Opinion issued June 28, 2022.

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00205-CV

PAUL DOUGLAS HANKS, Appellant

V.

WENDY ROY HANKS, Appellee

On Appeal from the 461st Judicial District Court
Brazoria County, Texas
Trial Court Case No. 89979-F

MEMORANDUM OPINION

Paul Douglas Hanks appeals the trial court's default judgment for Wendy Roy Hanks. The trial court erred in denying Paul's motion to set aside the default judgment because Paul was not given notice of the trial setting, so we reverse and remand for a new trial.

Background

Paul Hanks and Wendy Hanks divorced in 2018. The same year, Wendy petitioned to enforce the property division in the divorce decree. In August 2019, Paul's attorney moved to withdraw. A hearing was held on August 26, 2019, that reset the trial to November 2019, but it did not address the motion to withdraw. Paul's trial counsel attended that hearing, but Paul did not. Later, Paul's trial counsel filed an amended motion to withdraw, and a hearing was held that led to an order discharging Paul's trial counsel. Paul did not attend. In November 2019, a final hearing on Wendy's petition was held, and Paul did not attend. As a result, the trial court signed an order granting a default judgment against Paul.

Paul moved to set aside the default judgment. The trial court denied Paul's motion, and Paul filed this appeal. We abated and remanded the case to the trial court to determine when Paul first received actual notice of the default judgment or learned of the signing of the judgment. The trial court held the evidentiary hearing and found that Paul received actual notice of the default judgment on January 8, 2019. This appeal was then reinstated.

I. Applicable Law

A. Standard of Review

We review the denial of a motion to set aside a default judgment for an abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma,* 288 S.W.3d 922, 926 (Tex.

2009) (per curiam). The test for an abuse of discretion is whether the trial court acted in an arbitrary or unreasonable manner, or without reference to any guiding rules or principles. *In re Garza.*, 544 S.W.2d 836, 840 (Tex. 2018).

B. Motion for New Trial

The record must show that the appellant raised his complaint to the trial court in the form of a timely request, objection, or motion. TEX. R. APP. P. 33.1(a). A complaint on appeal about a trial court's failure to set aside a default judgment must be raised in a motion for new trial. TEX. R. CIV. P. 324(b)(1). The movant's motion must: (1) establish that the failure to appear was not intentional or the result of conscious indifference; (2) set up a meritorious defense; and (3) show that setting aside the default judgment would not delay or otherwise injure the plaintiff. *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939); *Lopez v. Lopez*, 757 S.W.2d 721, 722 (Tex. 1988) (per curiam) (the *Craddock* test applies to post-answer default judgments). The *Craddock* test "is based upon equitable principles and 'prevents an injustice to the defendant without working an injustice on the plaintiff.'" *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685 (Tex. 2002) (quoting *Craddock*, 133 S.W.2d at 126).

When a party has not received notice of a trial setting, the first prong of *Craddock* is satisfied, and the party need not meet the remaining prongs of the test to be entitled to a new trial. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84

(1988) ("failure to give notice violates 'the most rudimentary demands of due process of law.'"); *Lopez*, 757 S.W.2d at 723 (dispensing with second *Craddock* prong when party was not given notice of trial setting); *In re Marriage of Runberg*, 159 S.W.3d 194, 200 (Tex. App.—Amarillo 2005, no pet.) (dispensing with the third prong when a party was not given notice of a trial setting). When the *Craddock* test has been satisfied, a trial court abuses its discretion by denying a motion for new trial. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987).

II. Analysis

A. Jurisdiction

Wendy asks this Court to dismiss Paul's appeal for want of jurisdiction because Paul did not timely move to set aside default judgment, making his notice of appeal untimely as well. Wendy also argues that Paul has failed to meet his evidentiary burden to establish the date on which he first received notice of the judgment or acquired actual knowledge of its signing. "A court always has jurisdiction to determine its jurisdiction." *Jackson v. City of Texas City*, 265 S.W.3d 640, 644 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). To perfect an appeal, a party must file a notice of appeal "within 30 days after the judgment is signed." TEX. R. APP. P. 26.1. But that deadline is extended to 90 days if any party timely moves for new trial. TEX. R. APP. P. 26.1(a). Normally, a motion for new trial must be filed within 30 days after the judgment is signed. TEX. R. CIV. P. 329b(a). But the

filing period for post-judgment motions, along with the trial court's plenary power, is extended if a party does not receive notice or actual knowledge of the judgment within 20 days of its signing. TEX. R. CIV. P. 306a(4).

On remand, the trial court held an evidentiary hearing and found that Paul received actual notice of the default judgment entered against him on January 8, 2019. For that reason, the deadline to file a notice of appeal was extended from 30 days to 90 days after the judgment was signed. TEX. R. APP. P. 26.1(a). Paul filed his notice of appeal within those 90 days. And so, Paul timely moved to set aside the default judgment. TEX. R. CIV. P. 306a(4). Thus, this Court has jurisdiction over Paul's appeal.

B. Motion for New Trial

Paul asks the Court to reverse the trial court's judgment because he did not receive notice of the trial setting. *See Peralta*, 485 U.S. at 8 But if Paul failed to establish that he did not receive notice of the November 2019 trial setting then the trial court's decision must be upheld. Notice properly sent under Rule 21a is presumed received. TEX. R. CIV. P. 21a(e); *Cliff*, 724 S.W.2d at 780. If that notice is challenged, it must be proved according to the rule. *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005). Rule 21a requires service on the applicable party, that party's authorized agent, or their attorney of record. TEX. R. CIV. P. 21a(a).

1. Imputed Notice

Paul denies ever receiving notice of the trial setting. By contrast, Wendy argues that Paul received notice because his attorney agreed to the trial setting before his withdrawal, so his knowledge was imputed to Paul.

The attorney-client relationship is one of agency. *See Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 693 (Tex. 1986). "Knowledge acquired by an attorney during the existence of an attorney-client relationship, and while acting in the scope of his or her authority, is imputed to the client." *McMahan v. Greenwood*, 108 S.W.3d 467, 480–81 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). But when an attorney withdraws from their representation before conclusion of the proceedings, knowledge possessed by the attorney cannot be imputed to their client. *Tactical Air Def. Servs., Inc. v. Searock*, 398 S.W.3d 341, 346 (Tex. App.—Dallas 2013, no pet.) If a statute or rule provides the manner that notice must be given, that provision "must be followed with reasonable strictness." *Id*. at 346–47 (citing *John v. State*, 826 S.W.2d 138, 141 n. 4 (Tex. 1992)).

Rule 10, the rule governing withdrawal of counsel, contains provisions that protect the client's interest. TEX. R. CIV. P. 10; *see Moss v. Malone*, 880 S.W.2d 45, 50 (Tex. App.—Tyler 1994, writ denied). A motion to withdraw must state, among other things, "that a copy of the motion has been delivered to the party; that the party has been notified in writing of his right to object to the motion; whether the party

consents to the motion; the party's last known address and all pending settings and deadlines." TEX. R. CIV. P. 10. Rule 10 also requires that "[n]otice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail." *Id.*

A trial date was not set when Paul's attorney moved to withdraw. The motion stated (1) that a copy of the motion was delivered to Paul; (2) that Paul had been notified in writing of his right to object to the motion; (3) that Paul did not consent to the motion; and (4) Paul's last known address and all pending settings and deadlines. *See* TEX. R. CIV. P. 10. Confusingly, the motion stated that a hearing on the matter was set for August 26, 2019, but the cover letter included with the motion listed the hearing date as August 15, 2019. Paul's attorney filed an amended motion to withdraw that added a date for the trial setting and a new date for the hearing on the motion to withdraw. Afterward, the trial court granted the amended motion to withdraw and stated that there were no pending settings or deadlines in the case.

The record contains no return receipt from certified or registered mail, and there is no affidavit certifying service for Paul in either motion to withdraw. "A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service." TEX. R. CIV. P. 21a(e). The attorney's motion to withdraw and amended motion to withdraw included a certificate of service, but it only addressed

service on Wendy's attorney and not Paul. Paul's testimony and exhibit attached to his motion to set aside default judgment are the only evidence of service, but that only concerns the motion to withdraw that had no trial setting. Thus, Paul's attorney failed to comply with the requirements of Rule 10. *See* TEX. R. CIV. P. 10; *Searock*, 398 S.W.3d at 346–47 (there is no imputed notice when an attorney did not comply with the way notice must be given in a particular instance); *see also Walton v. Walton*, No. 11-15-00298-CV, 2018 WL 386422, at *5–6 (Tex. App.—Eastland Jan. 11, 2018, no pet.) (mem. op.) (violating Rule 10 precludes a finding of imputed notice). In short, no notice may be imputed to Paul about the trial setting.

2. Notice of the Trial Setting

Pursuant to Rule 21a, a properly sent notice creates a presumption that it was received by the addressee. TEX. R. CIV. P. 21a; *See Mathis*, 166 S.W.3d at 745. Wendy relies on this to argue that Paul cannot prove lack of notice. But the Court cannot presume that notice was properly sent on this record. *Id.* And Paul challenging that notice means that notice must be proved according to the rule. *Id.*

Here, the record contains no certificate of service for Paul, no return receipt from certified or registered mail, and no affidavit certifying service, so there is not prima facie evidence of service. TEX. R. CIV. P. 21a(e). Moreover, Rule 21a states that "[n]othing herein shall preclude any party from offering proof that the document was not received, or, if service was by mail, that the document was not received

within three days from the date that it was deposited in the mail." *Id*. Paul testified that he had moved and received the motion to withdraw but did not receive the amended motion to withdraw. Paul believed that there were no pending settings based on the information within the motion to withdraw. Because the record does not show proper service under Rule 21a, no presumption is created that Paul received notice.

Wendy further argues that when Paul testified that he was unaware of anything happening in his case after August 6th he contradicted his unsworn declaration in his motion to set aside the default judgment that he received a letter and motion to withdraw from his attorney after August 15th, so he had notice. Even if Paul contradicted himself, the motion he says he received was not the amended motion to withdraw which had the trial setting. Moreover, even if the trial judge disbelieved any part of Paul's declaration or testimony, that is not evidence that service occurred. *See Mathis*, 166 S.W.3d at 745 (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984)). Thus, this argument fails.

Wendy also argues that the trial court was the factfinder and the sole judge of the evidence and credibility of witnesses, so its denial of the motion to set aside the default judgment shows that Paul did not establish that he lacked notice of the trial setting. But the trial court stated in its ruling that Paul's motion was denied because "[i]t was not timely filed. So, therefore, [the court] lost plenary power—basically,

the authority–to do anything besides deny [it].” Because the trial court did not evaluate whether Paul was notified of the trial setting, its denial of the motion to set aside the default judgment does not resolve the notice issue.

Finally, Wendy argues she established constructive notice because Paul engaged in selective acceptance or refusal of certified mail in this case. *See Approximately $14,980.00 v. State*, 261 S.W.3d 182, 189 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Wendy relies on the fact that Paul admitted to having received the motion to withdraw but denied having received the amended motion that contained the trial setting as evidence that he engaged in selective acceptance or refusal. But constructive notice requires that Paul’s attorney complied with Rule 21a, and there must be evidence that Paul engaged in selective acceptance or refusal of certified mail in this case. *Id.* Paul’s attorney did not comply with Rule 21a, so the constructive notice argument is unavailing.

In brief, there was no evidence that the amended motion to withdraw listing the trial setting was properly sent or delivered to Paul, so it cannot be said that Paul received notice of the setting. TEX. R. CIV. P. 10; TEX. R. CIV. P. 21a. Thus, Wendy’s notice arguments fail.

3. *Craddock* Test

The *Craddock* test is one based on equitable principles to prevent “an injustice to the defendant without working an injustice on the plaintiff.” *Carpenter,* 98 S.W.3d

at 685 (citing *Craddock*, 133 S.W.2d at 126); *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966) (citing equitable principles to extend *Craddock* to cases in which a party has answered but failed to appear for trial). The purpose of the *Craddock* test is to address unduly harsh and unjust results when the defaulting party has no other remedy. *See Craddock*, 133 S.W.2d at 126.

Before turning to the substance of the *Craddock* test, we must address Wendy's argument that Paul failed to timely move for new trial and that he failed to preserve the issue for appeal because he did not conduct a *Craddock* analysis in his motion. First, the trial court found that Paul did not receive notice of the default judgment until January 8, 2020, meaning that Paul's motion to set aside the default judgment was timely. As to the preservation issue, the record must show that Paul raised the issue complained of to the trial court in the form of a timely request, objection, or motion. TEX. R. APP. P. 33.1(a); *Laws v. State*, 640 S.W.3d 227, 228–29 (Tex. Crim. App. 2022) (a party need not use magic words to preserve error). The motion need only "provide the trial judge and opposing counsel an opportunity to address, and if necessary, correct the purported error." *Laws*, 640 S.W.3d at 228–29. Paul's motion to set aside the default judgment complained of lack of notice to the trial court, so the issue was preserved for appeal. *See* TEX. R. APP. P. 33.1(a).

Now, we consider whether Paul has satisfied the first element of *Craddock* by establishing that his failure to appear was not intentional or the result of conscious

indifference. *See Craddock*, 133 S.W.2d at 126. Conscious indifference occurs when "the defendant knew [he] was sued but did not care." *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 576 (Tex. 2006) (per curiam). The excuse provided by the party challenging the default judgment need not be a good one to suffice. *See id.* (citing *Craddock*, 133 S.W.2d at 125).

In support of her argument, Wendy contends that because Paul knew his old address was still on file with the trial court, and he made no effort to correct it or ask about the status of his case, his failure to appear was either intentional or the result of conscious indifference. Yet unless failing to update his address with the trial court was intentional rather than a mistake, "due process requires some lesser sanction than trial without notice or an opportunity to be heard." *Mathis*, 166 S.W.3d at 746.

There is no evidence that Paul's failure to update his address was intentional. Instead, there is testimony that Paul notified his former attorney that he had moved to a new address, that he was unaware that he had to update his address with the trial court, and that mail was being forwarded to his new address. Paul testified that he received the motion to withdraw and the default judgment after they were forwarded to his new address, but that he received no other documents.

Paul also provided uncontroverted testimony that he was receiving medical care that caused him to be on bedrest beginning in July 2019. Attached to his motion to set aside the default judgment was his doctor's note that he would be receiving

treatment for the next four to six months and would be unable to attend court due to his medical problems. Paul also provided testimony that he had attempted multiple times to contact his former attorney in the latter half of 2019 but had not received a response. Moreover, up until his attorney's withdrawal, Paul had made all necessary appearances and had been actively responding to the case.

Here, the record establishes that Paul's failure to appear at trial was not intentional or due to conscious indifference, so the first prong of *Craddock* has been satisfied. *Craddock*, 133 S.W.2d at 126. When the first prong is established, the courts have dispensed with the need to satisfy the second and third elements for constitutional reasons. *See Lopez*, 757 S.W.2d at 723; *Mathis*, 166 S.W.3d at 744 (discussing when the courts of appeals have dispensed with the third element). Since Paul had no notice of the trial setting, the trial court erred in denying his motion to set aside the default judgment. *See Peralta*, 485 U.S. at 84; *Mathis*, 166 S.W.3d at 746. We reverse and remand to the trial court for a new trial.

III. Conclusion

In sum, because the *Craddock* test was satisfied, the trial court abused its discretion in refusing to set aside the default judgment against Paul. We reverse the trial court's judgment and remand the case for a new trial.

Sarah Beth Landau
Justice

Panel consists of Justices Goodman, Landau, and Countiss.