In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00117-CV

HOFER BUILDERS, INC., APPELLANT

V.

FIREMAN'S FUND INSURANCE COMPANY
AS SUBROGEE OF UNITED RENTALS, INC., APPELLEE

On Appeal from the County Court at Law Number 3,
Tarrant County, Texas
Trial Court No. 2014-001872-3; Honorable Mike Hrabal, Presiding

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February 7, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, Hofer Builders, Inc., appeals from a default judgment granted in favor of Appellee, Fireman's Fund Insurance Company as Subrogee of United Rentals, Inc., awarding Fireman's Fund $31,550.34 in damages and $12,460.31 in attorney's fees.[1]

[1] Originally appealed to the Second Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Second Court of Appeals and that of this court on any relevant issue. TEX. R. APP. P. 41.3.

Hofer asserts (1) the trial court erred in denying its motion for a new trial and (2) the evidence is legally and factually insufficient to award Fireman's Fund unliquidated damages. We reverse and remand.

BACKGROUND

In April 2014, Fireman's Fund filed its *Original Petition* alleging that Hofer damaged a forklift rented from United Rentals, Inc. through negligence and improper storage. Fireman's Fund alleged that it was required to pay United Rentals $37,418.34 pursuant to a standard Texas insurance policy. As a result, Fireman's Fund was subrogated to United Rentals's rights per the policy.

In October 2014, Fireman's Fund filed its *Motion for Default Judgment*. Attached as an exhibit was an affidavit authenticating its business records and representing that "[t]he amount of reasonable and necessary damages sustained by Fireman's Fund Insurance Company as a result of the occurrence made the basis of this lawsuit is $37,418.34." Also attached was an estimate by JLG Equipment Services, Inc., in Bedford, Pennsylvania, for $32,917.09 in parts and $4,001.25 in labor with an outside charge for "tele cyl inspection and rebuild" for $500.00. Another exhibit was a claim inquiry dated March 21, 2013, naming the payee as United Rentals, Inc., in Modesto, California, describing check number 0042690, dated February 20, 2013, with an amount of $16,635.93, and a second claim inquiry dated April 24, 2013, naming the same payee describing check number 0045152, dated April 5, 2013, in the amount of $10,782.41. Both checks were described as being issued in payment of 677-578994RA, invoice date 0/00/00. The checks totaled $27,418.34.

In addition to damages, Fireman's Fund's *Motion* sought attorney's fees of at least $12,460.31. An affidavit by Jeffrey Redall, Fireman's Fund's attorney of record, averred as follows:

> As counsel . . . I have knowledge as to the reasonable and customary fees charged by attorneys in the Houston area for services in cases of the same or similar nature as the above-entitled and styled cause. It is a reasonable and accepted practice in Texas, that the minimum fee contract for such legal representation should be 33 1/3% of the amount of Plaintiff's claim. The amount of reasonable attorney's fees in this case which is in accordance with local practice is the sum of at least $12,460.31 through the trial of this matter.

On November 19, 2014, the trial court granted Fireman's Fund's *Motion* awarding it $31,550.34 in damages, attorney's fees of $12,460.31, and additional attorney's fees in the event of an appeal. On January 1, 2015, Hofer filed a *Motion for New Trial.*

In its *Motion*, Tom Hofer, Hofer's President, averred by affidavit that, in May 2014, he became aware of Fireman's Fund's suit. He believed that any damages would be covered by an insurance policy held by Hofer and notified his carrier. Joel Voelkner was assigned as Hofer's claim adjuster and he undertook all direct communications with Fireman's Fund. In September 2014, Voelkner completed his investigation and informed Tom that Hofer's policy would not provide coverage for the claim and Hofer's insurer would not provide a defense. Voelkner also advised Tom that he would have plenty of time to retain counsel to defend it in the suit because he had obtained an extension of the answer deadline and there was no answer deadline in place. Tom was unaware Fireman's Fund filed a motion for default judgment in early November 2014 and did not receive any contact from Redall or anyone else connected with Fireman's Fund.

On December 12, 2014, Tom learned for the first time of Fireman's Fund's *Motion* and subsequent hearing when he received the trial court's letter enclosing the default judgment. He immediately contacted an attorney to represent Hofer in the suit.

In its *Motion for New Trial*, Hofer asserted that damage to the forklift was due to a defect in the design or manufacturing process constituting a superseding cause of the forklift's failure. Hofer also asserted that granting a new trial would not prejudice Fireman's Fund because not more than thirty days had passed since the hearing on Fireman's Fund's *Motion* and there was no risk that witnesses or other evidence would be compromised.

In its response, Redall filed an affidavit indicating there had been multiple extensions of time agreed to between him and Voelkner extending Hofer's deadline to file an answer. However, on October 1, 2014, Redall telephoned Voelkner and advised him via message that he needed to move forward with the motion for default judgment or be contacted by an attorney on Hofer's behalf. On October 6, Redall followed up with an email to Voelkner setting an October 10 deadline for Hofer to file its answer or Fireman's Fund would file a motion for default judgment. On October 7, Voelkner sent an email to Redall indicating he had made Hofer aware of the deadline. On October 13, Voelkner sent a second email to Redall indicating that on October 7, he had made Hofer aware of the deadline to file an answer.

On February 10, 2015, Hofer's *Motion for a New Trial* was denied. This appeal followed.

STANDARD OF REVIEW

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 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 plaintiff. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009); *Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939). We review a trial court's refusal to grant a motion for new trial for abuse of discretion. *Dolgencorp,* 288 S.W.3d at 926; *Cliff v. Huggins*, 724 S.W.2d 778, 778 (Tex. 1987). When a defaulting party moving for a new trial meets all elements of the *Craddock* test, then a trial court abuses its discretion if it fails to grant a new trial. *Dolgencorp,* 288 S.W.3d at 926; *Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994). When a party's proof in support of a motion for a new trial under *Craddock* is not controverted, the trial court may not disregard it. *Fidelity & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 576 (Tex. 2006).

CRADDOCK ANALYSIS

"The defendant's burden as to the first Craddock element has been satisfied when the factual assertions, if true, negate intentional or consciously indifferent conduct by the defendant and the factual assertions are not controverted by the plaintiff." *In re R.R.*, 209 S.W.3d 112, 115 (Tex. 2006). "In determining if the defendant's factual assertions are controverted, the court looks to all the evidence in the record." *Id.*

Here, Fireman's Fund has not directly controverted the facts set out in Tom Hofer's affidavit but has opted to offer additional facts through third-party emails

between Fireman's Fund's attorney and Hofer's insurance agent after Voelkner determined there was no coverage for Hofer's claim against its insurer.[2] "Intentional or conscious indifference" under *Craddock* means "that the defendant knew it was sued but did not care." *Hampton-Vaughan Funeral Home v. Briscoe*, 327 S.W.3d 743, 747-48 (Tex. App.—Fort Worth 2010, no pet.). *See Levine v. Shakelford, Melton & McKinley, L.L.P.*, 248 S.W.3d 166, 169 (Tex. 2008) ("[T]he complete definition of conscious indifference amounts to more than mere negligence."). Redall's emails to Voelkner and *vice versa* show Redall made Voelkner aware of an impending deadline and Voelkner responded—not Hofer. Beyond Voelkner's hearsay representation that he informed Hofer, there was no direct evidence by affidavit or testimony establishing that Fireman's Fund's deadline was *actually* relayed to Hofer. In fact, Hofer's affidavit establishes just the opposite. *See Tactical Air Def. Servs.,* 398 S.W.3d at 348 ("[e]vidence that notice was sent does not controvert evidence that notice was not received"). Moreover, Fireman's Fund does not assert anything that Hofer actually did, but, rather, what he failed to do. As such, Hofer's affidavit is sufficient to establish that its failure to follow-up after Voelkner withdrew from the dispute was negligent at best.

"A movant's motion need only set up, but not prove, a meritorious defense." *See K-Mart v. Armstrong*, 944 S.W.2d 59, 63 (Tex. App.—Amarillo 1997, writ denied). As such, Hofer's motion is sufficient to establish a defense which, if proved, would cause a different result including findings on damages. *Id.* (that K-Mart's store manager and employee asserted that boxes fell due to failure of a shelf upon which they were placed

[2] Fireman's Fund asserts Voelkner was Hofer's agent and Hofer denies that Voelkner was its agent. Whether Voelkner was Hofer's agent does not affect our analysis because, even if Voelkner was Hofer's agent, he abandoned his office when he determined Fireman's Fund's claim was not covered by Hofer's insurance policy. *See Tactical Air Def. Servs. v. Searock*, 398 S.W.3d 341, 346-47 (Tex. App.—Dallas 2013, no pet.) (collected cases cited therein) (when agent abandons his office before proceedings are concluded, any knowledge possessed by the agent cannot be imputed to the principal).

rather than the manner in which K-Mart's employees placed the boxes on the shelf sufficient to set up a meritorious defense).[3]

Once a defendant has alleged that granting a new trial will not injure the plaintiff, the burden of going forward with proof of injury shifts to the plaintiff. *Id.* In the trial court, Fireman's Fund failed to come forward with any evidence in response to Hofer's *Motion for New Trial* indicating Fireman's Fund would be injured or prejudiced by the granting of that motion. Instead, Fireman's Fund suggests that the sole measure for meeting this *Craddock* element is whether a defendant offers to reimburse a plaintiff for all reasonable expenses incurred in obtaining the default judgment. Fireman's Fund neither cites to, nor can we find, any case law supporting this proposition. Accordingly, Hofer's first issue is sustained. Because the first issue is sustained, we need not address Hofer's second issue concerning the sufficiency of the default judgment evidence presented because it offers no greater relief than Hofer is entitled to under its first issue. *See Dolgencorp*, 288 S.W.3d at 929 (concluding the appropriate remedy for legal insufficiency in a default judgment case is a remand for a new trial).

CONCLUSION

The judgment of the trial court against Hofer is reversed and this cause is remanded to the trial court for further proceedings.

Patrick A. Pirtle
Justice

[3] We will not engage in an analysis of whether the rental agreement provides Fireman's Fund a defense against a product liability claim by Hofer. For our purposes here, it is sufficient that Hofer has asserted a meritorious defense.