# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-18-00431-CV

Don **SHIN**,
Appellant

v.

**1800 BROADWAY URBAN RESIDENCE**,
Appellee

From the County Court at Law No. 3, Bexar County, Texas
Trial Court No. 2018CV01697
Honorable David J. Rodriguez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: January 23, 2019

AFFIRMED

Don Shin appeals from a default judgment in favor of 1800 Broadway Urban Residence ("1800 Broadway") in its forcible entry and detainer suit. We affirm.

**Facts**

1800 Broadway filed a forcible entry and detainer action against Shin in a Bexar County justice court. The justice court ruled in Shin's favor, and 1800 Broadway appealed to the county court at law. That court signed a judgment in favor of 1800 Broadway on April 6, 2018. That

judgment recites that defendant Don Shin had been served with citation but failed to appear for trial.

The judgment grants 1800 Broadway possession of the disputed premises, damages, and attorney's fees. On April 11, 2018, Shin filed a motion for new trial alleging that he was "unaware of the trial date due to a medical issue" that required him to be hospitalized from April 2 to April 7. That motion was heard and denied by written order on April 20, 2018. Shin subsequently filed two motions to set aside the default judgment, one on April 20, 2018, and one on May 17, 2018. Our record does not contain written orders on either motion.

**Standard of Review**

A trial court's refusal to grant a motion for new trial is reviewed for abuse of discretion. *Dolgencorp of Texas, Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). "When a defaulting party moving for new trial meets all three elements of the *Craddock*[1] test, then a trial court abuses its discretion if it fails to grant a new trial." *Id.*

**Discussion**

The Texas Supreme Court long ago established three factors necessary to setting aside a default judgment: (1) the defendant's failure to answer was not intentional or the result of conscious indifference, but was due to accident or mistake; (2) the motion for new trial sets up a meritorious defense; and (3) granting the motion will not cause delay or otherwise cause injury to the plaintiff. *Craddock*, 133 S.W.2d at 126. These factors apply to both no-answer and post-answer default judgments. *Lopez v. Lopez*, 757 S.W.2d 721, 722 (Tex. 1988). But a defendant who did not have actual or constructive notice of the trial setting establishes the first factor and is excused from

[1] *See Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (1939).

establishing the second. *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005) (citing *Lopez*, 757 S.W.2d at 723).

Shin challenges only the April 20, 2018 written order denying his April 11 motion for new trial.[2] Specifically, Shin asserts that the court abused its discretion by denying the motion because he did not receive notice of the April 6 hearing that resulted in the default judgment against him.

"Unlike service of citation, Rule 21a allows service of notices by anyone competent to testify." *Id.* at 745 (citing TEX. R. CIV. P. 21a). If notice is served by an attorney of record, that attorney must certify compliance with Rule 21a "in writing over signature and on the filed instrument." TEX. R. CIV. P. 21a(e); *see Mathis*, 166 S.W.3d at 745. Such a certificate constitutes "prima facie evidence of the fact of service." TEX. R. CIV. P. 21a(e). Further, "notice properly sent pursuant to Rule 21a raises a presumption that notice was received." *Mathis*, 166 S.W.3d at 745. "In the absence of evidence to the contrary, the presumption has the force of a rule of law." *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987); *see* TEX. R. CIV. P. 21a(e) (rule does not preclude party from offering proof that document was not received).

Shin contends on appeal that he was not given notice of the April 6, 2018 hearing date pursuant to Rule 21a. He urges that there is no presumption of receipt because there is no prima facie evidence of service. We disagree. Our record contains a notice of setting stating that this case was set for a non-jury trial on April 6, 2018. The notice contains a certificate of service, signed by counsel for 1800 Broadway, certifying that the notice was sent to Shin on March 23, 2018 by certified mail, return receipt requested, and by first class mail. It is undisputed that the address stated in the certificate of service is correct. Indeed, it is the same address stated by Shin himself in the signature block of his motion for new trial. This notice of setting constitutes prima facie

[2] In its brief, 1800 Broadway does not address the merits of the April 11 motion at all. Instead, it raises arguments pertaining only to Shin's April 20 and May 17 motions. Those arguments are irrelevant to our resolution of this appeal.

evidence of service on Shin and raises a presumption that notice was received. *Mathis*, 166 S.W.3d at 745; TEX. R. CIV. P. 21a(e). The question, then, is whether Shin produced any evidence that notice was not received. *See Cliff*, 724 S.W.2d at 780 (presumption has force of law in absence of evidence to the contrary); TEX. R. CIV. P. 21a(e) (rule does not preclude proof of non-receipt).

In his April 11 motion for new trial, Shin states only that he was "unaware of the trial date" because he was in the hospital from April 2 to April 7. This assertion does not constitute any evidence that Shin did not receive the notice that was mailed to him pursuant to Rule 21a ten days before his hospitalization began. Perhaps recognizing this deficiency, Shin states in his reply brief that "the presumption of constructive notice was refuted when the certified mail purporting to contain such documents was return [sic] 'unclaimed.'" But this statement is not supported by any citation to the record and our review of the record does not reveal any evidence that certified mail sent to Shin was returned "unclaimed."

The only evidence before us relevant to the court's denial of the April 11 motion for new trial is the March 23 notice of setting and the April 11 motion stating that Shin was "unaware" of the trial setting. Although the order denying the motion for new trial recites that a hearing was held on April 20, 2018, Shin did not bring forth on appeal a reporter's record of that hearing.[3]

> An appellate court may reverse a trial court for abuse of discretion only if, after searching the record, it is clear that the trial court's decision was arbitrary and unreasonable. Hence, the party that complains of abuse of discretion has the burden to bring forth a record showing such abuse. Absent such a record, the reviewing court must presume that the evidence before the trial judge was adequate to support the decision.

*Simon v. York Crane & Rigging Co*., 739 S.W.2d 793, 795 (Tex. 1987) (citations omitted).

[3] Our record contains reporter's records from a May 17, 2018 hearing on the April 20 motion, and a May 31, 2018 hearing on the May 17 motion. Neither of those records is relevant to our review of the court's April 20, 2018 order denying the April 11 motion.

Because we have no reporter's record from the hearing on Shin's April 11 motion for new trial, we must presume that the evidence before the trial court supported the denial of that motion. *See id.* We cannot conclude that the denial was an abuse of discretion. *Id.*

**Conclusion**

Shin has not demonstrated that the trial court abused its discretion by denying his motion for new trial. The judgment of the trial court is affirmed.

Irene Rios, Justice