In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00402-CV

DEBRA MOSTUE, APPELLANT

V.

THOMAS MANGOLD, APPELLEE

On Appeal from the County Court at Law No. 2
Travis County, Texas
Trial Court No. C-1-CV-12-001119, Honorable Todd T. Wong, Presiding

March 31, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.

Debra Mostue (Mostue) appeals from a default judgment entered in favor of Thomas Mangold (Mangold). The proceeding began as a suit filed by Mangold in the small claims court of Travis County. Being dissatisfied with the $1092.27 verdict and judgment awarded him, Mangold appealed to the Travis County Court at Law No. 2. The cause came for trial on June 23, 2015. Mostue did not appear at the setting, and the trial court entered a default judgment awarding Mangold approximately $11,598.27. Mostue filed a timely motion for new trial and argued that the circumstances warranted

a new trial per *Craddock v. Sunshine Bus Lines, Inc*., 134 Tex. 388, 133 S.W.2d 124 (Tex. Com. App. 1939). The trial court denied the motion, and Mostue appealed that decision.[1] Before us, she, again, contends that she satisfied the elements of *Craddock* and, therefore, was entitled to a new trial. We affirm.

The pertinent standard of review is one of abused discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (involving the refusal to grant a new trial after entry of a default judgment). According to *Dolgencorp*, "[w]hen a defaulting party moving for new trial meets all three elements of the *Craddock* test, then a trial court abuses its discretion if it fails to grant a new trial." *Id.*

Also per *Dolgencorp* and *Craddock*, "a default judgment should be set aside and a new trial granted when the defaulting party establishes that (1) the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no delay or otherwise injure the plaintiff." *Id.* at 925-26, *citing Craddock v. Sunshine Buslines, Inc., supra.* Finally, *Craddock* was extended to cover post-answer default judgments, like the circumstance at bar. *Id.* at 926.

We begin our analysis by addressing the first prong of *Craddock*. According to Mostue she satisfied it because she did not receive notice of the June 23rd trial setting and, if she did, her failure to attend trial was not intentional or the result of conscious indifference. Regarding the allegation of no notice, it is presumed that a trial court will not hear a case unless the parties were duly notified of the trial date. *Grant v. Grant*, No. 04-12-00315-CV, 2015 Tex. App. LEXIS 9679, at *9 (Tex. App.—San Antonio

[1] Because the appeal was transferred from the Third Court of Appeals to the Seventh Court of Appeals, the precedent of the Third Court and Texas Supreme Court, if any, controls. TEX. R. APP. P. 41.3.

September 16, 2015, no pet.) (mem. op.); *A & A Construction Servs., LLC v. Blevins*, No. 07-13-00251-CV, 2014 Tex. App. LEXIS 4538, at *8 (Tex. App.—Amarillo April 24, 2014, no pet.) (mem. op.); *Campsey v. Campsey*, 111 S.W.3d 767, 771 (Tex. App.—Fort Worth 2003, no pet.). In other words, we presume that all parties were afforded proper notice, and the burden lies with the complainant to show otherwise. And, to overcome this presumption, that complainant must affirmatively show his lack of notice. *Campsey*, 111 S.W.3d at 771. However, he does not satisfy that burden "by mere allegations, unsupported by affidavits or other competent evidence, that the appellant did not receive proper notice." *Id* at 772.

Here, counsel for Mostue verified several of the allegations contained in his client's motion for new trial. One such allegation was the representation that the "Defendant" did not receive notice of the trial setting. Yet, when the motion was heard, the very same counsel vacillated. He informed the trial court that he "might have received notice or not" though he "didn't think that [he] had notice of a setting."

No doubt, notice need not be sent to the party when that party retained an attorney who has entered an appearance. It is enough to send notice to counsel. *See* TEX. R. CIV. P. Rule 8 (stating that the attorney in charge shall be responsible for the suit as to such party whom he represents and all communications from the court and other counsel shall be sent to the attorney in charge); TEX. R. CIV. P. 21a(a) (stating that every notice required by the rules of civil procedure may be served by delivering a copy to the party to be served "or the party's duly authorized agent or attorney of record . . . .") And, counsel's representation that he may or may not have received notice of the setting (but he thinks he did) hardly constitutes affirmative evidence of nonreceipt.

Thus, the trial court could well have interpreted the representations as saying nothing or at least as too deficient to rebut the presumption in play. *See Hanners v. The State Bar*, 860 S.W.2d 903, 908 (Tex. App.—Dallas 1993, no writ) (stating that the trial court serves as the factfinder at a hearing on a motion for new trial and is the sole judge of the witnesses' credibility). Given this, we cannot say that the trial court somehow erred in refusing to accept the comment satisfying the first element of *Craddock*.[2]

Yet, having notice does not *ipso facto* mean that the first element of *Craddock* went unsatisfied. Again, the test requires proof that the failure to appear was not intentional or the result of conscious indifference, but was the result of an accident or mistake. So, it may be that one with notice may still be entitled to a new trial if his failure to appear arose from accident or mistake. Yet, rather than dwell further on this element, we will simply assume *arguendo* that her absence from trial was due to accident or mistake and turn to the second element of *Craddock*.[3] Again, it involves the matter of setting up a meritorious defense.

According to our Supreme Court, a "motion sets up a meritorious defense if it alleges facts which in law would constitute a defense to the plaintiff's cause of action

[2] It was suggested below that Texas Rule of Civil Procedure 245 required at least forty-five days prior notice of the trial setting. While that rule does say that a party is entitled to "reasonable notice of not less than forty-five days to the parties of a first setting for trial," the forty-five day period applies only to notice of the first trial setting. *In re Marriage of Camp*, No. 07-13-00283-CV, 2014 Tex. App. LEXIS 7830, at *8 (Tex. App.—Amarillo July 18, 2014, no pet.) (mem. op.); *Osborn v. Osborn*, 961 S.W.2d 408, 411 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). Mostue acknowledged in her appellate brief that the cause had been first set for trial on August 5, 2013 then reset for a later date. This negates any suggestion that she was entitled to at least forty-five days prior notice of the June 23, 2015 setting since the latter was not the first setting.

[3] Incidentally, had Mostue rebutted the presumption of notice and shown that she received none, it would have been unnecessary to consider the second and third elements of *Craddock. Felt v. Comerica Bank,* 401 S.W.3d 802, 806 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The absence of notice alone would have entitled her to a new trial. *Platt v. Platt*, 991 S.W.2d 481, 483-484 (Tex. App.—Tyler 1999, no pet.); *accord, Campsey v. Campsey*, 111 S.W.3d 767, 771 (Tex. App.—Fort Worth 2003, no pet.) (stating that if a defendant is not given notice of a trial setting as required by Texas Rule of Civil Procedure 245, then a default judgment should be set-aside as ineffectual).

and is supported by affidavits or other evidence providing prima facie proof that the defendant has such a defense." *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d at 927-28. The sole meritorious defense urged by Mostue consisted of the fact that the small claims court jury awarded Mangold only $1,096.27. According to her, "[a] meritorious defense is one, if proved, would cause a different result on retrial, although not necessarily the opposite result [and] . . . [a] verdict of $1,096.27 and a verdict of $11,598.27 [the latter being the award from the county court at law] is a different result. Thus . . . Mostue has established a meritorious defense." Yet, the award obtained in the small claims court is irrelevant. Indeed, once an appeal was perfected to the county court at law, the dispute had to be tried *de novo*. TEX. R. CIV. P. 506.3. A trial *de novo* "is a new trial in which the entire case is presented *as if there had been no previous trial*." *Id*. (emphasis added). So, if we are to treat the situation here as one where "no previous trial" had occurred, we must necessarily presume that no previous verdict of $1,096.27 had been entered. In other words, the award rendered by the small claims court had and has no relevance to or impact upon the award which could be rendered at the trial *de novo*. Therefore, it could not evince some kind of meritorious defense for purposes of *Craddock.*

In short, we cannot say that the county court at law abused its discretion in denying Mostue a new trial. The judgment of the trial court is affirmed.

Brian Quinn
Chief Justice