Affirmed in Part, Reversed and Remanded in Part, and Opinion Filed December 8, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-00330-CV

EDGAR TUNCHEZ, Appellant
V.
BRADLY HOUK, Appellee

On Appeal from the County Court at Law No. 1
Dallas County, Texas
Trial Court Cause No. CC-19-02501-A

MEMORANDUM OPINION

Before Justices Myers, Partida-Kipness, and Carlyle
Opinion by Justice Partida-Kipness

Appellant Edgar Tunchez appeals the trial court's November 26, 2019 order dismissing the underlying proceeding for want of prosecution and the March 10, 2020 order denying his motion to reinstate the case. We affirm the dismissal order, reverse and vacate the order denying the motion to reinstate, and remand to the trial court for further proceedings consistent with this opinion.

BACKGROUND

The underlying proceeding arises out of a June 13, 2017 motor vehicle collision. Tunchez filed suit against appellee Bradly Houk on April 26, 2019. By

letter dated July 29, 2019, the trial court notified Tunchez's counsel of record and Houk that the court had set the case "for dismissal hearing, pursuant to Rule 165A" on August 30, 2019 at 9:00 a.m. The record does not include a transcript of a hearing on August 30, 2019. The trial court's electronic docket sheet, however, shows that a dismissal hearing was held on August 30, 2019, and Tunchez's counsel attended the hearing. The case remained on the court's docket. On September 16, 2019, Tunchez filed an "Affidavit of Due Diligence" from Mitchell Draeger, a process server, in which Draeger detailed three unsuccessful attempts at serving Houk with the original petition on September 7, 2019, September 10, 2019, and September 13, 2019.

The trial court next notified Tunchez's counsel and Houk via letter dated September 20, 2019, that the cause was set "for dismissal hearing, pursuant to Rule 165A" on November 22, 2019, at 9:00 a.m. The letter stated that if no answer had been filed, or an answer was insufficient to place any fact in issue, the parties were expected to have moved for and have heard a summary judgment or proved up a default judgment before that date, and that the parties' failure to have done so would result in the dismissal of the case on that date. The letter also stated that live witnesses would not be required unless the default prove-up was for an unliquidated claim, and that liquidated claims and attorney's fees could be proved up by affidavit submitted with a form of judgment. The letter also informed the parties that if a party has "been unable to obtain service of process, you should plan to notify the court in writing to obtain a reset of the dismissal date or a trial setting as appropriate."

On November 20, 2019, Tunchez filed a "Verified Motion to Retain" in which he notified the court that he "is actively attempting service of the Defendant," and "has made contact with Defendant's sister and has retained the services of a private investigator to locate Defendant." Tunchez asked "that the case be retained on the Court's dismissal docket for an additional 30 days so that Plaintiff may continue efforts to serve Defendant." Tunchez's counsel did not appear at the November 22, 2019, dismissal hearing. The trial court signed a dismissal order dismissing the case without prejudice on November 26, 2019. The dismissal order consisted of a form order listing eight possible reasons for the dismissal. The trial court marked three of the eight listed reasons with an "X" indicating that the case was dismissed for the following reasons:

> (x) Failure to appear for a hearing or trial of which notice was had.
>
> (x) Failure to take action after notice of intent to dismiss for want of prosecution. (IN ACCORDANCE WITH RULE 165A LETTER)
>
> (x) Dismiss for Want of Prosecution.

The remaining five reasons remained unchecked. Those reasons included the following:

> ( ) Failure to comply with Rule 663a.
>
> ( ) Requested by Plaintiff.
>
> ( ) Inactive for a period longer than 12/18 months failure to comply with Rule 6 of the Judicial Rule of Administration
>
> ( ) Failure to follow a Court Order
>
> ( ) Inherent power – failure to prosecute with due diligence

On December 26, 2019, Tunchez filed a "Verified Motion to Reinstate" in which he stated that his failure to appear at the dismissal hearing was not the result of conscious indifference but was due to the mistake of his counsel who believed "that the motion to retain was sufficient for resetting of the hearing." Tunchez asked the court to reinstate the case and "reset this case for dismissal hearing in accordance with" his verified motion to retain.

The motion to reinstate was set for hearing on March 5, 2020, and then reset for 9:00 a.m. on March 10, 2020. At 5:38 p.m. on March 9, 2020, Tunchez's counsel, MacKenzie Linyard, filed an affidavit in which she stated that her failure to appear for the November 22, 2019, dismissal hearing was not intentional, willful, or the result of conscious indifference. Linyard stated that the failure was due to a calendaring mistake. Specifically, she explained that she submitted the verified motion to retain "pursuant to" the court's September 20, 2019, "order" and "to notify the Court in writing and request a resetting of the dismissal hearing." She explained that "once the Verified Motion to Retain was filed with the Court, the hearing was accidentally and mistakenly removed from [her] calendar." Linyard stated that she failed to appear for the hearing because she mistakenly believed her calendar was accurate.

Tunchez also filed an Affidavit of Due Diligence from a second process server, Heather Bork. In her affidavit, Bork explained that she attempted service on Houk on September 7, 2019, and September 10, 2019, at his "usual place of abode"

of 6910 Windhaven Parkway, #202, The Colony, Texas 75056. No one answered the door at that location when Bork knocked, so she left a notice for Houk "advising him to call and schedule a delivery." When Bork returned to the Windhaven Parkway address on September 13, 2019, a woman answered the door. The woman told Bork that Houk did not live there. The woman gave Bork two "possible" phone numbers for Houk and stated Houk "lives on 875 and Singleton in Midlothian, Texas." Bork then listed seventeen dates beginning September 24, 2019, on which she "searched TLO Transunion and nothing new showed for the defendant."

On March 10, 2020, the court held a hearing on Tunchez's Verified Motion to Reinstate. Linyard told the court that "it was a mistake that [she] missed the dismissal hearing set in November." She explained that the hearing was on the firm's electronic calendar but the hearing "for some reason, for some mistake, some accident, it was taken off my calendar before the time of the hearing" and after she filed the motion to retain. The trial judge questioned Linyard at length regarding whether they had evidence of diligence in serving Houk. Counsel informed the court that an order was needed that day because its plenary power would expire at the end of the day. Counsel also asked how best to provide the court with proof of diligence by the end of the day. The trial court suggested in-person delivery and adjourned.

At 1:38 p.m., Tunchez filed a Supplemental Verified Motion to Reinstate and reiterated his request that the court reinstate the case and reset the case for a dismissal hearing. In support, Tunchez attached Linyard's March 9 affidavit, Bork's March 9

affidavit of due diligence, and a new affidavit of due diligence signed by Bork on March 10, 2020. Bork's new affidavit set out thirteen instances between May 1, 2019, and August 27, 2019, and three instances between September 12, 2019, and September 27, 2019, when Bork attempted service on Houk and left notice for him at the Windhaven Parkway address. Bork also stated that "Collin Clark" called her office on September 30, 2019, and informed them that Houk "does not live there and he does not know him." The trial court signed an order denying the motion to reinstate that afternoon. Then, at 3:04 p.m., Tunchez filed a request for findings of fact and conclusions of law and a notice of appeal. The trial court declined to issue findings of fact and conclusions of law.

STANDARD OF REVIEW

We review a trial court's dismissal for want of prosecution under an abuse of discretion standard. *Mansaray v. Phillips*, 626 S.W.3d 402, 405 (Tex. App.—Dallas 2021, no pet.); *WMC Mortg. Corp. v. Starkey*, 200 S.W.3d 749, 752 (Tex. App.—Dallas 2006, pet. denied). Like a review of a dismissal for want of prosecution, we review a denial of a motion to reinstate under an abuse of discretion standard. *Franklin v. Sherman Indep. Sch. Dist*., 53 S.W.3d 398, 401 (Tex. App.—Dallas 2001, pet. denied) (per curiam); *see Gomez v. Sol*, No. 05-14-00893-CV, 2015 WL 6121751, at *2 (Tex. App.—Dallas Oct. 19, 2015, no pet.) (mem. op.). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to

any guiding rules and principles of law. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *WMC Mortg.*, 200 S.W.3d at 752.

APPLICABLE LAW

A trial court's authority to dismiss a case for want of prosecution stems from two sources: (1) Texas Rule of Civil Procedure 165a; and (2) the court's inherent authority under common law. TEX. R. CIV. P. 165a; *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *Green Mountain Energy Co. v. Kela*, No. 05-18-01330-CV, 2019 WL 5128168, at *1–2 (Tex. App.—Dallas Oct. 7, 2019, no pet.) (mem. op.). A court may dismiss pursuant to rule 165a when a party seeking affirmative relief fails to appear for any hearing or trial of which the party had notice, or when a case is not disposed within the Supreme Court of Texas' time standards. TEX. R. CIV. P. 165a(1),(2); *Villarreal*, 994 S.W.2d at 630. In addition to the court's power to dismiss under rule 165a, the common law "vests the trial court with the inherent power to dismiss independently of the rules of procedure when a plaintiff fails to prosecute his or her case with due diligence." *Mansaray*, 626 S.W.3d at 405 (quoting *Villarreal*, 994 S.W.2d at 630).

Regardless of the basis for the dismissal, due process requires that the party be provided with notice and an opportunity to be heard before a trial court may dismiss a case for want of prosecution. *Villarreal*, 994 S.W.2d at 630–31; *Franklin*, 53 S.W.3d at 401. The notice must advise the party of the basis for the potential

dismissal. *Boulden v. Boulden*, 133 S.W.3d 884, 886 (Tex. App.—Dallas 2004, no pet.).

"When a case is dismissed for want of prosecution, '[t]he court shall reinstate the case upon finding after a hearing that the failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained.'" *Smith v. Babcock & Wilcox Constr. Co., Inc.*, 913 S.W.2d 467, 468 (Tex. 1995) (quoting TEX. R. CIV. P. 165a(3)). This standard is essentially the same as that for setting aside a default judgment. *Id.* (citing *Craddock v. Sunshine Bus Lines,* 134 Tex. 388, 133 S.W.2d 124 (1939)). A failure to appear is not intentional or due to conscious indifference for Rule 165a purposes merely because it is deliberate; it must also be without adequate justification. *Id.* Proof of such justification—accident, mistake or other reasonable explanation—negates the intent or conscious indifference for which reinstatement can be denied. *Id.* (citing *Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992)). Also, conscious indifference means more than mere negligence. *Id.* (citing *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966)).

When a verified motion to reinstate reasonably explains the failure to appear at a dismissal hearing and the record contains no controverting evidence that the failure was intentional or the result of conscious indifference, the trial court abuses its discretion by denying the motion. *Pollefeyt v. Tex. Health Res.*, No. 02-19-00260-CV, 2020 WL 1888870, at *5 (Tex. App.—Fort Worth Apr. 16, 2020, no pet.) (mem.

op.) (first citing *S. Pioneer Prop. & Cas. Ins. v. Wilson*, No. 01-17-00444-CV, 2018 WL 3384558, at *3 (Tex. App.—Houston [1st Dist.] July 12, 2018, no pet.) (mem. op); and then citing *Dalmex, Ltd. v. Apparel Enters.*, 455 S.W.3d 241, 244 (Tex. App.—El Paso 2015, no pet.)). If the explanation in the verified motion is adequate to show mistake or accident, the movant need not present evidence supporting it at the oral reinstatement hearing. *Brooks-PHS Heirs, LLC v. Bowerman*, No. 05-18-00356-CV, 2019 WL 1219323, at *4 (Tex. App.—Dallas Mar. 15, 2019, pet. denied) (op. on reh'g) (citing *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994)).

ANALYSIS

In a single appellate issue, Tunchez argues the trial court abused its discretion by dismissing the case and denying his motion to reinstate. We address each order in turn.

I. Dismissal

The trial court provided three reasons for dismissal: (1) "[f]ailure to appear for a hearing or trial of which notice was had"; (2) "[f]ailure to take action after notice of intent to dismiss for want of prosecution. (IN ACCORDANCE WITH RULE 165A LETTER)"; and (3) "dismiss for want of prosecution." As noted above, a court may dismiss a case for want of prosecution under Rule 165a or its inherent power. A trial court may dismiss a case under rule 165a on "failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had

notice" or when a case is "not disposed of within the time standards promulgated" by the supreme court. TEX. R. CIV. P. 165a(1), (2).

Although the dismissal order includes "inactive for a period of longer than 12/18 months failure to comply with Rule 6 of the Judicial Rule of Administration" as a possible reason for dismissal, the trial court did not check that reason as the basis for dismissal here. As such, we need not determine whether dismissal was proper under Rule 165a(2). Similarly, we need not determine whether dismissal was proper under the court's inherent authority because the trial court did not check "inherent power – failure to prosecute with due diligence" as a reason for dismissal. Instead, we focus our analysis on whether the trial court abused its discretion by dismissing the case for Tunchez's failure to appear at the dismissal hearing. *See* TEX. R. CIV. P. 165a(1).

Tunchez had notice through counsel of the November 22, 2019, dismissal hearing. Yet, neither he nor his counsel appeared at the hearing. Because the trial court's notice specifically referenced Rule 165a, it adequately informed Tunchez of the possibility of dismissal for his failure to appear. *See Pollefeyt*, 2020 WL 1888870, at *4. The initial dismissal was, therefore, proper under Rule 165a(1). *See id.*; TEX. R. CIV. P. 165a(1) ("A case may be dismissed for want of prosecution on failure of any party seeking affirmative relief to appear for any hearing or trial of which the party had notice."). Because dismissal was proper under Rule 165a(1), we need not consider whether the other two reasons for dismissal checked by the trial

court also support dismissal. Under this record, we conclude the trial court did not abuse its discretion by dismissing the case for want of prosecution due to Tunchez and his counsel's failure to attend the November 22, 2019, dismissal hearing.

II. Reinstatement

However, even after properly dismissing a case for want of prosecution, the trial court must grant a properly-filed motion to reinstate if it finds "after a hearing that the failure of the party or his attorney [to appear] was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." TEX. R. CIV. P. 165a(3); *Smith*, 913 S.W.2d at 468. This standard is essentially the same as that for setting aside a default judgment. *See Smith*, 913 S.W.2d at 468 (citing *Craddock*). Under this standard, conscious indifference must be more than mere negligence; even a deliberate failure to appear is not intentional or due to conscious indifference unless it is without adequate justification. *Smith*, 913 S.W.2d at 468. Proof of accident, mistake, or "other reasonable explanation" negates intent or conscious indifference under Rule 165a. *Id.* Some excuse—not necessarily a good one—will suffice. *Milestone Operating, Inc. v. ExxonMobil Corp*., 388 S.W.3d 307, 310 (Tex. 2012).

In his "Verified Motion to Reinstate," Tunchez stated that his failure to appear at the dismissal hearing was not the result of conscious indifference but was due to the mistake of his counsel who believed "that the motion to retain was sufficient for resetting of the hearing." At the hearing and in his affidavit in support of the

supplemental motion to reinstate, however, Tunchez's counsel asserted that the failure to appear was due to a calendaring error. Specifically, counsel told the court in an affidavit and at the reinstatement hearing that the hearing was on her calendar before she filed the motion to retain and then was mistakenly removed from her calendar.

Counsel's belief that the motion to retain was sufficient to reset the dismissal hearing and prevent dismissal was a sufficient excuse to show that her failure to attend the hearing was not intentional or due to conscious indifference. *See Pollefeyt*, 2020 WL 1888870, at *6 (Pollefeyt's contention that she had mistakenly believed that her motion to amend her pleadings was sufficient to retain the case on the docket and that she did not realize the trial court had not granted it was "a sufficient excuse to show that her failure to attend the hearing was not intentional or due to conscious indifference."); *see also Smith*, 913 S.W.2d at 468 ("The Smiths' attorney reasonably explained his failure to appear for trial. He was actually in trial in another county and believed, based upon his credible explanation, that the court would grant a continuance for that reason. Even if the Smiths' attorney was not as conscientious as he should have been, his actions did not amount to conscious indifference."). Counsel's contention that a calendaring error after filing the motion to retain resulted in the failure to appear is also sufficient to negate a finding of conscious indifference. *See E&M Plumbing Ltd. v. W. Houston Winnelson Co.*, No. 01-17-00601-CV, 2018 WL 3542916, at *3 (Tex. App.—Houston [1st Dist.] July 24, 2018, no pet.) (mem.

op.) (E&M's counsel sufficiently established "accident or mistake" under Rule 165a(3) and negated the intent or conscious indifference by explaining that he inadvertently failed to record the March 24 deadline in his calendar, so the deadline passed without E&M filing a motion to retain and he did not discover the dismissal order until June 22).

Accordingly, we conclude the trial court abused its discretion by denying Touchez's reinstatement motion and sustain his appellate issue as to the denial of that motion.

CONCLUSION

Having concluded that the trial court abused its discretion by not reinstating the case, we reverse the trial court's denial of Tunchez's motion to reinstate and remand this case for further proceedings consistent with this opinion.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EDGAR TUNCHEZ, Appellant	On Appeal from the County Court at Law No. 1, Dallas County, Texas
No. 05-20-00330-CV V.	Trial Court Cause No. CC-19-02501-A.
BRADLY HOUK, Appellee	Opinion delivered by Justice Partida-Kipness. Justices Myers and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **AFFIRM** the trial court's November 26, 2019 dismissal order, **REVERSE** and **VACATE** the March 10, 2020 order denying appellant Edgar Tunchez's motion to reinstate, and **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

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

Judgment entered this 8th day of December 2021.