Opinion issued March 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01039-CV

LEISHA ROJAS, Appellant

V.

ROBERT SCHARNBERG, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 6824

MEMORANDUM OPINION

Leisha Rojas appeals a default judgment against her in a child custody dispute between the parents for possession and access to their son. In early June 2009, the father, Robert Scharnberg, filed a Petition to Modify Parent-Child

Relationship. When Rojas did not appear for trial, the court granted Scharnberg a default judgment. Rojas raises four issues on appeal, primarily based on her contention that the trial court erred in denying her motion for new trial. Because Rojas's due process rights were violated by a trial on the merits without proper notice to her, and because she satisfied the requirements for a new trial set forth in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939), we reverse the judgment of the trial court and remand for further proceedings on the merits.

Background

This suit affecting a parent-child relationship (SAPCR) arose when Scharnberg filed a Petition to Modify Parent-Child Relationship seeking to modify Rojas's possession and access to their son. Scharnberg requested the issuance of temporary orders, a temporary restraining order, and a temporary injunction, as well as reasonable attorney's fees. On the day the suit was filed, the trial judge granted a mutual temporary restraining order and set a hearing for June 11 on the remaining issues.

Rojas was served and appeared in court for the June 11 hearing. The trial court placed her under oath and advised her that the temporary injunction hearing was reset for June 25. On June 22, Rojas mistakenly filed her answer with the Brazoria County clerk, instead of filing it with the county district clerk or with the

court. Rojas's answer was not forwarded to the district clerk and was not in the court's file until she attached it to her Motion for New Trial. She appeared again at the June 25 hearing, but Scharnberg "passed" on this hearing.

Ten days after the second hearing, Scharnberg's attorney sent a letter to Rojas advising her that "a hearing" was scheduled for July 29. The letter does not indicate the type of hearing, reference any particular motion or request for relief that was to be heard by the trial court on that date, or state that the hearing was for a dispositive decision on the merits. The day before the scheduled hearing, Rojas faxed a letter to Scharnberg's attorney stating that she would be unable to attend the July 29 hearing and requesting that the hearing be rescheduled. There is no evidence that Scharnberg responded to Rojas's request.

Scharnberg appeared at the hearing on July 29, but Rojas did not. Scharnberg initially represented to the court that the hearing concerned his request for temporary orders. After an off-the-record discussion, Scharnberg stated that "[a]fter looking at our notice letter to Ms. Rojas, it does indicate that we would be setting today for the modification on final." The trial court's docket sheet does not contain any entry between June 25 and July 29 showing that the case had been set for trial on July 29. The docket sheet contains a handwritten entry dated July 29 that noted the case was "[s]et on the merits," but does not state when the trial

setting was first announced.[1]

After hearing testimony from Scharnberg and his attorney, the trial court rendered a default judgment in favor of Scharnberg. The "Default Order in Suit to Modify Parent-Child Relationship" stated that Scharnberg appeared and announced ready for trial on July 29, but Rojas "did not appear and wholly made default."

Rojas timely filed her Motion for New Trial along with a supporting affidavit. Scharnberg did not file a response to Rojas' Motion for New Trial. After an oral hearing, which consisted solely of attorney argument, the trial court denied the motion for new trial.

Motion for New Trial After Default Judgment

Rojas argues the trial court erred in denying her motion for new trial on the default judgment because she did not receive notice of the dispositive hearing on the merits and she satisfies all the *Craddock* factors for setting aside a default judgment.

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[1] Scharnberg asserts that the docket sheet shows that the case was set for the July 29 trial well before that date. We disagree with his reading of the docket sheet because nothing indicates when the "Set on Merits" notation was made other than the date itself, which was July 29. More importantly, "In general, a docket entry forms no part of the record that may be considered on appeal; instead, it is merely a memorandum made for the convenience of the clerk and the trial court. One reason for not considering docket entries on appeal is that they are inherently unreliable." *In re K.A.C.O.*, No. 14-07-00311-CV, 2009 WL 508295, at *4 (Tex. App.—Houston [14th Dist.] Mar. 3, 2009, no pet.) (citations omitted).

I. Standard of Review

We review the trial court's denial of a motion for new trial for an abuse of discretion. *See In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006). A trial court abuses its discretion if its decision is arbitrary, unreasonable, and without reference to guiding rules and principles. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997); *Imkie v. Methodist Hosp.*, 326 S.W.3d 339, 344 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

II. Rojas's Appearance

Rojas in her first issue contends that she made an appearance in the trial court, and therefore was entitled under the due process clause of the Fourteenth Amendment to the United States Constitution to notice of all dispositive hearings and trial settings.

Generally, a plaintiff may take a default judgment against a defendant who fails to file an answer. *See* TEX. R. CIV. P. 239. A defendant who fails to answer or appear is not entitled to notice of a hearing on the default judgment. *Wilson v. Wilson*, 132 S.W.3d 533, 536 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). A defendant who makes an appearance in the case, however, is entitled under the due process clause to notice of a trial on the merits or a hearing on a motion for default judgment. *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390–91 (Tex. 1989); *In re Marriage of Runberg*, 159 S.W.3d 194, 197 (Tex. App.—

Amarillo 2005, no pet.) (holding that husband's appearance in divorce suit entitled him to notice of final hearing under due process).

In *LBL*, the defendant had filed a prior pleading, but here Rojas did not file any pleadings with the court. Instead, she mistakenly filed her answer with the county clerk's office. Because she did not file a written answer, whether she made an "appearance" under Texas Rule of Civil Procedure 120 depends "on the nature and quality of the party's activities in the case." *See In re Marriage of Runberg*, 159 S.W.3d at 198 (quoting *Bradford v. Bradford*, 971 S.W.2d 595, 597 (Tex. App.—Dallas 1998, no pet.)). A key issue in examining these activities is whether the defendant takes any "affirmative action which impliedly recognizes the court's jurisdiction over the parties." *Serna v. Webster*, 908 S.W.2d 487, 492 (Tex. App.—San Antonio 1995, no writ).

Rojas appeared twice in the courtroom according to her uncontroverted affidavit. Rojas did not testify on either occasion, but she did inform the court of her intent to defend the lawsuit and her opposition to the TRO. She further stated in her affidavit that she "was sworn to appear on June 25, 2009." We must accept these uncontroverted statements as true. *See Dir., State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268–69 (Tex. 1994) (holding that trial court must accept as true uncontroverted affidavits of moving party when determining whether party has satisfied the elements to set aside default judgment).

Rojas was not merely a "silent figurehead in the courtroom, observing the proceedings without participating." *Bradford v. Bradford*, 971 S.W.2d 595, 598 (Tex. App.—Dallas 1998, no pet.). Merely observing proceedings in the courtroom does not constitute an appearance. *Id.* In *Bradford*, the defendant appeared at two hearings, announced "ready," and testified at one of the hearings. The defendant's actions in *Bradford* constituted an appearance such that the trial court's failure to set aside the default judgment taken without notice to the defendant was an abuse of discretion. *Id.* at 598. This case is similar. Rojas appeared twice, recognized the court's jurisdiction over her, and made affirmative statements to the court during the June 11 hearing that she intended to defend the lawsuit. She therefore made an appearance in the case no later than the second hearing on June 25.

III. Lack of Notice and Default Judgments

Rojas contends that because she made an appearance before the July 29 hearing, she was entitled to notice of the trial setting as a matter of due process.

A defendant who makes an appearance in the case is entitled under the due process clause to notice of a trial on the merits or a hearing on a motion for default judgment. *LBL*, 777 S.W.2d at 390–91. In *LBL*, the sole owner of the defendant company filed a motion to dismiss alleging the Texas court did not have personal jurisdiction. *Id.* at 390. After the trial court denied the motion to dismiss, the

plaintiff moved for a default judgment because the defendant had not filed an answer. He did not, however, serve the defendant with the motion for default judgment or notice of the default judgment hearing. The Texas Supreme Court reversed the default judgment and held, "Once a defendant has made an appearance in a cause, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the federal constitution." *Id.* at 390–91. Because the defendant had no actual or constructive notice of the hearing on the motion for default judgment, which effectively was his trial setting since it was dispositive of the case, his due process rights were violated. *Id.* at 391.

The requirement that a defendant receive notice of a trial setting applies to a hearing on a default judgment because it constitutes a "trial setting" dispositive of the case. *Bradford*, 971 S.W.2d at 597; *Murphree v. Ziegelmair*, 937 S.W.2d 493, 495 (Tex. App.—Houston [1st Dist.] 1995, no writ). The failure to provide the defendant with notice of the trial setting deprives the defendant of his constitutional right to be present and to voice his objections in an appropriate manner. *Bradford*, 971 S.W.2d at 597. "A fundamental element of due process is adequate and reasonable notice of proceedings." *Murphree*, 937 S.W.2d at 495 (quoting *Green v. McAdams*, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ)).

As in *LBL*, the defendant here, Rojas, was not given any notice of a hearing on a default judgment or of a trial on the merits. There is no certificate of service on the letter notifying Rojas of the hearing and the letter was not signed. It contained only a vague reference to a hearing on July 29; it did not state that the hearing concerned a disposition on the merits. Thus, even though Rojas made an appearance, she was not given notice of the default judgment hearing.

Scharnberg responds that Rojas waived her right to receive 45 days notice of the trial setting as required by Texas Rule of Civil Procedure 245. Scharnberg cites *In re Marriage of Parker*, 20 S.W.3d 812, 818 (Tex. App.—Texarkana 2000, no pet.), for the proposition that a defendant waives the right to 45 days notice by not taking any action after receiving notice of the trial setting in less than 45 days. Scharnberg asserts that Rojas knew of the hearing and deliberately chose not to appear. *Parker* is not responsive to Rojas's contentions. Rojas is not contending that she did not receive any notice whatsoever; she claims she did not receive any notice that the scheduled hearing was the final hearing on the merits or a hearing on a default judgment.

We conclude, therefore, that the default judgment was in violation of Rojas's due process rights.

IV. *Craddock* and the Failure to Give Notice

As part of her first issue, Rojas contends that the trial court abused its discretion in denying her motion for new trial because a defendant whose due process rights have been violated by a default judgment is entitled to a new trial without the necessity of meeting the three prong test for a new trial set forth in *Craddock.*

There is some debate among the courts of appeal whether a defendant whose due process rights are violated by a default judgment rendered without proper notice must also satisfy the *Craddock* factors for setting aside a default judgment. In *Craddock*, the Texas Supreme Court set forth three requirements that a defendant must satisfy to set aside a default judgment and grant a new trial: (1) the failure to file an answer or appear at a hearing was not intentional or the result of conscious indifference, but was a mistake or accident; (2) a meritorious defense; and (3) a new trial will not result in delay or prejudice to the plaintiff. *Craddock*, 133 S.W.2d at 126. The same prerequisites for setting aside a no-answer default judgment also apply to a post-answer default judgment. *Dir., State Emp. Workers' Comp. Div.*, 889 S.W.2d at 268. A trial court abuses its discretion by not granting a new trial when all three elements of the *Craddock* test are satisfied. *Id.*; *Blake v. Blake*, 725 S.W.2d 797, 800 (Tex. App.—Houston [1st Dist.] 1987, no writ).

A defaulted defendant who never received notice of a trial setting does not need to meet all the *Craddock* requirements. The defendant in that situation satisfies the first *Craddock* prong that the failure to file an answer or appear was not intentional or the result of conscious indifference. *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005); *Texas Sting, Ltd. v. R.B. Foods, Inc.*, 82 S.W.3d 644, 650 (Tex. App.—San Antonio 2002, pet. denied).[2] The defendant also does not need to show the second prong of a meritorious defense. *Mathis*, 166 S.W.3d at 744. The Texas Supreme Court has not addressed whether the defendant must still satisfy the third prong of lack of injury to the plaintiff. *Id.*; *see Dolgencorp of Texas, Inc. v. Lerma*, 288 S.W.3d 922, 927 n.1 (Tex. 2009) (stating Court need not address whether court dispenses with third *Craddock* prong in lack of notice default judgment because defendant demonstrated all three prongs on appeal).

This court, however, has held that the defendant does not need to prove either the second or third *Craddock* factors when setting aside a default judgment

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[2] Scharnberg further argues that Rojas acted with conscious indifference because she received notice of a hearing that could result in an order affecting her rights to her child. But Rojas had no notice of a hearing that could result in a final disposition of the case. Based on the prior history of the case, she could have reasonably believed, as Scharnberg's attorney stated at the commencement of the hearing, that the hearing concerned the same temporary matters that had previously been set for hearing. A temporary order is far different than a final order. Scharnberg does not provide any authority that notice that does not specify that the hearing will address a final disposition of the case means that a defendant who disregards it is consciously indifferent to the risk of a default judgment in the case. More importantly, the due process clause guarantees the right to reasonable and adequate notice of a trial setting or dispositive proceeding, neither of which were provided to Rojas. *Murphree*, 937 S.W.2d at 495.

for lack of notice of the dispositive hearing. *See Garcia v. Vera*, No. 01-05-1161-CV, 2006 WL 2865033, at *4 (Tex. App.—Houston [1st Dist.] Oct. 5, 2006, no pet.) (holding in SAPCR proceeding that defendant who did not receive notice of trial setting did not need to satisfy last two *Craddock* factors); *see also Mahand v. Delaney*, 60 S.W.3d 371, 375 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (holding in lack-of-notice cases party does not need to satisfy second and third *Craddock* factors and stating that "there is no logical or jurisprudential reason not to apply the same due process analysis to both the second and third prongs" of *Craddock*); *see Green v. McAdams*, 857 S.W.2d 816, 819 (Tex. App.—Houston [1st Dist.] 1993, no writ) (holding that imposing burden to show any of *Craddock* factors on defendant who did not receive notice of trial setting "would violate due process.").[3] Rojas, therefore, did not need to establish the third *Craddock* prong.

[3] Numerous courts have found that a trial court abuses its discretion in denying a motion for new trial when the defendant was not provided notice of the trial or default hearing without reviewing whether the *Craddock* factors have been satisfied or because the *Craddock* elements are inapplicable in that situation. *See, e.g.*, *Bradford*, 971 S.W.2d at 598 (stating that it was unnecessary to reach argument that defendant was entitled to a new trial under *Craddock* because he did not receive notice of default judgment hearing as required by due process); *Murphree v. Ziegelmair*, 937 S.W.2d 493, 495–96 (Tex. App.—Houston [1st Dist.] 1995, no writ) (stating that trial court's failure to give notice that a party's post-answer failure to attend a pretrial conference could result in a default judgment violated right to due process without any analysis under *Craddock*); *Moreno v. Polinard*, No. 04-08-00493-CV, 2009 WL 475953, at *1 (Tex. App.—San Antonio Feb. 25, 2009, no pet.) (ignoring *Craddock* requirements and holding that trial court erred in granting default judgment against a defendant who had not filed an answer, but had made an appearance and did not receive notice of default judgment hearing).

Finally, Rojas contends in her second issue that she satisfies the first and third prongs of *Craddock* regardless. We agree. Rojas demonstrated through her uncontested affidavit that her failure to appear at trial was not the result of conscious indifference. While she was aware of a scheduled hearing, she was not given notice that the case was set for final disposition that day. Her failure to file an answer was also not the result of conscious indifference but resulted from her misfiling the answer to the county clerk rather than the district clerk. *In re Marriage of Parker*, 20 S.W.3d 812, 817 (Tex. App—Texarkana 2000, no pet.) (stating that "if the defendant did not receive notice of trial, it cannot be said that

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Other courts have held that the *Craddock* factors are modified and that it is only necessary to satisfy the first *Craddock* element that the failure to attend the final hearing was not intentional or the result of conscious indifference. *Tex. Sting, Ltd.* v. *R.B. Foods, Inc.*, 82 S.W.3d 644, 651–52 (Tex. App.—San Antonio 2002, pet. denied) (holding trial court rendered post-answer default judgment without proper notice so defendant relieved from establishing second and third prongs of *Craddock* and that the first prong is satisfied by proving the due process violation); *In re Marriage of Parker*, 20 S.W.3d 812, 817 (Tex. App.—Texarkana 2000, no pet.) (holding that when defendant did not receive notice, the motion for new trial should be reviewed under first *Craddock* prong, but not the second and third prongs).

Still other courts have held that a party who demonstrates that it has been denied due process through lack of notice of a trial setting has necessarily satisfied the first element. *Smith v. Holmes*, 53 S.W.3d 815, 817 (Tex. App.—Austin 2001, pet. denied); *see also Coastal Banc SSB v. Helle*, 48 S.W.3d 796, 801 n.6 (Tex. App.—Corpus Christi 2001, pet. denied) (holding that the defendant satisfied the first element by demonstrating that it did not receive notice of the hearing and stating that the court did not have to address the last two prongs of *Craddock*). As explained in *Smith*, a party could not intentionally or with conscious indifference fail to appear or otherwise participate in the trial when the party does not receive notice of the trial. *Smith*, 53 S.W.3d at 818.

he acted intentionally or out of conscious indifference"). Even a slight excuse is sufficient to satisfy the first prong of *Craddock*. *P & H Transp., Inc. v. Robinson*, 930 S.W.2d 857, 861 (Tex. App.—Houston [1st Dist.] 1996, writ denied); *see also Garcia*, 2006 WL 2865033, at *4 (noting that under liberal construction of *Craddock* in a SAPCR proceeding an uncontroverted "slight excuse" for failing to appear at trial satisfies first prong).

Rojas also satisfied the third prong of *Craddock* that a new trial will not result in delay or prejudice to Scharnberg. She asserted in her motion for new trial that granting a new trial would not cause delay and her affidavit stated that she would be ready for trial at the court's earliest convenience. Scharnberg did not contest her affidavit and offered no evidence to demonstrate injury. In fact, he did not reply to her motion for new trial at all. *See Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex. 1994) (explaining that it is well-settled that defendant satisfies burden if plaintiff fails to controvert defendant's factual assertions in motion for new trial affidavits); *see also Parker*, 20 S.W.3d at 816 n.2 (stating that trial court is bound to accept as true movant's affidavits in support of motion for new trial after default judgment, unless opponent requests evidentiary hearing). Rojas did not offer to pay Scharnberg's attorney fees at the motion for new trial, but such an offer is not a precondition for granting a motion for new trial to set

aside a default judgment. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987) (citing *Angelo v. Champion Rest. Equip. Co.*, 713 S.W.2d 96, 97 (Tex. 1986)).

V. *Craddock* and SAPCR Proceedings

Scharnberg contends that we should not apply the *Craddock* test in a suit affecting the parent-child relationship (SAPCR) but rather allow the trial court to make its ruling based on the best interests of the child. Scharnberg suggests that we follow the reasoning of *Lowe v. Lowe*, 971 S.W.2d 720, 725 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). In that case, the court stated its "reluctance to apply" *Craddock* to a SAPCR proceeding and that it did not believe *Craddock* "is an appropriate test for suits involving the parent-child relationship." *See also Little v. Little*, 705 S.W.2d 153, 154 (Tex. App.—Dallas 1985, writ dism'd) (holding "that the best interests of the child override strict application of the *Craddock* test").

We note as an initial matter that the court in *Lowe* applied *Craddock* despite its reluctance, noting that "absent contrary guidance from the supreme court, we remain bound to apply *Craddock*." *Lowe*, 971 S.W.2d at 725. We agree that *Craddock* applies. Moreover, our court has previously held that this line of cases does not warrant jettisoning the *Craddock* factors. *Garcia*, 2006 WL 2865033, at *4. Instead, we apply those factors "very liberally to the facts of each case." *Id.*

We do agree with Scharnberg that the child's best interest is the paramount concern in a SAPCR. But the trial court may well be aided in determining the best interests of the child by a proceeding in which both parents participate. To increase the likelihood of such participation, a parent in a SAPCR needs to provide the other parent with adequate and reasonable notice of the time and nature of any hearing.

We decline Scharnberg's invitation to modify the *Craddock* test for a SAPCR and sustain Rojas's first issue.

Conclusion

The trial court abused its discretion in failing to set the default judgment aside and grant a new trial. We do not need to reach Rojas's third and fourth issues because of this conclusion. The judgment is reversed and the cause is remanded for a new trial.

Harvey Brown
Justice

Panel consists of Justices Jennings, Higley, and Brown.