NO. 12-15-00047-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MARK J. HEALEY, APPELLANT	***§***	***APPEAL FROM THE 3RD***
V.	***§***	***JUDICIAL DISTRICT COURT***
EDWIN N. HEALEY, APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION ON REHEARING

Mark Healey has filed a motion for rehearing, which is overruled. However, we withdraw our opinion and judgment of December 30, 2015, and substitute the following opinion and a corresponding judgment in their place.

Mark Healey appeals a default judgment rendered against him in favor of Edwin Healey. He presents three issues on appeal. We affirm.

BACKGROUND

Edwin Healey filed suit against Mark Healey and his brothers, E. Peter Healey and Paul C. Healey, in November 2013. In his petition, Edwin alleged, among other causes of action, "money had and received" against all defendants. Mark was served with citation and a copy of the petition on November 21, 2013. He failed to answer the suit, and Edwin filed a motion for default judgment on November 11, 2014. Nine days later, Mark filed a special appearance, alleging lack of jurisdiction because he lives in Missouri and does not have sufficient contacts with Texas. He did not file an answer subject to his special appearance or request that the special appearance be set for hearing. On November 25, 2014, the trial court granted the default judgment without a hearing.

Mark filed a motion for new trial and an answer on December 18, 2014. After a hearing, the trial court denied the motion. The trial court then severed the judgment against Mark from the case against his brothers. This appeal followed. Initially, Mark presented four issues, but conceded in his reply brief that he waived his first issue. Therefore, we do not address that issue.

DEFAULT JUDGMENT

In his second and third issues, Mark contends the trial court erred when it granted the default judgment and denied his motion for new trial. He alleges he was not notified of the motion for default judgment, which deprived him of due process. He further argues that the trial court should have granted the motion for new trial to correct this alleged deprivation.[1]

A plaintiff may take a default judgment against a nonanswering defendant at any time after the defendant's answer date. *See* TEX. R. CIV. P. 239. A postappearance default judgment occurs when the defendant has appeared in the lawsuit but has failed to file an answer. ***LBL Oil Co. v. Int'l Power Servs., Inc.,*** 777 S.W.2d 390, 390 (Tex. 1989). Once a defendant has made an appearance, he is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment. ***Id.*** at 390-91.

In this case, the only pleading Mark filed was a special appearance. By filing a special appearance, a nonresident challenges the trial court's exercise of jurisdiction. TEX. R. CIV. P. 120a. Rule 120a requires that nonresidents present a special appearance "by sworn motion," and allows that it "may be amended to cure defects." ***Id.***

If a nonresident defendant tries but fails to properly enter a special appearance, the appearance may become a general appearance. *See* TEX. R. CIV. P. 120a(1). A party enters a general appearance when he (1) invokes the judgment of the trial court on any question other than the court's jurisdiction, (2) recognizes by his acts that an action is properly pending, or (3) seeks affirmative action from the court. ***Dawson-Austin v. Austin***, 968 S.W.2d 319, 322 (Tex. 1998). "An unverified special appearance neither acknowledges the court's jurisdiction nor

[1] For the first time, Mark argues in his reply brief that "the failure to set aside the default judgment was further error because Appellant properly raised the issues set forth in ***Craddock v. Sunshine Bus Lines***¸133 S.W.3d 124 (Tex. 1939)." Issues raised for the first time in a reply brief may not be considered. ***Bankhead v. Maddox***¸ 135 S.W.3d 162, 164 (Tex. App.—Tyler 2004, no pet.). This is the case even when, as here, the arguments are in response to the appellee's brief. ***Bich Ngoc Nguyen v. Allstate Ins. Co.***¸404 S.W.3d 770, 781 (Tex. App.—Dallas 2013, pet. denied).

seeks affirmative action. While it cannot be used to disprove jurisdiction, it certainly does not concede it." ***Id***.

Edwin points out that Mark's special appearance was defective. Mark contends that the special appearance, even if defective, still constituted an appearance entitling him to notice. But Mark did not seek affirmative relief, recognize that the action was properly pending, or invoke the trial court's judgment prior to the granting of the default judgment. *See* ***Dawson***, 968 S.W.2d at 322. Therefore, Mark's defective special appearance did not constitute a general appearance. *See* ***id.*** Mark did not generally appear until he filed his motion for new trial, which sought affirmative relief and was not subject to the special appearance. *See* ***Anderson v. Anderson***, 786 S.W.2d 79, 81 (Tex. App.—San Antonio 1990, no writ).

A defendant who has not answered or otherwise appeared in a case after being properly served with citation is not entitled to notice of a default judgment proceeding. ***Sedona Pac. Hous. P'ship v. Ventura***, 408 S.W.3d 507, 512 (Tex. App.—El Paso 2013, no pet.). Because Mark did not answer or appear, he was not entitled to notice of the default judgment until it was signed. *See* TEX. R. CIV. P. 306a(3) (requiring clerk to give notice to parties when judgment is signed). Mark argues on appeal that the alleged lack of notice entitled him to a new trial. But because Mark was not entitled to notice, he was not entitled to a new trial. Mark's second and third issues are overruled.

SEVERANCE

In his fourth issue, Mark contends the trial court erred when it severed the default judgment against him into a separate cause.

After granting the default judgment against Mark and denying his motion for new trial, the trial court severed the default judgment against Mark into a separate cause. This made the default judgment against Mark final and appealable. *See* TEX. R. CIV. P. 240; ***Lehmann v. Har–Con Corp.***, 39 S.W.3d 191, 195 (Tex. 2001). The suit against Mark's brothers proceeded to a jury trial, and the jury found in favor of Edwin. The trial court rendered judgment consistent with the jury's verdict.[2]

[2] The judgment in the original matter was attached to Edwin's brief. Generally, the appellate court can review only the record as filed and cannot review documents not included in the record or not considered by the trial court. ***Burke v. Ins. Auto Auctions Corp.***, 169 S.W.3d 771, 775 (Tex. App.—Dallas 2005, no pet). However, the court can consider documents outside the record for the purpose of determining its own jurisdiction over the case.

Mark contends that the severance order should be set aside because Edwin sought to hold all defendants jointly and severally liable for "money had and received." Texas Rule of Civil Procedure 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. A claim is severable if (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues. ***Paradigm Oil, Inc. v. Retamco Operating, Inc.***, 161 S.W.3d 531, 540 (Tex. App.—San Antonio 2004, pet. denied).

A trial court has broad discretion in the severance of causes of action. ***Morgan v. Compugraphic Corp.***, 675 S.W.2d 729, 734 (Tex. 1984). If a defaulted defendant could have been sued independently, a trial court does not abuse its discretion by severing the cause of action against him from those against other defendants, even if there is an alleged "indivisible injury," or joint and several liability. ***Paradigm Oil***, 161 S.W.3d at 540; *see* ***Morgan***, 675 S.W.2d at 733-34. In this case, Edwin could have brought suit against Mark independently and the cause of action could have been tried as if it were the only claim in controversy. Therefore, the trial court did not abuse its discretion by severing the default judgment against Mark from the remaining action against his brothers. *See* ***Morgan***, 675 S.W.2d at 733-34; ***Paradigm Oil***, 161 S.W.3d at 540. Mark's fourth issue is overruled.

DISPOSITION

Having overruled Mark's second, third, and fourth issues, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered April 6, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

Sabine Offshore Serv. v. City of Port Arthur, 595 S.W.2d 840, 841 (Tex. 1979); ***Harlow Land Co., Ltd. v. City of Melissa***, 314 S.W.3d 713, 716 n.4 (Tex. App.—Dallas 2010, no pet.).

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 6, 2016

NO. 12-15-00047-CV

MARK J. HEALEY,
Appellant
V.
EDWIN N. HEALEY,
Appellee

Appeal from the 3rd District Court
of Henderson County, Texas (Tr.Ct.No. 2014C-0638)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that all costs of this appeal are hereby adjudged against the Appellant, **MARK J. HEALEY,** for which execution may issue, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.