



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00424-CV

IN RE RPH CAPITAL PARTNERS, LP

Original Mandamus Proceeding¹

OPINION ON REHEARING

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 14, 2017

PETITION FOR WRIT OF MANDAMUS DENIED

The motion for rehearing filed on January 12, 2017, by real parties in interest Peridot Joint Venture, Millennium Exploration Company, LLC, and Richard Monroy is granted. This court's opinion and order in this original proceeding dated December 6, 2016, are hereby withdrawn and this opinion is substituted. Upon further consideration and for the reasons set forth in this opinion, we deny the petition for writ of mandamus.

Relator, RPH Capital Partners, LP ("RPH"), filed suit against Peridot Joint Venture, Millennium Exploration Company, LLC, and Richard Monroy (collectively "Peridot"), alleging various claims for relief based on a dispute arising from a participation agreement involving a

¹ This proceeding arises out of Cause No. 2016-CI-05251, styled *Peridot Joint Venture, Millennium Exploration Company, LLC, and Richard Monroy v. RPH Capital Partners, LP*, pending in the 57th Judicial District Court, Bexar County, Texas, the Honorable Antonia Arteaga presiding.

number of oil and gas properties. When Peridot did not appear for the trial on the merits, RPH obtained a default judgment. Peridot challenged the default judgment by filing a petition for bill of review in the trial court. After the trial court granted Peridot's bill of review on June 9, 2016, RPH filed this original proceeding.

BACKGROUND

RPH, an investment group that invests in oil and gas properties, entered into a participation agreement with Peridot. In exchange for payments made to RPH, Peridot was allowed to participate in drilling and operating various oil and gas wells and share in any resulting profits. In August 2015, Peridot demanded that RPH forfeit all future interest in a well subject to the participation agreement. In response to Peridot's demand, RPH filed suit against Peridot. In its petition, RPH alleged Peridot did not make payments under the participation agreement and engaged in fraud by selling interests in properties Peridot did not own to outside investors. RPH sought a declaratory judgment and damages for breach of contract, detrimental reliance, and promissory estoppel. RPH also sought an injunction. After a hearing was held on RPH's request for a temporary injunction on November 5, 2015, the trial court announced it was granting the temporary injunction and instructed the parties to submit an agreed proposed order. RPH sent a draft of the proposed order, via email, to Wade McClure, lead counsel for Peridot. The proposed order left a blank for the time and date of trial on the merits. McClure approved the order as to form, and RPH filed it with the trial court.

The trial court signed the order on November 5, 2015. A trial date of December 14, 2015, was hand-written into the signed order. The signed order was emailed to McClure after 5:00 p.m. on November 5, 2015, thus giving Peridot 38 days' notice of the trial date.

The case was called for trial on December 14, 2015. Peridot did not appear for trial. Counsel for RPH told the trial court that Peridot received notice of the trial date, but for the past

“30 days or so” Peridot had not responded to text messages, emails or phone calls. RPH put on evidence of damages and the trial judge signed a post-answer default judgment awarding RPH \$4,504,500.00 in damages, attorney’s fees of \$50,000.00, and punitive damages of \$3,000,000.00, each, against Peridot Joint Venture, Millennium Exploration Company, LLC, and Richard Monroy, for a total of \$13,554,500.00.

Peridot did not file a motion for new trial, nor did it file a notice of appeal. On March 24, 2016, after RPH began to garnish Peridot’s bank accounts, Peridot filed an original petition for bill of review. In the petition, Peridot contended it never received a copy of the December 14, 2015 judgment, a contention which is undisputed. Because the temporary injunction order gave only 38 days’ notice of the trial date, Peridot further argued it was deprived of its due process right to notice of a trial and was entitled to a reversal of the judgment. On May 17, 2016, Peridot filed a motion for summary judgment on its bill of review. After a hearing, the trial court granted summary judgment in Peridot’s favor. The summary judgment order vacated the December 14, 2015 default judgment based on the trial court’s finding “that as a matter of law, the Peridott [sic] Plaintiffs were denied due process.” RPH then filed this petition for writ of mandamus, asking this court to order the trial court to vacate the summary judgment order and reinstate the December 14, 2015 judgment.

ANALYSIS

Mandamus relief is available when a trial court erroneously grants a bill of review. *In re Spiller*, 303 S.W.3d 426, 431 (Tex. App.—Waco 2010, orig. proceeding); *In re Nat’l Unity Ins. Co.*, 963 S.W.2d 876, 877 (Tex. App.—San Antonio 1998, orig. proceeding). However, in order to be entitled to mandamus relief, the relator must show the trial court’s ruling was a clear abuse of discretion. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding).

Generally, a bill-of-review plaintiff must “plead and prove (1) a meritorious defense or claim to the underlying cause of action, (2) which the plaintiff was prevented from making by the fraud, accident, or wrongful act of the opposing party or official mistake, (3) unmixed with any negligence or fault on the part of the plaintiff.” *Eastin v. Dial*, 288 S.W.3d 491, 497 (Tex. App.—San Antonio 2009, pet. denied); *see also City of Laredo v. Threadgill*, 686 S.W.2d 734, 734-35 (Tex. App.—San Antonio, 1985, no writ). However, that standard is modified when a party is prevented from filing a motion for new trial because the trial court failed to send notice of a default judgment. *Threadgill*, 686 S.W.2d at 735. When a defaulting party shows that it was not notified that a judgment was taken, and this lack of notice caused the party to miss the deadline for filing a motion for new trial, the bill-of-review plaintiff must satisfy the test set out in *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. Com. App. 1939) governing the granting of motions for new trial following a default judgment. *Id.*

Applying the foregoing law to the instant case, because the trial court failed to provide notice of the default judgment, Peridot was required to prove (1) its failure to appear at trial was not intentional or the result of conscious indifference, but was due to mistake or accident; (2) it has a meritorious defense to the suit; and (3) granting the motion will not delay or otherwise work an injury to RPH. *See Craddock*, 133 S.W.2d at 126 (setting out the three factors necessary for a trial court to set aside a default judgment and grant a new trial.). However, in this case, we must also consider the fact that the order setting the trial date failed to provide the full forty-five days’ notice required by the rules of civil procedure. *See TEX. R. CIV. P. 245.*

A party that has filed an answer is “entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the federal constitution.” *Custom-Crete, Inc. v. K-Bar Servs., Inc.*, 82 S.W.3d 655, 659 (Tex. App.—San Antonio 2002, no pet.) (*citing LBL Oil Co. v. International Power Serv., Inc.*, 777 S.W.2d 390, 390–91 (Tex.1989)).

The forty-five day notice provision of Rule 245 is mandatory. A trial court's failure to comply with Rule 245 in a contested case deprives a party of its constitutional right to be present at the hearing, to voice its objections in an appropriate manner, and results in a violation of fundamental due process. Failure to give the required notice constitutes lack of due process and is grounds for reversal.

Id. (citations omitted).

When a party demonstrates it did not receive forty-five days' notice of the first trial setting, it has satisfied the first *Craddock* factor, and is relieved of the burden of meeting the remaining factors. *Id.* at 660; *In re Marriage of Runberg*, 159 S.W.3d 194, 200 (Tex. App.—Amarillo 2005, no pet.). In this case, there is no dispute that Peridot was served with process and answered and appeared in the lawsuit. There is also no dispute that notice of the first trial setting, December 14, 2015, was transmitted to Peridot when the signed temporary injunction order was sent to Peridot's counsel after 5:00 p.m. on November 5, 2015, by email. Therefore, Peridot did not receive forty-five days' notice of the trial setting, which satisfies the first *Craddock* factor. *Custom-Crete*, 82 S.W.2d at 660. Further, the inadequate notice relieved Peridot of proving the remaining *Craddock* factors. *Id.*

RPH argues that Peridot waived its complaint regarding the insufficient notice of the trial date. Insufficient notice under Rule 245 may be waived if a party proceeds to trial without objecting to the lack of notice. *Custom-Crete*, 82 S.W.3d at 659. In *Custom-Crete*, the defendant was a corporation. *Id.* At trial, a corporate representative appeared, intending to represent the corporation. *Id.* The trial court refused to allow the representative to participate in the trial, so the defendant corporation did not appear and participate in the trial that resulted in the default judgment and, thus, did not waive its right to proper notice of the trial setting. *Id.* Similarly, in the current case Peridot did not appear and participate in the trial. Accordingly, Peridot did not waive its right to forty-five days' notice of the first trial setting.

CONCLUSION

Based on the foregoing analysis, we hold the trial court did not clearly abuse its discretion when it granted Peridot's bill of review, and accordingly we deny Relator's petition for writ of mandamus.

Karen Angelini, Justice