TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00076-CV

Bruce Hitt, Appellant

v.

Frank Zarauskas d/b/a Boondocks Bar & Grill, Appellee

FROM COUNTY COURT AT LAW OF TOM GREEN COUNTY
NO. 14C084L, HONORABLE BEN NOLEN, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This is an appeal from an order denying a motion for new trial following a post-answer default judgment. Because the defendant presented uncontroverted proof entitling him to relief, we must reverse.

BACKGROUND

Appellant Bruce Hitt is a real-estate broker and investor who, at relevant times, owned a San Angelo restaurant then known as the "Stillwater Bar & Grill."[1] In 2013, Hitt entered into a transaction with appellee Frank Zarauskas that the parties seem to agree entailed a lease of the premises to Zarauskas for $2,500 per month. Zarauskas would later allege, however, that Hitt had also agreed—orally—to sell the restaurant to him, to execute a lease-purchase-option to that end in

[1] Apparently the name was a reference to the restaurant's location—near the shore of Lake Nasworthy.

exchange for a $15,000 payment, and to share certain income and expenses from the restaurant's operations. In reliance on these alleged promises and representations, Zarauskas would claim, he paid Hitt (in addition to the monthly rent) $15,000 for the purchase option, expended substantial additional funds in making improvements to the premises, and began operating the restaurant under new management (and with a new name, "Boondocks Bar & Grill"), incurring additional expenses in that enterprise. But according to Zarauskas, Hitt "lied and stole the funds," refusing to sign the lease-purchase option or to honor the parties' agreed-upon division of restaurant income and expenses. Based on these allegations, Zarauskas, through counsel, sued Hitt in the county court at law seeking actual and exemplary damages under theories of common-law fraud, constructive fraud, and negligent misrepresentation, or alternatively recovery in quantum meruit or promissory estoppel.

Hitt obtained counsel and answered with a general denial, further pleading the statute of frauds as an affirmative defense. Hitt also alleged that Zarauskas had ceased to pay his monthly rent after about six months (a fact that Zarauskas admitted in his court filings, explaining that he was attempting to recoup some of the amounts he perceived Hitt owed him). Hitt asserted a counterclaim seeking recovery of the rent in question, plus attorney's fees.

Hitt also brought a forcible-detainer action in justice court seeking possession of the premises and unpaid rent. This action proceeded to trial,[2] and Hitt obtained a judgment of possession, plus an award of $10,000 (the jurisdictional maximum[3]) in back rent. From this judgment, Zarauskas perfected an appeal de novo to the county court at law (which happened to be

[2] In the meantime, Zarauskas had unsuccessfully sought temporary injunctive relief to bar the forcible-detainer action from going forward.

[3] *See* Tex. Gov't Code § 27.031(a)(1).

the same trial court in which the parties had previously filed their competing claims for monetary relief). By order signed on June 3, 2014, the county court at law ruled in Hitt's favor on the issue of possession. Further, per an agreement of the parties, the court ordered the remaining issue of back rent consolidated into the parties' preexisting litigation. A few weeks later, on June 24, 2014, the trial court signed an "Administrative Closing Order" closing the surviving cause "for administrative purposes without prejudice until further action is initiated by the parties." "This closing," the order further specified, "does not constitute a dismissal or a decision on the merits."

During the ensuing six months, the sole case activity reflected in the clerk's record is two certificates of written discovery filed by Zarauskas's counsel, the first indicating that counsel had served Hitt's counsel with requests for disclosure and production in July 2014, and the second indicating that Zarauskas's counsel had served Hitt's counsel with responses to requests for discovery in September 2014. However, in November 2014, Zarauskas's counsel wrote the court administrator advising that "[o]ur client wants us to move this case" and inquiring about setting a docket-control conference or scheduling order.

The record reflects no further activity in the case until the following February, when Hitt's counsel filed a motion to withdraw, citing a "lack of communication between client and counsel." The motion did not set forth that a copy had been delivered to Hitt, that Hitt had been notified in writing of his right to object to the motion, whether Hitt objected to the motion, Hitt's last known address, or any pending settings and deadlines.[4] The motion did include a certificate of

[4] *Cf.* Tex. R. Civ. P. 10 ("If another attorney is not to be substituted as attorney for the party, the motion shall state: that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party consents to the motion;

service to Hitt via certified mail, return receipt requested, via an address on Coventry Lane in San Angelo (the "Coventry address").

In early March, the court administrator issued a notice of hearing on the motion to withdraw for March 12, 2015. The notice was directed to both counsel and to Hitt personally, with the latter mailed to an address differing from the Coventry address to which the motion itself had purportedly been mailed. That second address, on Muirfield Lane in San Angelo (the "Muirfield address"), had been the location at which Hitt had been personally served with process at the inception of the case. The hearing notice mailed to Hitt was returned by the postal service.

The trial court did not receive any objection or other response from Hitt, and it granted his counsel's withdrawal by order of March 12, 2015. Thereafter, Zarauskas, through counsel that continued to represent him, prosecuted the suit to a successful conclusion. In July, Zarauskas filed requests for admission directed to Hitt, with the accompanying certificate of service reflecting transmission, by both regular mail and certified mail, return receipt requested, to the same Muirfield address to which the earlier hearing notice had been mailed and returned. The case was thereafter set for hearing on the merits for November 10, with notice of the setting issued by the court administrator in mid-October. Similar to the previous hearing notice, the notice intended for Hitt was mailed to the Muirfield address and eventually returned as undeliverable by the postal service.

On November 10, the hearing on the merits went forward as scheduled. Only Zarauskas and his counsel appeared. The trial court took judicial notice of the papers and pleadings

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the party's last known address and all pending settings and deadlines.").

on file, held that the requests for admission had been deemed admitted, and heard evidence presented through Zarauskas's testimony. At the conclusion of the hearing, the court signed a final judgment awarding Zarauskas $150,000 in damages and ordering that Hitt take nothing on his claims.

Thereafter, Hitt, through new counsel, filed a timely motion to set aside the judgment and for new trial, asserting three alternative grounds: (1) he had not received notice of the trial setting; (2) he had not been given at least 45 days notice of the trial setting as required by Texas Rule of Civil Procedure 245[5]; and (3) he was entitled to a new trial on equitable grounds based on evidence that establishes each of the three *Craddock* elements. In support of his motion, Hitt presented evidence that consisted of his own affidavit and attached excerpts from the record. In his affidavit, Hitt averred that he had never received notice and had been unaware of the trial setting until after the adverse judgment was signed, when "several friends told me that a judgment had been entered against me."

Hitt explained that although he had previously owned and resided at the Muirfield address to which service of notice by mail had been attempted, he had moved from San Angelo to San Antonio in late June or early July 2014, following the administrative closure order, and had sold the Muirfield property and ceased to have any residence there in late January 2015—several months before service was attempted. Moreover, Hitt averred, he had "never set up a mail box at that [Muirfield] address, and . . . did not use that property as my mailing address," relying instead on a post-office box. This was his practice, Hitt elaborated, due to the nature of his business, which

[5] Tex. R. Civ. P. 245 (requiring "reasonable notice of not less than forty-five days to the parties of a first setting for trial").

entailed purchasing, improving, and selling real estate for investment purposes, during which he would typically live at a given physical location for a period between approximately 12 and 36 months. In the case of the Muirfield address, Hitt testified that he had purchased the property as an investment in 2012, and lived there while it was being remodeled, before eventually selling it in January 2015.

In sum, Hitt emphasized, he had neither resided at nor received mail at the Muirfield address at the time service by mail of the hearing notice was attempted there, an assertion also consistent with the postal service's return of the notice as undeliverable. For the same reasons, Hitt further explained, he had never received and had been unaware of the requests for admission Zarauskas had purported to serve him by mail at the Muirfield address in July 2015. Nor, Hitt continued, had he received the notice of hearing on his counsel's motion to withdraw mailed to the Muirfield address in March 2015 (and, as with the notice of trial setting, subsequently returned by the postal service).

More broadly, Hitt also denied any prior knowledge that the litigation with Zarauskas had been reopened, adding that after the lawsuit had been administratively closed, he "believed that Zarauskas intended to abandon his claims." Hitt similarly averred that his counsel had filed his motion to withdraw "[u]nbeknownst to me and without my consent," although Hitt acknowledged that the Coventry address at which counsel had purported to mail him the withdrawal motion was the residential address of Hitt's mother, that "on occasion" he had received mail there, and that this address still appeared on his driver's license. Hitt also "d[id] not recall or have a record of having received any telephone calls from [counsel]" regarding his withdrawal.

Zarauskas did not file a response or controverting evidence, and neither party presented evidence during an ensuing oral hearing on Hitt's motion. In his argument during the hearing, Zarauskas urged chiefly that Hitt was to blame for any nonreceipt of hearing notices because he had failed to provide the court clerk with a current and correct address, as required by Section 30.015 of the Civil Practice and Remedies Code.[6]

Upon the hearing's conclusion, the trial court signed an order denying Hitt's motion without specifying the grounds on which it had relied. This appeal followed.

ANALYSIS

On appeal, the parties reurge essentially the same arguments they advanced below. We review a trial court's order denying a motion for new trial under an overarching abuse-of-discretion

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[6] Section 30.015 provides, in relevant part:

> (a) In a civil action filed in a district court, county court, statutory county court, or statutory probate court, each party or the party's attorney must provide the clerk of the court with written notice of the party's name and current residence or business address.
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> . . .
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> (d) If the party's address changes during the course of a civil action, the party or the party's attorney must provide the clerk of the court with written notice of the party's new address.

Tex. Civ. Prac. & Rem. Code § 30.015(a), (d). "If the party or the party's attorney fails to provide the notice required by Subsection (a), the trial court may assess a fine of not more than $50." *Id*. § 30.015(e).

standard,[7] which inquires whether the trial court acted "arbitrarily or without reference to guiding legal principles" in some matter committed to its discretion.[8] However, a trial court is said to have no "discretion" to analyze or apply the law incorrectly, so we review such decisions de novo.[9] Our disposition of this appeal turns on questions of law, chiefly the application of the familiar *Craddock* standards to Hitt's uncontroverted proof. The *Craddock* standards generally require that a defendant seeking to set aside a default judgment (whether no-answer or post-answer[10]) and obtain a new trial must establish: (1) that the nonappearance was not intentional or the result of conscious indifference; (2) a meritorious defense; and (3) that a new trial would cause neither delay nor undue prejudice.[11] When these elements are satisfied, a trial court abuses its discretion by not granting a new trial.[12]

A defendant satisfies its burden as to the first *Craddock* standard when its factual assertions, if true, negate intentionally or consciously indifferent conduct by the defendant and the

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[7] *See, e.g.*, *Cliff v. Huggins*, 724 S.W.2d 778, 778–79 (Tex. 1987) (citing *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984)); *Limestone Constr., Inc. v. Summit Comm'l Indus. Props., Inc.*, 143 S.W.3d 538, 542 (Tex. App.—Austin 2004, no pet.) (citing *Cliff*, 724 S.W.2d at 778–79; *Smith v. Holmes*, 53 S.W.3d 815, 817 (Tex. App.—Austin 2001, no pet.)).

[8] *See, e.g.*, *Limestone Constr.,* 143 S.W.3d at 542 (citing *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004)).

[9] *See id*. (citing *In re E.I. DuPont De Nemours & Co.*, 136 S.W.3d 218, 223 (Tex. 2004); *Comanche Nation v. Fox*, 128 S.W.3d 745, 749 (Tex. App.—Austin 2004, no pet.)).

[10] *See, e.g.*, *Cliff*, 724 S.W.2d at 779 (citing *Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex. 1986)).

[11] *See, e.g.*, *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005); *Cliff*, 724 S.W.2d at 779 (citing *Craddock v. Sunshine Bus Lines*, *Inc.* 133 S.W.2d 124, 126 (Tex. 1939)).

[12] *See, e.g.*, *Director State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).

factual assertions are not controverted by the plaintiff.[13] The focus of the inquiry is the defendant's knowledge and acts.[14] Intentional or consciously indifferent conduct is more than mere negligence—rather, it entails that a defendant knew of the proceedings, yet "did not care."[15] "[S]ome excuse, although not necessarily a good one, will suffice to show that a defendant's failure to [appear] was not because the defendant did not care."[16] And "failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification," and "[p]roof of such justification—accident, mistake or other reasonable explanation—negates . . . intent or conscious indifference."[17]

To demonstrate that he met the first *Craddock* element, Hitt emphasizes his uncontroverted proof that he did not appear at the hearing on the merits because he never received notice of that setting. Indeed, the hearing notice was returned as undeliverable by the postal service, as Hitt points out, and he presented further uncontroverted proof as to how and why the attempt failed—the Muirfield address to which the notice had been mailed, although formerly his residence and the location at which he had been personally served with process, was not and had never been an address where he had set up a mailbox or received mail, nor had he even resided there for several

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[13] *See In re R.R.*, 209 S.W.3d 112, 115 (Tex. 2006) (per curiam); *see also Evans*, 889 S.W.2d at 268 (affidavits attached to motion need not be offered into evidence).

[14] *See In re R.R.*, 209 S.W.3d at 115 (citing *Evans*, 889 S.W.2d at 269).

[15] *See Fidelity & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 575–76 (Tex. 2006) (per curiam).

[16] *In re R.R.*, 209 S.W.3d at 115.

[17] *Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995) (citing *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992)).

months prior to the attempted delivery. Hitt's counsel's motion to withdraw is also consistent with these assertions—while not providing a "last known address" for Hitt in so many words, it nonetheless contained a certificate of service reflecting service by mail to Hitt at an address other than the Muirfield address.

A defendant who has appeared in a case, as had Hitt, is entitled to notice of a trial setting as a matter of due process, and proof that such notice was lacking satisfies the first *Craddock* requirement, as one cannot be consciously indifferent to a trial of which he is unaware.[18] When such notice is lacking, moreover, the Texas Supreme Court has dispensed with *Craddock*'s meritorious-defense element in light of the due-process considerations.[19] And, following similar reasoning, this Court's own holdings have likewise dispensed with the lack-of-prejudice element.[20]

In response to Hitt's assertions, Zarauskas initially suggests that we must presume, per Rule of Civil Procedure 21a, that Hitt received the hearing notice because, he insists, it was mailed to Hitt's "last known address." It is true that notice properly sent pursuant to Rule 21a raises a presumption that notice was also received.[21] But Rule 21a requires that the notice be properly addressed,[22] and Hitt, again, presented uncontroverted proof that he had never set up a mailbox or

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[18] *See Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam) (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86–87 (1988)).

[19] *See id*.

[20] *See Holmes*, 53 S.W.3d at 817.

[21] *See* Tex. R. Civ. P. 21a(e); *Mathis*, 166 S.W.3d at 745; *Cliff*, 724 S.W.2d at 780.

[22] *See* Tex. R. Civ. P. 21a(b)(1) ("Service by mail or commercial delivery service shall be complete upon deposit of the document, postpaid and properly addressed, in the mail or with a commercial delivery service.").

received mail at the Muirfield address. Zarauskas similarly overlooks that the hearing notice was not accompanied by the proof of service Rule 21a requires to give rise to the presumption.[23] In any event, any such presumption would have "vanished" in the face of Hitt's proof of non-receipt.[24]

Yet the chief thrust of Zarauskas's position on appeal, as below, is that Hitt "waived" his right to notice of the hearing or is otherwise not entitled to complain of its absence because he failed to keep his address updated with the trial court, as required by Section 30.015 of the Civil Practice and Remedies Code. As an initial observation, Zarauskas seems to presume without record support that Hitt bears responsibility for others' decisions to attempt service on him at the Muirfield address, a location at which it was uncontroverted that Hitt had never set up a mailbox or received mail, nor had his counsel referred to it in his motion to withdraw. But assuming Hitt bore a duty to monitor proceedings and correct these errors by virtue of Section 30.015, nothing in that statute would impose the draconian sanction of a default judgment for his noncompliance—instead, the Legislature has deemed it sufficient to authorize a "fine of not more than $50."[25] And more critically, the Texas Supreme Court, addressing an analogous argument made in reliance on Texas Rules of Civil Procedure 21a, held that if such a duty existed, "due process requires some lesser

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[23] *See id.* at 21a(e) ("A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice shall be prima facie evidence of the fact of service."); *Mathis*, 166 S.W.3d at 745 ("Here, the record contains no certificate of service, no return receipt from certified or registered mail, and no affidavit certifying service.").

[24] *See* Tex. R. Civ. P. 21a(e) ("Nothing herein shall preclude any party from offering proof that the document was not received"); *Cliff*, 724 S.W.2d at 780 (presumption of service under Rule 21a "is not 'evidence' and it vanishes when opposing evidence is introduced that [a document] was not received").

[25] Tex. Civ. Prac. & Rem. Code § 30.015(e).

sanction than trial without notice or an opportunity to be heard" "unless noncompliance was intentional rather than a mistake."[26]

Hitt presented uncontroverted proof that would negate intent (or, for that matter, conscious indifference) on his part in any failure to update his address with the trial court. Hitt averred that his counsel (who otherwise would have continued receiving any notices directed to Hitt) had filed his motion to withdraw without Hitt's knowledge or consent and that Hitt did not recall any phone calls from counsel concerning the matter. During the hearing on Hitt's motion, the trial court seemed to regard this proof as falling short of negating any conceivable awareness on Hitt's part that his counsel was seeking to withdraw. But even assuming so, or that Hitt should otherwise be charged with any failure by his counsel to provide a correct last-known address for him, it remains that Hitt provided an excuse for his not having actively monitored the proceedings—following his success in evicting Zarauskas from the restaurant premises and the administrative closure of the remaining cause, Hitt had "believed that Zarauskas intended to abandon his claims" and had remained unaware that Zarauskas had later reopened the litigation by pursuing the claims after all.

While Hitt perhaps can be fairly accused of imprudence in relying on these understandings or assumptions, *Craddock* did not require Hitt to negate mere negligence.[27] On the contrary, Hitt needed only prove *some* excuse that would negate his having failed to update his

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[26] *Mathis*, 166 S.W.3d at 746 (citing *Peralta*, 485 U.S. at 85–86; *Cliff*, 724 S.W.2d at 779).

[27] *See In re R.R.*, 209 S.W.3d at 115; *cf. Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 812 (Tex. 2012) (observing that claimant seeking to set aside default judgment via bill of review ordinarily must prove deprivation of opportunity to present meritorious defense through conduct by others that is unmixed by any fault or negligence of claimant's own).

address intentionally or while knowing of the need, yet not caring.[28] Based on the uncontroverted proof Hitt provided, he did so. And although Zarauskas insinuates that there may be more to the story in regard to Hitt's forthrightness in receiving or responding to hearing notices or other communications related to the underlying litigation, we are confined to the record that the parties have actually presented.

On that record, Hitt has established *Craddock*'s first element. And, assuming Hitt is required to prove them here, his unconverted proof would likewise establish the remaining two elements; indeed, Zarauskas presents only passing argument to contest them. Hitt has satisfied *Craddock*'s second element by alleging facts that would establish defenses to the alleged contractual obligations underlying Zarauskas's claims, including the Statute of Frauds and Zarauskas's material breach through nonpayment of rent.[29] As for the third element, it is enough that Hitt alleged that a new trial would not injure Zarauskas, and Zarauskas made no effort to establish the contrary.[30]

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[28] *See Smith*, 913 S.W.2d at 468 (proof of attorney's mistaken understanding that trial court would grant continuance motion sufficed to negate intent or conscious indifference in failing to appear at trial; "[e]ven if the . . . attorney was not as conscientious as he should have been, his actions did not amount to conscious indifference"); *cf. Campus Invs., Inc. v. Cullever*, 144 S.W.3d 464, 466 (Tex. 2004) (per curiam) (defendant's failure to update addresses for its registered agent and registered office, causing it to not receive service through the Secretary of State, amounted to negligence in performance of its statutory duties and was thus some evidence supporting denial of bill of review challenging default judgment).

[29] *See Evans*, 889 S.W.2d at 270 ("Setting up a material defense is determined based on the facts alleged in the movant's motion and supporting affidavits, regardless of whether those facts are controverted. It is sufficient that the movant's motion and affidavits set forth facts which in law constitute a meritorious defense." (citations omitted)).

[30] *See id.* ("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." (citing *Cliff*, 724 S.W.2d at 779; *Angelo v. Champion Rest. Equip. Co.*, 713 S.W.2d 96, 98 (Tex. 1986))).

Our holdings comport with the jurisprudential policy, emphasized strongly by the Texas Supreme Court, that "an adjudication on the merits is preferred in Texas."[31] They also render it unnecessary for us to reach any further grounds for reversal that Hitt urges.[32]

CONCLUSION

Because Hitt has satisfied the *Craddock* standard, we must reverse the trial court's judgment and remand for a new trial.[33]

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[31] *Milestone Operating, Inc. v. ExxonMobil Corp.*, 388 S.W.3d 307, 310 (Tex. 2012) (per curiam) (citing *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex. 1992)).

[32] *See* Tex. R. App. P. 47.1.

[33] *See, e.g.*, *Evans*, 889 S.W.2d at 268.

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Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Field

Reversed and Remanded

Filed: March 29, 2017