TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00755-CV

Jessica Dennis and Douglas Dennis, Appellants

v.

GEICO, Appellee

FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY
NO. C-1-CV-16-008001, HONORABLE ERIC SHEPPERD, JUDGE PRESIDING

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

In this case involving an automobile collision, Jessica Dennis and her father Douglas Dennis (the Dennises) appeal from the trial court's final default judgment awarding appellee GEICO $10,417.28 plus interest and costs and ordering that the Dennises take nothing on their counterclaim. We will reverse the trial court's judgment and remand for a new trial.

In August 2016, GEICO sued the Dennises, alleging that "a motor vehicle owned by Plaintiff's insured Rene Zavala . . . was damaged by a vehicle negligently operated by [Douglas Dennis], whose negligence proximately caused the collision and damages in the amount of $10,417.28. Plaintiff compensated its insured for the loss, thereby becoming subrogated in the amount of $10,417.28." The petition further alleged that, "[a]t the time of the collision, [Jessica Dennis] was the owner of the motor vehicle driven by [Douglas Dennis], and the [vehicle] was operated with [Jessica Dennis's] consent and knowledge. Upon information and belief, [Jessica Dennis] wrongfully

and/or negligently entrusted his/her motor vehicle to an incompentent [sic], reckless, unlicensed and uninsured driver."

The Dennises filed an answer and counterclaim asserting that it was Zavala, not the Dennises, who negligently caused the collision. The Dennises later filed with the trial court a number of documents purporting to demonstrate the damages they incurred as a result of the collision. Douglas Dennis also filed an affidavit alleging that Zavala's negligence caused the collision.

In December 2016, GEICO filed a "Motion to Enter Final Default Judgment" asserting that Jessica Dennis had failed to file an answer after being served. A court official sent an email to GEICO's counsel stating that the trial court was "unable to sign the [default] judgment because defendant has filed an answer." GEICO later filed a motion for summary judgment with accompanying documents.

In November 2017, the trial court held a bench trial at which the Dennises, who were acting pro se at the time, did not appear. At the trial, the only evidence that GEICO presented was the notice of trial sent to the Dennises and the "green cards" allegedly demonstrating that the Dennises received the notice. The trial court then signed the final default judgment, and the Dennises appealed.

On appeal, the Dennises assert that they had difficulty finding the courtroom, that they arrived for trial less than ten minutes after the scheduled time, and that the court had already signed the default judgment when they arrived. In their appellate issues, the Dennises contend that there was insufficient evidence to support the judgment, that they are entitled to a new trial as a matter of public policy, and that they are entitled to a new trial because they have met the elements of *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939).[1] Because it is dispositive,

[1] GEICO has not filed an appellee's brief.

we will address only the Dennises' contention that there was insufficient evidence to support the trial court's judgment.

"Unlike the situation with 'no answer' default judgments, when a defendant answers but later fails to appear at trial, a default judgment cannot be taken based on the plaintiff's pleading allegations alone." *Romano v. Newton*, No. 03-06-00255-CV, 2007 WL 2509838, at *6 (Tex. App.—Austin Sept. 6, 2007, no pet.) (mem. op.); *see Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009) (per curiam) ("No-answer and post-answer default judgments differ in the issues a plaintiff is required to prove . . . . [I]f the defendant files an answer . . . a trial court may not render judgment on the pleadings and the plaintiff is required to offer evidence and prove all aspects of its claim."); *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979) ("A post-answer 'default' constitutes neither an abandonment of defendant's answer nor an implied confession of any issues thus joined by the defendant's answer. Judgment cannot be entered on the pleadings, but the plaintiff in such a case must offer evidence and prove his case as in a judgment upon a trial."); *Rouhana v. Ramirez*, No. 08-16-00356-CV, 2018 WL 3629372, at *2 (Tex. App.—El Paso July 31, 2018, no pet. h.) ("The standards governing a no-answer and post-answer default judgments differ greatly . . . . [I]n a post-answer default, the plaintiff must offer evidence and prove their case as in a trial for any contested issue. A judgment cannot be entered on the pleadings themselves.") (cleaned up).

"A plaintiff seeking to prevail on a negligence cause of action must establish the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach." *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017). As explained above, the only evidence

that GEICO presented at trial was the notice of trial sent to the Dennises and the "green cards" allegedly demonstrating that the Dennises received the notice. Moreover, although the documents attached to GEICO's motion for summary judgment included an estimate of the costs of repair to Zavala's vehicle, the only evidence that GEICO presented that could have established that it was the Dennises' negligence that caused the collision was a police report. However, the police report notes that the officer cited Zavala for "FAILED TO YIELD—RIGHT TURN ON RED." In addition, under "Contributing Factors (Investigator's Opinion)," only Zavala's vehicle is listed. The only infraction for which the officer cited Douglas Dennis was driving with a suspended license.

We conclude that there was insufficient evidence to support the trial court's judgment. Accordingly, we sustain the Dennises' first issue, and we must reverse the trial court's judgment and remand for a new trial. *See Bennett v. McDaniel*, 295 S.W.3d 644, 645 (Tex. 2009) (per curiam); *Lerma*, 288 S.W.3d at 930.

CONCLUSION

We reverse the trial court's final default judgment and remand this cause to the trial court for a new trial.

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Scott K. Field, Justice

Before Chief Justice Rose, Justices Pemberton and Field

Reversed and Remanded

Filed: August 30, 2018