Affirmed and Memorandum Opinion filed May 24, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00085-CV

FIDEL ALMENDAREZ, Appellant

V.

ROY VALENTIN, Appellee

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2008-41003

MEMORANDUM OPINION

This is an appeal from a post-answer default judgment in a suit in which both appellant Fidel Almendarez and appellee Roy Valentin alleged breach of the parties' commercial lease agreement. Almendarez raises a single issue complaining that he was denied an opportunity to be heard. We affirm the trial court's judgment.

BACKGROUND AND PROCEDURAL POSTURE

This case was set for a jury trial during the two-week docket beginning October 26, 2009.[1] Our record contains the trial court's July 29, 2009 notices and the trial court's August 24, 2009, trial preparation order, which were sent to counsel for both parties. The trial preparation order advised that failure to attend docket call would result in dismissal of the case and again advised that trial was set for the two-week period beginning October 26. The parties were then advised that trial would commence October 28, at 1:30 p.m. That morning, Almendarez's counsel appeared and requested a continuance, citing illness and informing the court that he had lost his voice. The court granted a short continuance until the week of November 9, 2009. On October 29, 2009, the trial court mailed a written notice advising the parties that trial was set November 9, 2009, at 1:30 p.m.

On Monday, November 9, 2009, Almendarez and his counsel did not appear for trial. Almendarez's counsel acknowledged that the trial court called his office inquiring about his absence and advising that the court was ready to proceed with trial. Almendarez's counsel's office relayed the message to him while he was at the eye doctor. Counsel did not return the call to the court, but instead instructed his office to inform the court that he was at the eye doctor and his eyes were dilated. When neither Almendarez nor his counsel appeared, the court dismissed Almendarez's claims for want of prosecution. Valentin moved for a default judgment on his counterclaim. After a hearing, the trial court signed a final default judgment awarding Valentin damages in the amount of $44,740.53, plus attorney's fees, costs, and interest.

On November 12, 2009, Almendarez's counsel filed a motion to set aside the default judgment, in which counsel asserted that he had been very ill and he was not aware

[1] Almendarez .refers to October 19, 2009, which was the date for docket call and a pre-trial hearing. Almendarez's counsel was obviously aware of the trial setting because he appeared to request a continuance on the morning of October 28, 2009. In addition, on October 20, 2009, he filed supplemental evidence and motions in limine and to permit juror note taking in response to the trial preparation order.

of the rescheduled trial date. He also filed a motion for new trial raising the same arguments. Valentin responded to the motions. Included in the response was a transcript from another court hearing that Almendarez's counsel participated in on November 9, 2009. In addition, Valentin's counsel provided an affidavit stating that he had observed Almendarez's counsel in a hearing on Friday, November 6, before the Monday trial setting. He averred that Almendarez's counsel did not appear ill and his voice was strong. Valentin also provided an affidavit from the court coordinator stating that she both called each attorney and mailed a notice informing them that the case was re-set to November 9, 2009, at 1:30 p.m. At docket call on October 19, she had advised counsel for both parties to check the court's docket on its webpage for updates on the status of the start time for trial. Valentin's counsel averred that the website posted the trial date well in advance of November 9. We have no record of a hearing on Almendarez's motion for new trial. The trial court denied both the motion to set aside the default judgment and motion for new trial by a signed order on November 30, 2009. Almendarez filed a timely notice of appeal.

BRIEFING DEFICIENCIES

Texas Rule of Appellate Procedure 38.1(i) requires that an appellant's brief "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." Tex. R. App. P. 38.1(i). To comply, an appellant must provide a discussion of the facts and authorities relied upon necessary to a resolution of the issues raised in the brief. *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc*., 106 S.W.3d 118, 129 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

Issues on appeal are waived if an appellant fails to support his contentions with citations to appropriate authority. *Abelnour v. Mid Nat'l Holdings, Inc*., 190 S.W.3d 237, 241 (Tex. App.—Houston [1st Dist.] 2006, no pet); *see also Lundy v. Masson*, 260 S.W.3d 482, 503 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (concluding that appellant failed to provide argument or cite authority for contentions on appeal and appellate court

was "not required to do the job of the advocate"). An appellate court has no duty or right to perform an independent review of the record and applicable law to determine whether there was error. *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.).

We are to construe briefing rules liberally. *See* Tex. R. App. P. 38.9. Appellate briefs are to be construed reasonably so as to preserve the right to appellate review. *El Paso Nat. Gas v. Minco Oil & Gas, Inc*., 8 S.W.3d 309, 316 (Tex. 1999). Nevertheless, substantial compliance with the rules is required. *Harkins v. Dever Nursing Home*, 999 S.W.2d 571, 573 (Tex. App.—Houston [14th Dist.], 1999, no pet.). Failure to substantially comply with the requirements of Texas Rule of Appellate Procedure 38 results in waiver of the issues on appeal. *Valadez*, 238 S.W.3d at 845. In particular, failure to cite legal authority or provide substantive analysis of the legal issue presented results in waiver of the complaint. *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 338 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding that parties asserting error on appeal must put forth some specific argument and analysis showing that the record and the law support their contentions).

"A court of appeals must not affirm or reverse a judgment or dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities." Tex. R. App. P. 44.3. A reasonable time is given to an appellant when he is provided with an opportunity to amend his brief. *See Fredonia State Bank v. General Am. Life Ins. Co*., 881 S.W.2d 279, 284 (Tex. 1994).

ANALYSIS

Almendarez's first brief in this appeal failed to comply with the Texas Rules of Appellate Procedure. In particular, the brief failed to contain citations to the record. *See* Tex. R. App. P. 38.1(g),(i). In addition, Almendarez's citations to authority were to the

federal rules of procedure and cases applying those rules. Even though Almendarez amended his brief in response to this court's order advising him the original brief was defective, his amended brief also fails to include citations to the record. *See* Tex. R. App. P. 38.1(g),(i). Moreover, the brief contains statements concerning matters outside the record.

Almendarez raises a single issue on appeal. He asks "[w]hether the district judge erred on the side of justice, by denying appellant fundamental fairness in the pursuit of justice and his day in court to present his case before a jury." He then complains that the default judgment is void because the trial court lacked jurisdiction. He also asserts that counsel was not informed of the date and time of the rescheduled jury trial. "The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." Tex. R. App. P. 38.1(f). Because counsel has alluded to a question of notice, we may treat the issue as attacking the default judgment based on lack of notice. Importantly, however, Almendarez has completely failed to address the law applicable to our review of the judgment in this case.

A. Dismissal for Want of Prosecution

Almendarez has not challenged the dismissal of his claims for want of prosecution, either in this court or in the court below. Even though he acknowledges that he was aware of the dismissal the following day, he did not file a motion to reinstate. *See* Tex. R. Civ. P. 165a(3). Therefore, any error in the trial court's dismissal of Almendarez's claims was not preserved. *See Andrews v. ABJ Adjusters, Inc.*, 800 S.W.2d 567, 569 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (holding that, in the absence of a proper motion to reinstate, a challenge to a dismissal for want of prosecution is not preserved).

B. Default Judgment

The well-established test for determining whether a default judgment should be set aside and a new trial ordered is set forth in *Craddock v. Sunshine Bus Lines, Inc*., 134 Tex. 388, 133 S.W.2d 124, 126 (1939). A default judgment should be set aside and a new trial granted when the defaulting party establishes that: (1) the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake; (2) the motion for new trial sets up a meritorious defense; and (3) granting the motion will occasion no delay or otherwise injure the plaintiff. *Id.* The *Craddock* requirements apply to post-answer default judgments. *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966). A post-answer default judgment occurs when a defendant who has answered fails to appear for trial. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979).

A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *Cliff v. Huggins*, 724 S.W.2d 778, 778 (Tex. 1987). A trial court abuses its discretion in failing to grant a new trial if the *Craddock* elements are met. *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994).

Almendarez completely failed to address the *Craddock* standard for setting aside a default judgment and granting a new trial. Many of Almendarez's citations to authority are to the federal rules of procedure and cases applying those rules. *See, e.g.*, Fed. R. Civ. P. 55(a) (addressing default judgments in federal court); *Williams v. New Orleans Public Serv., Inc.*, 728 F.2d 730, 735 (5th Cir. 1984) (affirming default judgment based on pattern of neglect).[2]

[2] Almendarez has cited to a United States Supreme Court case, *Mullana v. Central Hanover Bank & Trust Co*, 339 U.S. 306, 314, 70 S.Ct. 652 (1950), for the proposition that a fundamental requirement of due process is an opportunity to be heard. *Mullana* is not a default judgment case; it concerned notice to beneficiaries of the settlement of a trust fund established under New York banking laws. *See id.* at 307. Almendarez has failed to make a due process argument in the context of a default judgment and the governing Texas law for setting it aside.

Almendarez's assertion that the trial court lacked jurisdiction is without merit. He asserts that a judgment is void where there has not been proper service of citation. *See Smith v. Commercial Equip. Leasing Co.,* 678 S.W.2d 917, 918 (Tex. 1984). There is no assertion that citation was not served properly in this case. Almendarez, the petitioner, filed an answer to Valentin's counter-petition on July 16, 2008. Nevertheless, he has addressed only no-answer default cases in which appellants had complained of defective service of process. Appellant cites *Higginbotham v. General Life & Acc. Ins. Co.,* 796 S.W.2d 695, 696-97 (Tex. 1990) (addressing service of citation on domestic insurance companies); *Smith,* 678 S.W.2d at 918 (addressing variance in service of citation from the method stated in the citation); and *McKanna v. Edgar*, 388 S.W.2d 927, 929-30 (Tex. 1965) (addressing substituted service on the secretary of state).

Almendarez's brief also cites to Texas Rule of Civil Procedure 124. Rule 124 states:

> In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance by the defendant, as prescribed in these rules, except where otherwise provided by law or these rules.
>
> When a party asserts a counterclaim or a cross-claim against another party who has entered an appearance, the claim may be served in any manner prescribed for service of citation or as provided in Rule 21(a).

Tex. R. Civ. P. 124. Rule 124 is inapplicable to the facts of this case.

Valentin offered proof of notice through the court coordinator's affidavit that she had mailed notice of the re-set trial date and called both attorneys to advise them. The affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. *See* Tex. R. Civ. P. 21a.

When a case has been previously set for trial, the trial court may reset the case to a later date on reasonable notice to the parties, which may be less than 45 days. Tex. R. Civ.

P. 245; *O'Connell v. O'Connell*, 843 S.W.2d 212, 215 (Tex. App.—Texarkana 1992, no writ). Notice may be either actual or constructive. *See Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988). Because Almendarez's attorney knew that the case was set for trial for during the two-week docket, he had a duty to keep in touch with the court to ascertain the start date for trial. *See Melton v. Ryander*, 727 S.W.2d 299, 302 (Tex. App.—Dallas 1987, writ ref'd n.r.e.). When an attorney fails to make reasonable inquiries concerning his pending litigation, he fails to exercise due diligence. *Conrad v. Orellana*, 661 S.W.2d 309, 313 (Tex. App.—Corpus Christi 1983, no writ).

In a post-answer default judgment, the defaulting party must establish the absence of intent or conscious indifference in failing to appear at trial by proof that he was not given notice of the default judgment hearing. *See Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005) (per curiam). If that element is established, he is not required to set up a meritorious defense. *Id.* Almendarez's counsel alleged that he did not receive the notice mailed by the trial court. His only support for that assertion was his affidavit attached to the motion for new trial. The notices were mailed to each counsel's address of record, and Valentin's counsel provided an affidavit that he received the notice of trial date. He asserted that Almendarez's counsel's failure to monitor the court's website as instructed showed conscious indifference. Moreover, the court's website provided constructive notice of the trial date. *See Lopez*, 757 S.W.2d at 723.

The trial court serves as fact-finder at a hearing on a motion for a new trial and, accordingly, is the sole judge of the credibility of a witness. *See Harmon Truck Lines, Inc. v. Steele*, 836 S.W.2d 262, 265 (Tex. App.—Texarkana 1992, writ dism'd). Although Almendarez's counsel argued that he had not received notice of the setting, it is clear that the trial court did not accept his position and was confident that notice had been sent. *See Hanners v. State Bar of Texas*, 860 S.W.2d 903, 908 (Tex. App.—Dallas 1993, writ dism'd).

The appellant bears the burden of bringing forward a sufficient record to show the trial court's error. *See Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990). The record does not contain a reporter's record from the hearing on Almendarez's motion for new trial. Without a complete record, we must presume the missing portions of the record would support the trial court's decision. *In re D.A.P.*, 267 S.W.3d 485, 487 (Tex. App.—Houston [14th Dist.] 2008, no pet.). When a record is incomplete (and the rule for a partial record does not apply, as here), we must presume that the missing portion of the record supports the factual determinations made by the fact-finder. *Bennett v. Cochran*, 96 S.W.3d 227, 230 (Tex. 2002).

Because of his briefing deficiencies and incomplete record, Almendarez has not established that the trial court abused its discretion in denying his motion for new trial and refusing to set aside the default judgment against him. We overrule the sole issue on appeal.

Accordingly, we affirm the judgment of the trial court.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Seymore and Boyce.