony of his brother indicating that he had observed Demetrio and Maria living together in the same household before the entry of the default judgment. Demetrio also asked the trial court to take judicial notice of “Movant’s Supporting Affidavit.” That affidavit, however, is not included in the appellate record, so we do not consider it as evidence of any *Craddock* element.

³ Even had the trial court had no discretion but to believe Demetrio’s testimony, Demetrio still would have difficulty satisfying *Craddock*’s first element. Other courts of appeals have recognized that declining to answer a divorce petition out of hope of reconciliation may be the result of conscious indifference, given the warning about the consequences of default provided in the citation. *Cf. Coston v. Coston*, No. 12-09-00458-CV, 2010 WL 3249856, at *7 (Tex. App.—Tyler Aug. 18, 2010, pet. denied) (mem. op.); *Vasquez v. Vasquez*, No. 04-97-00850-CV,

Accordingly, we overrule Demetrio's first issue. We need not consider Demetrio's second issue complaining about the trial court's reconsideration of its initial grant of a new trial. Because we have already determined that the denial of the motion for new trial should be upheld for the reason discussed above, we must affirm. *Id.* at 38 (noting that trial court's decision should be upheld on any legal theory supported by evidence).

Conclusion

Having determined the trial court did not abuse its discretion by denying Demetrio's motion for new trial, we affirm the trial court's judgment.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Higley and Brown.

1998 WL 422296, at *2 (Tex. App.—San Antonio July 29, 1998, no pet.) (mem. op.). We do not decide whether these cases apply here given the conflicting testimony in the record and the deference we afford to the trial court's decision, but Demetrio has not argued or provided any authority persuading us that a different result would be required.