**Petition for Writ of Mandamus Denied and Memorandum Opinion filed February 9, 2010**

**In The**

# Fourteenth Court of Appeals

**NO. 14-09-01058-CV**

**IN RE JOHN DRAKE, Relator**

**ORIGINAL PROCEEDING**
**WRIT OF MANDAMUS**

## MEMORANDUM OPINION

On December 21, 2009, relator, John Drake, filed a petition for writ of mandamus in this Court. *See* Tex. Gov't Code Ann. §22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. Relator asks this Court to compel the Honorable Jaclanel McFarland, presiding judge of the 133rd District Court of Harris County, to set aside her September 16, 2009 order granting a motion for new trial. We deny the petition.

### BACKGROUND

On January 27, 2009, relator served real party in interest, Sandra Roach Godfrey, with an original petition and citation. After Godfrey failed to appear and file an answer, relator moved for a default judgment. On April 2, 2009, the trial court signed the default judgment in favor of relator. On April 17, 2009, Godfrey filed an unverified motion for new trial, asserting that (1) the failure to file an answer was not intentional or the result of

conscious indifference, but rather the result of accident or mistake; (2) she has meritorious defenses; and (3) the granting of a new trial would not result in delay or prejudice to relator.

On June 22, 2009, Godfrey filed an unverified "affidavit" in support of her motion for new trial. On June 22, 2009, the trial court held a hearing on the motion for new trial. According to relator's petition for writ of mandamus, the trial court stated that it would grant a new trial when Godfrey resubmitted a corrected affidavit.

On September 16, 2009, the trial court signed the order granting Godfrey's motion for new trial. On October 12, 2009, relator filed a motion to rescind the September 16 order, asserting that the trial court did not have plenary power to grant a new trial. At the time relator filed his mandamus petition, the trial court had not ruled on the motion to rescind.

## STANDARD OF REVIEW

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court abused its discretion and relator has no adequate remedy by appeal. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 259 (Tex. 2008) (orig. proceeding). A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law, or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). When an order is void, the relator need not show that he does not have an adequate remedy, and mandamus relief is appropriate. *In re Sw. Bell. Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (orig. proceeding) (per curiam).

## ANALYSIS

Relator asserts that the trial court's written order granting Godfrey's motion for new trial is void because (1) it was signed 167 days after the April 2, 2009 default judgment; and (2) an oral ruling on the motion for new trial at the June 22, 2009 hearing was not effective. *See Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993) (orig. proceeding) (per curiam) ("An order granting a new trial or modifying, correcting, or reforming a judgment must be written and signed."); Tex. R. Civ. P. 329b(e) (if motion for new trial is overruled by operation of law, trial court's plenary power expires 105 days after signing of judgment).

We first must determine whether the April 2, 2009 default judgment is a final judgment. If the default judgment is interlocutory, then the trial court "retains continuing control . . . and has the power to set [it] aside any time before a final judgment is entered." *Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993) (per curiam).

A default judgment is not presumed to be final. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 829 (Tex. 2005) (orig. proceeding); *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693 (Tex. 1986) (orig. proceeding) (per curiam). When there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it (1) actually disposes of every pending claim and party, or (2) clearly and unequivocally states that it finally disposes of all claims and all parties. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). "[A] default judgment that fails to dispose of all claims can be final only if the 'intent to finally dispose of the case' is 'unequivocally expressed in the words of the order itself.'" *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d at 830 (quoting *Lehmann*, 39 S.W.3d at 200); *see also In re Lynd. Co.*, 195

S.W.3d 682, 685 (Tex. 2006) (orig. proceeding) ("A default judgment is deemed final if it expresses an unequivocal intent to finally dispose of the case.").

Relator asserted claims in his original petition for negligence, negligence per se, gross negligence, breach of fiduciary duty, violations of the Deceptive Trade Practices Act, negligent misrepresentation, fraud, and breach of contract. The April 2, 2009 default judgment expressly disposes of only the breach of contract claim: "On the claim of Breach of Contract, the court finds in favor of Plaintiff, John Drake, and against Defendant, Sandra Roach Godfrey, in the amount of $100,000.00 (One Hundred Thousand and No/100 Dollars)." The April 2, 2009 default judgment does not refer to relator's other causes of action or his requests for mental anguish damages, punitive damages, or treble damages; nor does it contain any clear and unequivocal language demonstrating an intent to render a final judgment. Therefore, the April 2, 2009 default judgment is interlocutory. *See Burlington Coat Factory Warehouse of McAllen Inc.*, 167 S.W.3d at 830 (default judgment was interlocutory because it awarded damages on negligence claim, but did not dispose of request for exemplary damages based on gross negligence); *Houston Health Clubs, Inc.*, 722 S.W.2d at 693 (default judgment was interlocutory because it did not dispose of punitive damage issue). Because the April 2, 2009 default judgment is interlocutory, the trial court retained jurisdiction to set aside the default judgment and grant a new trial. *See Houston Health Clubs*, 722 S.W.2d at 693–94; *In re Bro Bro Props., Inc.*, 50 S.W.3d 528, 530 (Tex. App.—San Antonio 2000, orig. proceeding [mand. denied]).

Relator has not established his entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny relator's petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Frost, Boyce, and Sullivan.