

Opinion issued December 15, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00943-CV

JAMES LARRY, Appellant

V.

**CITY OF PRAIRIE VIEW BOARD OF ADJUSTMENT & APPEALS,
Appellee**

**On Appeal from the 506th District Court
Waller County, Texas
Trial Court Case No. 06-09-18499**

MEMORANDUM OPINION

Plaintiff-appellant James Larry appeals the trial court's failure to award damages in conjunction with a default judgment rendered against defendant-

appellee City of Prairie View Board of Adjustment & Appeals (Prairie View Board). We affirm.

BACKGROUND

Larry sued the Prairie View Board alleging that it did not follow the proper procedures for deeming a building he owns “substandard” and ordering it be demolished.

A. Larry’s Claims

Larry’s verified Original Petition, filed September 29, 2006, asserts that (1) he was not given information about why his building was considered substandard, and (2) he was improperly denied the opportunity to repair the building to remedy any code violations. According to Larry, the Prairie View Board’s actions with respect to his property violated the Prairie View Code of Ordinances and were thus illegal and violated his due process rights.

B. Requested Relief

Larry’s petition contained the following prayer for relief:

WHEREFORE, Plaintiff’s [sic] pray that the Defendant be duly cited to appear and answer herein; that upon a final trial of this cause, Plaintiff is granted an injunction to prevent the demolition of said premises and

1. Judgment against Defendants for Plaintiff’s damages as set forth above, in an amount within the jurisdictional limits of this Court;
2. Costs of court;
3. Attorney’s fees; and

4. Such other and further relief to which Plaintiff's [sic] may be entitled.

C. Larry's Motion for Default Judgment

In 2010, Larry filed a motion for default judgment alleging that the Prairie View Board had failed to answer after being properly served and requesting that "the court grant[] this Motion for Default Judgment and enter a default judgment against the Defendant." Attached to this motion was (1) proof of service on the Prairie View Board, and (2) an affidavit setting forth the details and dates of Larry's various communications with the Prairie View Board's representatives and stating that the "actions and lack of response by the City of Prairie View has affected the normal operations of my business activities since 2006."

D. The Trial Court's Judgment

On August 31, 2010, the trial court held a hearing on Larry's motion for default judgment. Larry appeared and announced ready. No one appeared on behalf of the Prairie View Board. Without hearing evidence, the court deemed the allegations in Larry's petition admitted and ruled that "plaintiff is entitled to an injunction as prayed for." It thus ordered that the Prairie View Board "desist and refrain from demolishing" Larry's building "until defendant has complied with the provisions of the Substandard Building Code as adopted by the City of Prairie View City Council." The court's judgment did not award damages, as "[n]o damages ha[d] been prayed for, nor presented, nor proven."

E. Larry's Motion for New Trial

Larry filed a motion for new trial stating that he had “previously prayed for damages in his Original Petition,” but “inadvertently did not include an affidavit concerning damages with his motion for default judgment.” He attached an affidavit “concerning damages” and requested that the court grant his motion for new trial and “enter a new default judgment which includes an award of damages to Plaintiff.” The attached affidavit stated that “the actions and lack of response by the City of Prairie View has affected the normal operations of my business activities since 2006.” It further averred that he had operated a towing business out of his building and that he had “suffered lost profits of at least \$4,234,862 from [his] inability to operate his towing business” since 2006.¹ The motion was overruled by operation of law.

PARTIES' ARGUMENTS

Larry brings two issues on appeal:

1. Did the City of Prairie View Board of Adjustment & Appeals violate James Larry's due process rights, thereby causing damages?
2. Did the Trial Judge deny James Larry damages, caused by the City of Prairie View Board of Adjustments & Appeals, which were prayed for in his original petition?

¹ The affidavit references attached “financial statements.” It is not apparent, however, if or how the lost profits amount of \$4,234,862 was derived from the attached one-page income statement for Black Cat Towing and Recovery reflecting revenues, expenses, and net income before taxes for the years 2002–2005.

Larry contends that the Prairie View Board improperly interfered with his business operations by ordering his building demolished and depriving him of an avenue to resolve the dispute. He argues that he prayed for damages in his petition that the trial court should have awarded to him in the default judgment. He thus requests that this Court award him \$4,234,862.

In response, the Prairie View Board asserts that Larry's request in his petition that he be awarded "damages as set forth above in an amount within the jurisdictional limits of this Court" was insufficient to provide fair notice of the damages Larry sought. It points out that there are no damages "set forth above" in the petition. It thus requests that we affirm the trial court's judgment.

APPLICABLE LAW

When a no-answer default is entered against a party on an unliquidated claim, the non-answering party is deemed to have admitted all facts properly pleaded, except for the amount of damages. *Texas Commerce Bank, Nat'l Ass'n v. New*, 3 S.W.3d 515, 516 (Tex. 1999); *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *Whitaker v. Rose*, 218 S.W.3d 216, 220 (Tex App.—Houston [14th Dist.] 2007, no pet.).

"After a default judgment occurs, unliquidated damages, i.e., damages not expressly provided for within a written instrument, must be proven to the trial court." *Lucas v. Clark*, 347 S.W.3d 800, 803 (Tex. App.—Austin 2011, no pet.)

(citing TEX. R. CIV. P. 243). Unliquidated damages can be proved up through an evidentiary hearing or with affidavits. *Texas Commerce Bank, Nat'l Ass'n*, 3 S.W.3d at 517.

“Recovery for unliquidated damages in the form of lost profits . . . requires that the injured party do more than show that it suffered some lost profits.” *Lucas*, 347 S.W.3d at 803. The amount of the loss must be shown by competent evidence with reasonable certainty. *Heine*, 835 S.W.2d at 84. To meet this reasonably-certain-evidence standard, opinions or estimates of lost profits must, at a minimum, be based on objective facts, figures, or data from which the amount of lost profits can be ascertained. *Id.*

ANALYSIS

Larry complains that he requested in his petition an award of actual damages “in an amount within the jurisdictional limits of this Court,” but was not awarded lost profit damages by the trial court. Absent special exceptions, a plaintiff’s request for an award of damages “within the jurisdictional limits of the court” is sufficient to provide notice pleading of a claim for unliquidated damages. TEX. R. CIV. P. 47; *see also Cont'l Sav. Ass'n v. Gutheinz*, 718 S.W.2d 377, 383 (Tex. App.—Amarillo 1986, writ ref’d n.r.e.) (“[T]he pleadings met the requirement to state that the damages sought exceed the minimum jurisdictional limits of the court.”).

Whether Larry *pleaded* actual damages, however, is not the relevant inquiry because pleadings cannot prove up unliquidated damages in a default judgment. *See* TEX. R. CIV. P. 243. In his motion for default judgment, Larry did not request an award of damages. He also failed to provide any evidence of lost profit damages at the default judgment hearing or with supporting affidavits.

The trial court did not err by not awarding unliquidated lost profits damages to Larry that were not requested nor proven up with evidence. Larry purported to prove up his lost profits for the first time with an affidavit attached to his motion for new trial. We need not address the deficiencies in that evidence or whether Larry otherwise satisfied the requirements for obtaining a new trial based on new evidence² because Larry does not argue here that the trial court abused its discretion by denying his motion for new trial.

CONCLUSION

We affirm the trial court's judgment.

² *See, e.g., Chapman v. Abbot*, 251 S.W.3d 612, 620 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“A party who seeks a new trial on the ground of newly discovered evidence must satisfy the court that (1) the evidence has come to his knowledge since the trial, (2) it was not owing to want of due diligence that the evidence did not come to his attention sooner, (3) the evidence is not cumulative, and (4) the evidence is so material that it would probably produce a different result if a new trial were granted.”).

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.