COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00137-CV

$25,435.00 IN U.S. CURRENCY — APPELLANT

V.

THE STATE OF TEXAS — APPELLEE

FROM THE 78TH DISTRICT COURT OF WICHITA COUNTY
TRIAL COURT NO. 183,741-B

MEMORANDUM OPINION[1]

I. INTRODUCTION

This is an appeal from the granting of a default judgment. The State filed suit against appellant, William Renard Johns, seeking forfeiture of $25,435.00 in United States currency. In its notice of seizure and intended forfeiture, the State alleged that the money was contraband subject to seizure under the forfeiture

[1]*See* Tex. R. App. P. 47.4.

statute, Chapter 59 of the Texas Code of Criminal Procedure. Despite Johns's late answer, the trial court entered a default judgment, ordering forfeiture of the money. Later, the trial court denied Johns's motion for new trial. The sole issue in this case is whether the trial court abused its discretion by denying the motion for new trial, concluding that Johns failed to set forth a meritorious defense. We will affirm.

II. BACKGROUND

According to an affidavit attached to the State's notice, patrol officer Gabriel Villarreal of the Wichita County Sheriff's Office was patrolling Highway 287 on December 5, 2015, when he observed Johns speeding. After initiating a traffic stop, Johns gave Villarreal consent to search the rental vehicle he was driving. Inside the car, tucked within a duffle bag, Villarreal found twenty-five bundles of United States currency and a baggie of a white, powdery substance that he knew to be consistent with cocaine, although there was not enough to field-test to confirm that it was. The bundles of currency were wrapped in black rubber bands and appeared to be in $1,000 bundles of different denominations. Villarreal averred that the manner in which the currency had been bundled and accompanied by cocaine indicated that the currency was funds from criminal activity. Johns denied knowledge of the currency and claimed that he did not know how the money got into his duffle bag.

Villarreal placed Johns under arrest for money laundering. After returning to the sheriff's office, Villarreal counted the currency. By Villarreal's count, the

bundles contained fifty-one $100 bills, thirty-two $50 bills, 926 $20 bills, twenty-one $10 bills, and one $5 bill, for a total of $25,435.00 in United States currency.

On December 14, 2015, the State filed this suit. Johns answered by general denial on February 5, 2016. Johns also sought some discovery from the State on February 16, 2016. The record indicates that although the trial court's default judgment was not filed until February 23, 2016, the trial court signed its default-judgment order on February 4, 2016. The record further indicates that on February 23, 2016, the State had filed, and the trial court granted, a motion to strike Johns's late answer. Also on February 23, 2016, Johns filed his motion for new trial.

Regarding a meritorious defense, Johns pleaded in his motion for new trial only that he had "a meritorious defense." Johns's motion was not accompanied by any affidavits or other evidence. The trial court initially set a hearing for Johns's new-trial motion on March 14, 2016, but the record indicates that the hearing was not held until April 5, 2016.

Prior to the hearing, on March 23, 2016, Johns filed an amended motion for new trial. Regarding a meritorious defense, Johns's amended motion asserted that he had "a meritorious defense in that the funds the subject of [the State's] suit are not contraband." Accompanying this motion, Johns filed his own affidavit. In his affidavit, Johns averred: "I have a meritorious defense to Plaintiff's Notice of Seizure and Intended Forfeiture. The money the subject of this suit was not contraband as alleged in the Plaintiff's Petition." At the April 5

hearing, neither the State nor Johns submitted any additional evidence via testimony or affidavits. The trial court denied Johns's new-trial motion. In its findings of fact and conclusions of law, the trial court found that it had signed the default judgment on February 4, 2016, and that the State had filed the signed order on February 23, 2016. Regarding whether Johns had set up a meritorious defense in order to defeat the default judgment, the trial court found that Johns "did not claim, but denied, ownership of the $25,435.00 in U.S. Currency." The trial court also concluded that Johns's new-trial motion failed to set up a meritorious defense because Johns had "only made the conclusory statement that the 'money subject of this suit was not contraband as alleged' in [the State's] Petition." This appeal followed.

III. DISCUSSION

In response to Johns's sole issue that the trial court abused its discretion by denying his motion for new trial, the State, among other arguments, asserts that this court should look only to Johns's original motion for new trial and its lack of evidentiary support when reviewing the trial court's denial. Johns does not counter this argument, but Johns does argue that he supported his meritorious defense by way of his affidavit, which was attached to his amended motion, wherein he averred that the funds in this case were not contraband. As explained below, we agree with the State that our review is limited to Johns's original motion for new trial.

A. Johns's Untimely Filed Amended Motion for New Trial

Under rule 329b(b), an amended motion for new trial may be filed without leave of court before any preceding motion for new trial is overruled and "within thirty days after the judgment or other order complained of is signed." Tex. R. Civ. P. 329b(b). An amended motion for new trial filed more than thirty days after the trial court *signed* its judgment is untimely. *Low v. Henry*, 221 S.W.3d 609, 619 (Tex. 2007) (citing *Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003)).

In its discretion, a trial court may consider the grounds raised in an untimely motion and grant a new trial under its inherent authority. *Moritz*, 121 S.W.3d at 720. The purpose of an untimely motion for new trial is to guide the trial court in the exercise of its inherent authority, but the motion "is a nullity for purposes of preserving issues for appellate review." *Id.* (citing *Kalteyer v. Sneed*, 837 S.W.2d 848, 851 (Tex. App.—Austin 1992, no writ)). Thus, an untimely amended motion for new trial "does not preserve issues for appellate review, even if the trial court considers and denies the untimely motion within its plenary power period." *Moritz*, 121 S.W.3d at 721.

Here, Johns's amended motion for new trial, filed on March 23, 2016, was filed well outside the thirty-day requirement after the trial court signed its February 4, 2016 order of default judgment. Even though the trial court was free to consider the pleadings found within the amended motion and to consider Johns's attached affidavit, this court is precluded from reviewing that motion and attached evidence. *Id.* at 720–21. Thus, we are constrained by the parameters

of Johns's original motion for new trial when reviewing whether the trial court erred by denying a new trial.

B. Johns Failed to Set Up a Meritorious Defense

Johns asserts that the trial court abused its discretion by denying his motion for new trial. In the dispositive portion of his sole issue, Johns asserts that he set up a meritorious defense. We disagree.

We review the denial of a motion for new trial under an abuse-of-discretion standard. *Dir., State Emps. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994). After a default judgment, the "trial court abuses its discretion by not granting a new trial when all three elements of the *Craddock* test are met." *Id.* (citing *Bank One, Tex., N.A. v. Moody*, 830 S.W.2d 81, 85 (Tex. 1992)). *Craddock* provides that a new trial should be granted after a default judgment when (1) 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; (2) provided the motion for a new trial sets up a meritorious defense; and (3) is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939). The *Craddock* requirements are applicable to post answer default judgments. *Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966).

The defaulting party has the burden of setting forth facts establishing all three elements of the *Craddock* test. *Scenic Mountain Med. Ctr. v. Castillo*, 162

S.W.3d 587, 590 (Tex. App.—El Paso 2005, no pet.). If the motion and accompanying affidavits fail to establish any prong of the *Craddock* test, then the trial court's denial of a new trial will be upheld. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992); *Ivy*, 407 S.W.2d at 215.

In this case, the trial court found that Johns failed to set up a meritorious defense, which is required by *Craddock*. We determine here whether Johns met this burden based on the facts alleged in the motion and the supporting affidavit, regardless of whether those facts are controverted. *Evans*, 889 S.W.2d at 268–69. Setting up a meritorious defense "means '[t]he motion must allege *facts* which in law would constitute a defense to the cause of action asserted by the plaintiff, and must be supported by affidavits or other evidence proving prima facie that the defendant has such meritorious defense.'" *Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993) (quoting *Ivy*, 407 S.W.2d at 214). This is required "to prevent the reopening of cases to try out fictitious or unmeritorious defenses." *Ivy*, 407 S.W.2d at 214. Therefore, conclusory allegations are insufficient. *Folsom Invs., Inc. v. Troutz*, 632 S.W.2d 872, 875 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.). A conclusory statement is one that does not provide the underlying facts to support the conclusion. *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ).

Here, Johns asserted, in his motion for new trial, only that he had a meritorious defense. Johns did not set forth any facts supporting this position. This is insufficient to set up a meritorious defense. *See Ivy*, 407 S.W.2d at 214–

15 (holding that defendant—who alleged in new-trial motion that he had good and valid deed to land, that defendant had valid and meritorious defense, and that defendant was fee simple owner—had alleged mere conclusions that were insufficient to set up meritorious defense). Thus, the trial court did not abuse its discretion by denying Johns's motion for new trial because he failed to set up a meritorious defense. We overrule Johns's sole issue.

IV. CONCLUSION

Having overruled Johns's sole issue on appeal, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and GABRIEL, JJ.

DELIVERED: December 15, 2016