Opinion issued July 21, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00581-CV

JOE ARMAND DJOMO, Appellant

V.

RUTH LEUKEU TCHENGWE, Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Case No. 2019-84293

MEMORANDUM OPINION

Appellant Joe Armand Djomo challenges the trial court's default protective order rendered based on the application filed by appellee Ruth Leukeu Tchengwe. In his sole issue, Djomo argues that the trial court erred in denying his motion for new trial, which requested the trial court to set aside the default protective order

and hold a new hearing on the merits. Because we conclude that Djomo did not satisfy all the requirements for obtaining a new trial, we affirm.

Background

Tchengwe and Djomo are married but separated and are the parents of two minor children. On November 22, 2019, Tchengwe filed an application for a protective order, alleging that Djomo had "engaged in conduct that constitutes family violence as defined in Section 71.004 of the Texas Family Code"; that Djomo had "committed acts that were intended . . . to result in physical harm, bodily injury, assault, or sexual assault against" her; that he had "committed an act constituting a felony offense involving family violence" against her; and that he had "caused serious bodily injury to [her]."

Tchengwe supported the application with an affidavit recounting several instances of violence by Djomo against her, beginning in 2014 when the couple lived in Cameroon. According to her affidavit, several additional incidents of violence occurred while the couple lived in Harris County, Texas, including an assault on July 23, 2019 that resulted in the couple's separation and Djomo's arrest and subsequent indictment for the offense of assault against a family member. Tchengwe obtained a Magistrate's Order for Emergency Protection in connection with the criminal case against Djomo. According to the affidavit, while that emergency protection order was in place, Djomo came to her home in violation of

the protection order at 4:00 a.m., knocked on her door, and called to her. He left before police arrived, and Tchengwe was able to leave safely with her children.

The trial court granted a temporary protective order. Djomo answered the application for protective order with a general denial, and he specifically denied that he had engaged in conduct constituting family violence. The trial court set the case for a hearing on February 3, 2020, but the case was subsequently reset numerous times. The trial court held a preliminary hearing with the parties to address issues such as procuring interpreters and the logistics of using Zoom to conduct the hearing. The parties also discussed terms of an agreed protection order but were unable to reach an agreement.

The final hearing was eventually set for July 17, 2020, at 9:30 a.m. via Zoom. Neither Djomo nor his counsel appeared at that time, and after waiting several minutes, the trial court proceeded with a default hearing. Tchengwe testified at the hearing about Djomo's acts of violence against her and her need for a protective order. The trial court rendered a protective order for a duration of ten years.

Djomo and his attorney subsequently attempted to log into Zoom at 1:30 p.m. for the hearing, at which time they realized that they had mistaken the time for the hearing. Djomo's attorney contacted the trial court that same day, and timely filed a motion for new trial seeking to have the default order set aside.

Djomo argued that his failure to appear was a mistake based on confusion surrounding the numerous resets of the case and was not intentional or the result of conscious indifference. He and his counsel both provided affidavits stating facts to support the basis for their misunderstanding regarding the timing of the hearing. The motion for new trial also stated that the "cause of action is based on an Application for Protective Order. To this cause of action, Joel Armand Djomo can and does set up the meritorious defense to the cause of action in this case." It further stated, "A new trial in this case will neither occasion delay nor prejudice [Tchengwe]," and that Djomo "will tender reasonable costs and expenses incurred by reason of this motion." The trial court denied the motion for new trial, and this appeal followed.

Motion to Set Aside Default Judgment and Grant New Trial

In his sole issue, Djomo argues the trial court abused its discretion in failing to set aside its default protective order and grant a new trial because he had established that his failure to attend the hearing was due to a mistake or accident as provided for in *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex. 1939). *Craddock* directs a trial court to set aside a default judgment and grant a new trial if (1) the failure to appear before judgment was due to a mistake or an accident and was not intentional or the result of conscious indifference, (2) the motion for new trial sets up a meritorious defense, and (3) the motion is filed at a time when its

granting will not cause delay or injury to the plaintiff. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925–26 (Tex. 2009) (per curiam) (citing *Craddock*, 133 S.W.2d at 126). We review the trial court's ruling on a motion for new trial for an abuse of discretion. *See id.* at 926.

Djomo's arguments focus primarily on the first *Craddock* element—whether his failure to appear was due to a mistake or an accident and was not intentional or the result of conscious indifference. Djomo's motion for new trial asserted facts demonstrating that he and his counsel had actively engaged in litigating the protective order, including communicating with Tchengwe's counsel minutes before the hearing was set to occur. Djomo alleged that his counsel "did not catch the change in time for the hearing of July 17, 2020 at 1:30 pm to July 17, 2020 at 9:30 am," and, as a result they both missed the hearing. Djomo and his attorney both provided affidavits supporting these facts.

However, the *Craddock* standard also requires that Djomo "set up" a meritorious defense in his motion for new trial. *See id.* at 927. "Setting up a meritorious defense does not require proof 'in the accepted sense.'" *Id.* at 927–28 (quoting *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966)). This does not mean that the motion should be granted if it merely alleges that the defendant "has a meritorious defense." *Ivy*, 407 S.W.2d at 214. Rather, a motion for new trial sets up a meritorious defense if in it the movant alleges facts that in law would

constitute a defense to the plaintiff's claim and supports those facts by affidavits or other evidence providing prima facie proof that the defendant has such a defense. *Lerma*, 288 S.W.3d at 928.

Djomo's motion for new trial contains only a conclusory statement that Tchengwe's "cause of action is based on an Application for Protective Order" and that Djomo "can and does set up the meritorious defense to the cause of action in this case." Nothing in this motion asserts any facts that would constitute a defense to Tchengwe's factual claims made in her pleadings, supporting affidavit, or trial testimony. Nor do the affidavits filed with the motion for new trial contain any evidence providing prima facie proof that Djomo has such a defense. Both affidavits contain only statements relevant to the reasons for missing the hearing.

Djomo's sole argument regarding this element in his appellate brief asserts that he "had a meritorious defense as he had filed an answer denying that he had committed family violence and expressed that in his motion to set aside default and motion for new trial." His pleadings, however, are not competent evidence. *See Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (holding that party's pleadings are not substitute for competent evidence, even if pleadings are sworn or verified); *Ceramic Tile Int'l, Inc. v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004, no pet.) (holding that pleadings "are not evidence, unless offered and admitted as evidence by the trial court");

Posada v. Perkins, No. 05-20-00535-CV, 2022 WL 99998, at *3–4 (Tex. App.—Dallas Jan. 11, 2022, no pet.) (mem. op.) (holding general denial "would have put appellees to their proof, but it does not—standing alone—constitute a legal defense to their pleaded allegations"). And, as stated above, conclusory statements are not sufficient to meet the second *Craddock* element. *See Lerma*, 288 S.W.3d at 928 (holding that movant must allege facts that in law would constitute a defense to plaintiff's claim and support those facts by affidavits or other evidence providing prima facie proof that movant has such defense); *Ivy*, 407 S.W.2d at 214 (holding that movant does not satisfy second *Craddock* element if motion for new trial merely alleges that defendant "has a meritorious defense").

Djomo failed to provide prima facie proof that he had a meritorious defense to the protective order. *See, e.g.*, *Dupuy v. Williams*, No. 14-19-00463-CV, 2021 WL 5707430, at *8 (Tex. App.—Houston [14th Dist.] Dec. 2, 2021, pet. denied) (mem. op.) (applying *Craddock* in context of challenge to default protective order and holding that trial court did not abuse its discretion in denying motion for new trial when appellant failed to provide prima facie proof of meritorious defense to protective order); *Novik v. Lendr, LLC*, 592 S.W.3d 907, 915 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Because Djomo did not meet all three *Craddock* elements, the trial court did not abuse its discretion in denying his motion for new trial. *See Dupuy*, 2021 WL 5707430, at *8.

We overrule Djomo's sole issue.

Conclusion

We affirm the order of the trial court.

Richard Hightower
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.