

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-17-00057-CV

IN RE KEN EDWARD SMITH

Original Proceeding
75th District Court of Liberty County, Texas
Trial Cause No. CV1611266

MEMORANDUM OPINION

In this mandamus proceeding, Ken Edward Smith (Ken) contends the trial court abused its discretion by granting a motion for new trial and failing to sign an order dismissing the motion for new trial. Ken contends the real party in interest, Tanya Marie Smith (Tanya), filed her motion to set aside a default judgment too late to invoke the trial court's jurisdiction to grant a new trial.

The trial court signed a default divorce decree on December 19, 2016. Tanya filed a motion to set aside the default judgment. The certificate of service on the motion is dated January 17, 2017, and the motion was received by the trial court

clerk on January 19, 2017. On February 8, 2017, the trial court held a hearing on the motion to set aside the default judgment. Tanya appeared pro se at the hearing, and Ken's attorney appeared at the hearing. Evidently going by the date on the certificate of service, the trial court noted that Tanya filed her motion on the thirtieth day; however, Ken's attorney informed the trial court that he did not receive a copy of the motion in the mail.

In a declaration attached to her motion to set aside the default judgment, Tanya stated that she did not receive notice of the judgment until January 13, 2017, a date more than twenty days but less than ninety days after the trial court signed the default judgment. *See* Tex. R. Civ. P. 306a(4). The trial court's implied finding that Tanya received notice of the judgment on January 13, 2017, is supported by Ken's counsel's acknowledgment that Tanya called him in mid-January and obtained his fax number. Rule 306a operated to extend the trial court's plenary power to grant the motion for new trial. *See In re Lynd Co.*, 195 S.W.3d 682, 686 (Tex. 2006). The petition for a writ of mandamus is denied.

PETITION DENIED.

PER CURIAM

Submitted on March 24, 2017
Opinion Delivered April 6, 2017
Before Kreger, Horton, and Johnson, JJ