Affirmed and Memorandum Opinion filed August 24, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00998-CV

TOTAL CORROSION MANAGEMENT, LLC D/B/A TCM OFFSHORE, LLC, Appellant

V.

ANZ (AMERICAN NATIONAL ZONE) SECURITY GUARD & PATROL SERVICES, INC., Appellee

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On Appeal from County Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 1077222

M E M O R A N D U M O P I N I O N

Appellant Total Corrosion Management, L.L.C. ("TCM") appeals the denial of its motion for a new trial following a default judgment entered against it. TCM contends the trial court abused its discretion by denying its motion for new trial and

not setting aside the default judgment because it met the requirements of C*raddock*.[1] We affirm.

I. BACKGROUND

Appellee American National Zone Security Guard & Patrol Services, Inc. ("ANZ") sued TCM for breach of contract on May 2, 2016. ANZ alleged that TCM had failed to pay for security services it provided subject to the agreement. It is undisputed that ANZ served TCM with the citation and petition through TCM's registered agent, Incorp. When TCM failed to respond within the appropriate time frame, ANZ then filed a motion for default judgment. The final default judgment was granted on September 21, 2016, in favor of ANZ for damages and attorney's fees.

On October 20, 2016, TCM filed a motion to set aside the default judgment and for a new trial, claiming that the failure to appear was the result of an accident or mistake stemming from "reduced staff and email errors." This motion was supported by an affidavit from TCM's president, Michael Husser, which provided, in pertinent part:

> Due to economic downturns in the oil and gas industry, TCM has downsized considerably. During the time period that this matter was filed and served, TCM's office staff was extremely limited and, further, the former CFO of TCM, Amjad Malik, was no longer employed with TCM and had not been replaced. At the time of service, TCM used the company, Incorp, as its Registered Agent. TCM, however, was not aware that Incorp sent the citation and process to Mr. Malik's email address only. I incorrectly believed that Mr. Malik's email had been forwarded to my email address, however, the email was not forwarded and the citation and process were not received by TCM. TCM is unaware of any other mailing or notice sent to TCM's office by mail or facsimile. As such, due to the mistaken beliefs and unintentional error,

[1] *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. Com. App. 1939) (providing the standard for when a default judgment should be set aside and a new trial granted).

> TCM did not respond to Plaintiff's Petition because it was not aware of this lawsuit.

ANZ filed a response, maintaining that TCM was properly served and it failed to answer. ANZ further objected to Husser's affidavit as inadmissible hearsay and containing speculation. The trial court conducted a hearing on TCM's motion on December 6, 2016; however, no record of that hearing is before us. On December 8, 2016, the trial court signed an order that "[t]he parties had appeared and after an evidentiary hearing" TCM's motion for new trial and to set aside the default judgment were denied. TCM filed a timely notice of appeal.

II. ANALYSIS

In its single point of error, TCM asserts the trial court abused its discretion in denying its motion for new trial and not setting aside the default judgment because (1) the failure to answer was due to mistake and not conscious indifference, (2) it has meritorious defenses to the claim, and (3) a new trial would not cause delay or unduly prejudice ANZ's case.

We review a trial court's refusal to grant a motion for new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009) (per curiam); *Cliff v. Huggins*, 724 S.W.2d 778, 778-79 (Tex. 1987). Additionally, the prerequisites for granting a motion to set aside a trial court's default judgment also apply to a no-answer and a post-answer default judgment. *Id*. at 779. In *Craddock*, the Supreme Court set forth the guiding rule or principle which trial courts must follow in determining whether to grant a motion for new trial:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Id. (quoting *Craddock*, 133 S.W.2d at 126); *accord Milestone Operating, Inc. v. Exxonmobil Corp.*, 388 S.W.3d 307, 310 (Tex. 2012); *Sutherland v. Spencer*, 376 S.W.3d 752, 754 (Tex. 2012).

The defaulting defendant has the burden of proving all three elements of the *Craddock* test are met before a trial court is required to grant a motion for new trial. *Sunrizon Homes, Inc. v. Fuller*, 747 S.W.2d 530, 532 (Tex. App.—San Antonio 1988, writ denied). A trial court abuses its discretion by not granting a new trial when all three elements of the *Craddock* test are met. *Lerma*, 288 S.W.3d at 925.

Here, TCM argues throughout its brief that the evidence it presented to the trial court was "uncontroverted testimony." On this basis, TCM cites to cases wherein movant's uncontroverted affidavit was sufficient to require a trial judge to set aside a default judgment. *See Milestone Operating, Inc.*, 388 S.W.3d at 310 (uncontroverted excuse negated intentional or consciously indifferent conduct); *Sutherland*, 376 S.W.3d at 754 (same).

Unlike cases where an uncontroverted affidavit constitutes the only evidence before the trial court, here ANZ asserts it objected to Husser's affidavit and provided additional evidence to show that a new trial would cause ANZ harm.[2] Once ANZ controverted TCM's affidavit, the trial court was not required to accept the movant's assertions as true and an evidentiary hearing was necessary to resolve the fact questions raised. *See Estate of Pollack*, 858 S.W.2d at 392 ("The trial court generally may not resolve disputed fact issues regarding intent or conscious indifference on affidavits alone."); *see also Hensley v. Salinas*, 583 S.W.2d 617, 618-19 (Tex. 1979) ("[W]hen a motion presents a question of fact upon which

[2] The record confirms that ANZ filed objections to TCM's affidavit in response to the motion for new trial. An objection is sufficient to controvert an affidavit offered to support a motion for new trial seeking to set aside a default judgment. *See Estate of Pollock v. McMurrey*, 858 S.W.2d 388, 391 (Tex. 1993).

evidence must be heard, the trial court is obligated to hear such evidence when the Motion for New Trial alleges facts, which if true, would entitle the movant to a new trial and when a hearing for such purpose is properly requested."); Tex. R. Civ. P. 324(b)(1). During the evidentiary hearing, the trial court must make an essentially factual inquiry into the acts and knowledge of the defaulting party to determine whether the failure to appear was intentional. *See Gotcher v. Barnett*, 757 S.W.2d 398, 401 (Tex. App.—Houston [14th Dist.] 1988, no writ) (analyzing *Craddock* standard in no-answer default judgment). Findings of fact would be appropriate in this instance, but we have none here.

Additionally, and more important, we do not have a record before us to indicate whether other evidence was heard at the hearing on appellant's motion for new trial and to set aside judgment. The trial court could have found Husser's affidavit to be inadmissible hearsay and/or speculative, which would leave no evidence satisfying the first element of *Craddock*. Nothing shows that it did not. Likewise, the trial court could have heard other evidence, as argued by ANZ, that shows TCM failed to meet the third element of *Craddock*. Again, nothing shows that it did not. Absent a record of that hearing, we must presume there was evidence presented to the trial court sufficient to support the ruling. *See Hebisen v. Clear Creek Indep. Sch. Dist.*, 217 S.W.3d 527, 536 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Norris v. Hubbard*, 841 S.W.2d 538, 539-40 (Tex. App.—Houston [1st Dist.] 1992, no writ) (affirming denial of motion for new trial and to set aside default judgment where no record of trial court evidentiary hearing); *see also Dowell v. Theken Spine, L.L.C.*, No. 14-07-00887-CV, 2009 WL 1677844, at *4 (Tex. App.—Houston [14th Dist.] June 2, 2009, no pet.) (mem. op.) ("Absent a complete record of the hearing showing that the trial court abused its discretion in denying Dowell's motion for new trial, we must presume that adequate evidence was presented at the hearing to support the trial court's order."). Appellant has the

burden to present an appellate record demonstrating error. *See Mays v. Pierce*, 281 S.W.2d 79, 82 (Tex. 1955); *Giraldo v. Pavia*, No. 14-12-00256-CV, 2013 WL 440574, at *2 (Tex. App.—Houston [14th Dist.] Feb. 5, 2013, no pet.) (mem. op.). Because it has failed to show that there was no other evidence, TCM has not met its burden to present an appellate record demonstrating error. The appellate record does not contain a reporter's record. Therefore, we find that the evidence presented at the hearing supported the trial court's judgment. TCM's issue is overruled.

III. CONCLUSION

Having overruled TCM's sole issue, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Boyce, Donovan and Jewell.