Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-12-00522-CV

Dionisio G. **TORRES** d/b/a Torres Design & Construction, Torres Design & Construction, Inc., and Torres Construction,
Appellant

v.

Leticia **HAYNES**,
Appellee

From the 49th Judicial District Court, Webb County, Texas
Trial Court No. 2011CVF001094-D1
Honorable Jose A. Lopez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: November 6, 2013

AFFIRMED

Dionisio Torres appeals from a no-answer default judgment. In two issues, he contends the trial court erroneously denied his motion for a new trial, and in the alternative, he is entitled to a remand for a new hearing on damages. We affirm.

BACKGROUND

Leticia Haynes hired Torres to build a restaurant in Laredo, Texas. In July 2011, Haynes filed suit against Torres alleging breach of contract, breach of warranty, violations of the DTPA, and negligence. The record shows Torres was served with citation in August 2011, but the record

does not reflect that Torres filed an answer or any other pleading.[1] On February 27, 2012, Haynes moved for the entry of default judgment against Torres. Shortly after Haynes filed her motion, the case was transferred from the 111th Judicial District Court to the 49th Judicial District Court. On April 5, 2012, the 49th Judicial District Court held a hearing on Haynes's motion and her unliquidated damages. The court rendered a default judgment, finding Hayes's damages to be in the amount of $232,587.32 and awarding her attorney's fees and court costs in the amount of $10,456.00.

ANALYSIS

Denial of Motion for New Trial

We review a trial court's denial of a motion to set aside a default judgment and grant a new trial for an abuse of discretion. *See Norton v. Martinez*, 935 S.W.2d 898, 901 (Tex. App.—San Antonio 1996, no writ). We apply the familiar *Craddock* standard:

> [a] default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Craddock v. Sunshine Bus Lines, Inc., 133 S.W.2d 124, 126 (Tex. 1939); *Olivares v. Cauthorn*, 717 S.W.2d 431, 432 (Tex. App.—San Antonio 1986, writ dism'd). No hearing was held on the motion for new trial. Torres's motion for new trial failed to meet at least two of the *Craddock* requirements.

First, Torres's motion does not show that his failure to file an answer was due to a mistake or was not intentional or the result of conscious indifference. The motion alleged that Torres's

[1] The clerk's record contains a filing labelled "Defendant's Designation of Expert Witnesses." However, it is apparent that it was filed by Haynes's counsel.

counsel appeared when the case was originally called in the 111th Judicial District Court and that his counsel was under the impression that constituted a general appearance. The motion further alleged that his counsel never received notice of the case's transfer to the 49th Judicial District Court. These allegations—although they may explain why Torres did not *appear* before the 49th Judicial District Court—do not explain why Torres never filed an *answer* or any other pleading in either the 49th Judicial District Court or 111th Judicial District Court.

In addition, up until April 5, 2012, the date on which the default judgment hearing was held, there is no affirmative showing in the record that Torres or his attorney appeared before either court. The record does not support Torres's assertion that his attorney appeared when the case was originally called in the 111th Judicial District Court—as the motion for new trial itself acknowledged. The docket sheet reflects that Haynes's counsel appeared when the case was called in that court, but it makes no mention of Torres or his attorney appearing. The docket sheet reflects that Torres's attorney made his only appearance on the same day as the default hearing in the 49th Judicial District Court, but only *after* the court had held the hearing and rendered the default judgment.

Second, for a motion for new trial to "set up" a meritorious defense under *Craddock*, "[t]he motion must allege *facts* which in law would constitute a defense to the cause of action asserted by the plaintiff, and must be supported by affidavits or other evidence proving prima facie that the defendant has such meritorious defense." *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966). The motion for new trial stated that "[Torres] has a defense to the allegations filed against him." That bare statement plainly does not meet the *Craddock* standard. *See id.* ("[A] new trial should be granted to a defaulting defendant if his motion 'sets up a meritorious defense.' This does not mean that the motion should be granted if it merely *alleges* that the defendant 'has a meritorious

defense.’”). The trial court did not abuse its discretion by denying Torres’s motion for new trial, and we overrule Torres’s first issue.

Unliquidated Damages Hearing

In his second issue, Torres asks this court to remand the case for a hearing on unliquidated damages. His briefing on this issue is not clear: he appears to contend either the trial court failed to hold a damages hearing or the trial court committed error by not allowing Torres to be heard at the hearing.

Before rendering a default judgment, a court is required to hold an evidentiary hearing to assess unliquidated damages. TEX. R. CIV. P. 239. The record reflects the trial court did conduct the required hearing, at which Haynes testified and offered documentary evidence about her damages and attorney’s fees. The docket sheet and the reporter’s record show that neither Torres nor his counsel appeared at the hearing. We note a defendant who does not appear and does not file an answer after being served with citation is not entitled to notice of a default hearing. *Long v. McDermott*, 813 S.W.2d 622, 624 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Olivares*, 717 S.W.2d at 434. We overrule Torres’s second issue.

The judgment of the trial court is affirmed.

Luz Elena D. Chapa, Justice