AFFIRMED; Opinion Filed May 6, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00619-CV

DENNIS JAMES POLEDORE, JR., Appellant
V.
CHERI YLONDA POLEDORE, Appellee

On Appeal from the 303rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-14-13701

MEMORANDUM OPINION

Before Justices Myers, Stoddart, and Whitehill
Opinion by Justice Stoddart

Dennis James Poledore, Jr. appeals from the trial court's entry of a post-answer default judgment in the parties' divorce proceeding. On appeal, appellant makes several arguments about why the trial court's entry of a default judgment violated his due process rights. We affirm the trial court's judgment.

In July 2014, appellant filed a pro se petition for divorce from appellee Cheri Ylonda Daniel.[1] Appellant stated in his petition that the parties had been separated for several years and did not intend to live together as husband and wife in the future. He also explained that appellee "abandoned her responsibilities as a wife" by failing to provide financial and emotional support, and he had been convicted of a felony for which he was sentenced to sixty years' incarceration.

[1] The trial court's final judgment changed appellee's last name from Poledore to Daniel.

In his original petition, appellant requested a "discovery hearing to determine [c]ommunity property benefits." Appellee filed an answer.

In October 2014, appellant filed a "motion for a discovery hearing and production of discovery material documents" relating to community property assets. When the trial court did not issue an order on his motion, he sent a letter to the trial court asking that his motion be resolved. The trial court sent a letter back to appellant stating the trial court could not take any action until he set his motion for a hearing, which he should do if he believed appellee had not complied with her discovery obligations. The letter included contact information for the trial court coordinator and informed appellant that he could appear by telephone at the hearing if necessary.

Appellee filed a counter-petition for divorce on January 16, 2015. On March 3, 2015, the court coordinator sent a notice of hearing to the parties, stating there would be a pre-trial hearing on March 30, 2015, and failure to appear at the hearing "may result in a default judgment being entered against you." The court coordinator also sent a letter to appellant reiterating that the case was set for a hearing on March 30. The letter stated: "I will set up for a Court Call hearing at that time. You may address your discovery issues at that time." On March 17, 2015, appellant filed a motion to appear at the hearing by telephone or video. In his motion, appellant acknowledged he received notice of the hearing and that his failure to appear at the hearing may result in a default judgment.

Appellant failed to appear at the hearing and, on March 30, 3015, the trial court entered the final decree of divorce, which states that appellant "did not appear in person or telephonically. The court proceeded on a default." After being notified of the final divorce decree, appellant sent a letter to the trial court coordinator explaining he was unable to attend the hearing telephonically because of errors by the prison staff where he is incarcerated. Appellant

did not file a motion for new trial, but did file a "Formal Bill of Exception."[2] In this filing, appellant states that at the time of the hearing, "several attempts were made by the court to invoke the conference call with [appellant], but the TDCJ-ID Prison officials failed to assure [sic] [appellant's] presence at the prescribed time and location." As a result, he failed to appear telephonically at the hearing.

On appeal, appellant argues the trial court violated his due process rights during the March 30 hearing because signing the divorce decree was a sanction for appellant's failure to appear and the decree was entered without adequate notice to him; he was not afforded his requested discovery hearing, and the trial court failed to conduct a hearing to determine whether appellant's failure to appear was a deliberate act by appellant.

As to his first two issues, the record refutes both contentions. The record shows the court coordinator sent a notice of the hearing to the parties, and the notice stated that failure to appear at the hearing "may result in a default judgment being entered against you." The court coordinator also sent a letter to appellant reiterating that the case was set for a hearing. In his motion to appear by telephone or video, appellant acknowledged he received the notices and knew that his failure to appear could result in a default judgment. To the extent he now argues the notice was invalid because it was not signed by the trial judge, the judge is not required to sign notices of hearings. *See Edwards v. Phillips*, No. 04-13-00725-CV, 2015 WL 1938873, at *3 (Tex. App.—San Antonio Apr. 29, 2015, no pet.) (collecting cases).

Likewise, the record shows the trial court sent a letter to appellant informing him that the court could not take any action on his discovery motion until appellant set the motion for a hearing. The letter included contact information for the trial court coordinator and informed

[2] A bill of exception exists when a trial court refuses to admit evidence and the complaining party then provides the excluded evidence for appellate review. *Sparks v. Booth*, 232 S.W.3d 853, 870 (Tex. App.—Dallas 2007, no pet.). The purpose behind a bill of exception is to put excluded evidence in the record so that the appellate court can determine if the trial court erred in excluding it or erred in ruling in some way materially related to the evidence. *Gray v. Gray*, 971 S.W.2d 212, 218 (Tex. App.—Beaumont 1998, no pet.).

appellant that he could appear by telephone at the hearing if necessary. The court coordinator's subsequent correspondence to appellant informed him that he could address his discovery issues at the March 30 hearing and the court coordinator would "set up for a Court Call hearing."

The record shows appellant had notice of the March 30 hearing, was informed his discovery dispute could be considered at the hearing, had an opportunity to appear via phone, and knew he could suffer a default judgment for failure to appear. Appellant's contentions to the contrary are not supported by the record. We overrule appellant's first and second issues.

In his third issue, appellant argues the trial court violated his due process rights because it failed to conduct a hearing to determine whether his failure to appear was a deliberate act. Appellant argues the prison guards were at fault and, if the trial court had held a hearing, he could have presented evidence showing his failure to appear was the fault of the prison guards. Appellant's argument on his third issue echoes the language used in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124 (Tex. 1939), which establishes the test for when a trial court must set aside a default judgment. We will apply the *Craddock* analysis.

A trial court must set aside a default judgment if a defendant satisfies the three-factor *Craddock* test: (1) the defendant's failure to appear was not intentional or the result of conscious indifference, but due to a mistake or accident; (2) the defendant has a meritorious defense; and (3) granting a new trial will not cause delay or an injury to the plaintiff. *McLeod v. Gyr,* 439 S.W.3d 639, 654 (Tex. App.—Dallas 2014, pet. denied). The defaulting defendant has the burden of proving all three elements of the Craddock test before a trial court is required to grant a motion for new trial. *Utz v. McKenzie*, 397 S.W.3d 273, 278 (Tex. App.—Dallas 2013, no pet.).

Appellant did not file a motion for new trial or otherwise develop a record to show he is entitled to a new trial. Even if we were to consider appellant's "Formal Bill of Exception" to be

a motion for new trial, appellant only argued the first *Craddock* factor. His motion did not present evidence that the prison guards were at fault and he neither argued nor presented evidence addressing the second and third *Craddock* factors. *See Onwubuche v. Olowolayemo,* No. 01–10–00945–CV, 2012 WL 1067950, *2 (Tex. App.—Houston [1st Dist.] Mar. 29, 2012, no pet.) (mem. op.) ("Because the defaulting party has the burden to show that the elements of the *Craddock* test are satisfied, . . . the defaulting party must put forward any necessary evidence on these issues; typically a motion for new trial is the vehicle for offering such evidence into the record."). As a consequence of appellant's failure to file a motion for new trial and introduce evidence satisfying the *Craddock* factors, appellant failed to meet his burden. We overrule appellant's third issue.

We affirm the trial court's judgment.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

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Court of Appeals
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JUDGMENT

DENNIS JAMES POLEDORE, JR., Appellant

No. 05-15-00619-CV V.

CHERI YLONDA POLEDORE, Appellee

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Trial Court Cause No. DF-14-13701.
Opinion delivered by Justice Stoddart.
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 6th day of May, 2016.