AFFIRM in part, REVERSE in part, and REMAND; Opinion Filed December 18, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-00990-CV

MAURICIO ESTRADA, Appellant
V.
BOSS EXOTICS, LLC AND RODNEY MCGAFFEY, Appellees

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-23-06469

OPINION

Before Justices Pedersen, III, Smith, and Garcia
Opinion by Justice Smith

Appellant Mauricio Estrada appeals a no answer default judgment rendered against him in a lawsuit filed by appellees Boss Exotics, LLC and Rodney McGaffey. For the following reasons, we affirm the default judgment, but reverse the award of unliquidated damages and attorney's fees and remand for further proceedings.

Background

In October 2020, Estrada bought a vehicle from Boss Exotics, which is owned and operated by McGaffey. After Boss Exotics notified Estrada of an error on the

vehicle's title, Estrada sued both Boss Exotics and McGaffey.[1] The parties negotiated to settle the suit, and, in December 2022, Estrada's counsel drafted a settlement agreement. Appellees signed the agreement, which provided that Boss Exotics was to tender $15,000 and the vehicle's title to Estrada, care of his counsel. Boss Exotics did so, and Estrada's counsel cashed the $15,000 check shortly after receiving it.

Pursuant to the agreement, Estrada's counsel filed a letter notifying the court that the suit had been settled. At a February 2023 dismissal hearing, however, counsel reported that Estrada needed more time before dismissing the case. And at a March dismissal hearing, counsel notified the court that Estrada no longer wanted to settle the suit.

Appellees initiated this action, alleging that Estrada failed to perform his duties under the settlement agreement and asserting claims for breach of the settlement agreement and fraudulent inducement. Estrada did not file an answer, and appellees filed a motion for default judgment on their claims. Following a brief hearing, the trial court signed an order granting the motion. The court ordered that appellees recover judgment for the sum of $90,000 and post-judgment interest. It also awarded reasonable and necessary attorneys' fees and court costs in the amount of $5,856.96 and conditional appellate fees.

[1] *Mauricio Estrada v. Boss Exotics, LLC d/b/a Boss Exotics, Rodney James McGaffey, and John Does 1-10*, Cause Number DC-22-01740, filed in the 95th District Court of Dallas, County.

Estrada filed a motion to set aside the default judgment. Among other things, the motion stated that Estrada failed to file an answer because of accident or mistake, as opposed to intentionally or with conscious disregard. Specifically, he explained:

> My failure to file an answer was due to not having legal advice. I have tried numerous times to call and seek help but I have not been successful. I was also not aware of any hearing for this case. All I received by mail was the citation.

At a subsequent hearing on his motion, Estrada further described the reason for his motion to set aside the default judgment:

> The -- the reason for this motion was because, um, I was trying to seek help -- I was trying to find some legal advice at the moment. I was trying to con- -- to call different counsels, and, um, I just wasn't getting any -- any luck.
>
> I contacted the State Bar as well, and I was able to get some numbers but, um, I wasn't able to find any -- any counsels either because they didn't have time or they couldn't take my case at the moment. And I just -- I just wasn't sure how to file an answer or what was -- what was needed to -- to properly file an answer. That's why I was -- I was my -- my intention was not to not file anything. I just wanted to file the correct answer, and I just -- I just wasn't sure exactly how to -- how to do that.

After hearing the parties' arguments, the trial court signed an order denying Estrada's motion. This appeal followed.

Denial of Motion to Set Aside Default Judgment

In his first issue, Estrada asserts that the trial court abused its discretion by not setting aside the default judgment and granting a new trial because he satisfied each

of the *Craddock*[2] elements. We review a trial court's denial of a motion to set aside a default judgment and motion for new trial for an abuse of discretion. *Huffman Asset Mgmt., LLC v. Colter*, No. 05-22-00779-CV, 2023 WL 7319054, at *4 (Tex. App.—Dallas Nov. 7, 2023, pet. denied) (mem. op.) (citing *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam)). The test for abuse of discretion is whether the trial court acted arbitrarily or without reference to guiding legal principles. *Id.*

A defendant can prove he is entitled to a new trial after a no answer default judgment in either of two ways. *MobileVision Imaging Servs., L.L.C. v. LifeCare Hosps. of N. Tex., L.P.*, 260 S.W.3d 561, 564 (Tex. App.—Dallas 2008, no pet.). The first is by showing service of process was invalid. *Id.* (citing *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex. 2006) (per curiam)). Alternatively, the defendant can establish the three *Craddock* elements:

> (1) the defendant's failure 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) the motion for new trial sets up a meritorious defense; and
>
> (3) the motion is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

[2] *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. [Comm'n Op.] 1939).

Craddock, 133 S.W.2d at 126. When a defendant satisfies each of the three *Craddock* elements, a trial court abuses its discretion if it fails to grant a new trial. *Dolgencorp*, 288 S.W.3d at 926.

A defendant satisfies his burden under the first *Craddock* element when his factual assertions, if true, negate that his failure to answer was intentional or consciously indifferent and the plaintiff does not controvert the assertions. *Milestone Operating, Inc. v. ExxonMobil Corp.*, 388 S.W.3d 307, 310 (Tex. 2012) (per curiam). In determining whether there is intentional disregard or conscious indifference, the trial court examines the defendant's knowledge and acts. *Perry v. Benbrooke Ridge Partners L.P.*, No. 05-16-01486-CV, 2018 WL 2138957, at *2 (Tex. App.—Dallas May 7, 2018, no pet.) (mem. op.). "A failure to appear is not intentional or due to conscious indifference merely because it was deliberate; rather it must also be without justification." *Id.* "[S]ome excuse, although not necessarily a good one, will suffice to show that a defendant's failure to file an answer was not because the defendant did not care." *In re Marriage of Sandoval*, 619 S.W.3d 716, 721 (Tex. 2021) (per curiam) (quoting *Sutherland v. Spencer*, 376 S.W.3d 752, 755 (Tex. 2012)). "Proof of justification—accident, mistake (including some mistakes of law), or other reasonable explanation—negates intent or conscious indifference." *Id.* at 723. "In other words, the fact that an inference of conscious indifference may be drawn does not foreclose the defendant from positing a reasonable excuse for his actions." *Id.*

Here, Estrada explained that it was not his intention to "not file something," he was not sure how to file a correct answer, and he had tried to find counsel to help. However, an inability to find counsel does not automatically negate intentional or consciously indifferent conduct. *Holmes v. Eiland Coffee at Canyon Creek, LLC*, No. 05-22-01083-CV, 2023 WL 3836431, at *3 (Tex. App.—Dallas June 6, 2023, no pet.) (mem. op.). Estrada's explanation makes clear that he understood an answer was required, but nothing in the record indicates that he tried to file one on his own or contact either the trial court or opposing counsel in an effort to obtain additional time to do so. On this record, the trial court reasonably could have found that Estrada's explanation did not negate his conscious indifference to filing an answer before judgment. *See, e.g.*, *id.* at *1, 3 (affirming denial of new trial when defendant, who argued only that he could not find counsel, did not negate a finding that his failure to answer was intentional or the result of conscious indifference); *Zappavigna v. Zappavigna*, No. 02-11-00472-CV, 2013 WL 1234913, at *2 (Tex. App.—Fort Worth Mar. 28, 2013, no pet.) (mem. op.) (affirming denial of new trial when party knew of trial date but did not contact court regarding her inability to attend or attempt to secure new counsel).

We conclude that Estrada failed to meet his burden to prove the first prong of the *Craddock* test by demonstrating that his failure to answer before judgment was due to a mistake or accident, as opposed to intentional disregard or conscious

indifference, on his part.[3] Accordingly, the trial court did not abuse its discretion by denying Estrada's motion for new trial. We overrule his first issue.

Damages

In his second issue, Estrada contends that the evidence is legally and factually insufficient to support the trial court's award of unliquidated damages. Specifically, he complains that appellees failed to provide any evidence of the vehicle's sales price.

In a no answer default, all alleged facts are deemed admitted *except* the amount of unliquidated damages. *See Guardiola v. Moosa*, No. 05-20-00503-CV, 2021 WL 1220694, at *3 (Tex. App.—Dallas Apr. 1, 2021, no pet.) (mem. op.) (emphasis added). "Damages are unliquidated when they cannot be accurately calculated from the factual allegations in the petition or any written instruments in the record." *Id.* (quoting *Sumah v. Rodriquez*, No. 01-15-00813-CV, 2016 WL 4055585, at *3 n.1 (Tex. App.—Houston [1st Dist.] July 28, 2016, no pet.) (mem. op.)). "When damages are unliquidated, the trial court must hear evidence as to damages, TEX. R. CIV. P. 243; however, such damages need not be presented with testimony. . . . Affidavits will satisfy the evidence requirement of Rule 243." *Krawiec v. Holt*, No. 05-17-00307-CV, 2018 WL 2126858, at *2 (Tex. App.—Dallas May 7, 2018, no pet.) (mem. op.) (internal citation omitted).

[3] Having concluded that Estrada did not satisfy one of the *Craddock* elements, we need not reach his arguments on the remaining elements. *See* TEX. R. APP. P. 47.1.

A defendant may challenge the legal and factual sufficiency of evidentiary support for unliquidated damages on appeal from a no answer default judgment. *See Argyle Mech., Inc. v. Unigus Steel, Inc.*, 156 S.W.3d 685, 687 (Tex. App.—Dallas 2005, no pet.). We sustain a legal sufficiency or "no evidence" challenge if the record shows one of the following: (1) a complete absence of a vital fact; (2) rules of law or evidence bar the court from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence establishes conclusively the opposite of the vital fact. *Huffman Asset Mgmt.*, 2023 WL 7319054, at *10 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005)). In reviewing the challenge, we consider the evidence in the light most favorable to the judgment and indulge every reasonable inference that supports it. *City of Keller*, 168 S.W.3d at 821–22. For a factual sufficiency challenge, we consider all the evidence in the record and set the adverse finding aside only if the evidence supporting the finding is so weak or so against the overwhelming weight of the evidence that the finding is clearly wrong and unjust. *Fernandez v. Dunlap*, No. 05-23-00765-CV, 2024 WL 3963854, at *6 (Tex. App.—Dallas Aug. 28, 2024, no pet.) (mem. op.).

Appellees' petition pleaded for "the sales price of the [v]ehicle, its post-settlement expenses incurred enforcing the [s]ettlement [a]greement and getting paid from [Estrada's] bank, and its other and incidental and consequential damages." Appellees' motion for default judgment noted that appellees' damages were

unliquidated and a hearing was required under Texas Rule of Civil Procedure 243. In an affidavit attached to the motion, appellees' counsel averred that Boss Exotics sent Estrada $15,000 and the title to the vehicle as required by the settlement agreement.

Although there was some evidence to support damages of $15,000 for Boss Exotics' payment pursuant to the settlement agreement, the trial court's default judgment order awarded damages totaling $90,000. Estrada asserts that Boss Exotics failed to present any evidence to support the additional $75,000 in damages related to the vehicle. We agree.

The settlement agreement, which was attached to appellees' petition and an affidavit in support of the motion for default judgment, states that "[Estrada] viewed an online advertisement on Boss Exotics' website for [the vehicle] at a purchase price of $79,995.00." However, neither the motion nor the affidavit makes any mention of the actual sales price that Boss Exotics and Estrada agreed to or the balance Estrada owed on the vehicle.

At the motion for default judgment hearing, appellees' damages were mentioned only during argument by their counsel:

> The damages that we are requesting is the $15,000 settlement payment that we paid pursuant to that settlement agreement. We also are seeking $75,000, which is the balance of the vehicle. And the title that was to be tendered back to us from defendant pursuant to the settlement agreement, Section 4, would have allowed us to get paid the $75,000 from the defendant's bank and then $5,856.96 in attorney's fees.

An attorney's statements generally are not evidence unless they are made under oath. *See U.S. Gov't v. Marks*, 949 S.W.2d 320, 326 (Tex. 1997). An opponent may waive the oath requirement by failing to object when he "knows or should know that an objection is necessary," *see Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (per curiam), but neither Estrada nor an attorney on his behalf was present to waive the oath requirement. *See Tomes v. Thompson*, No. 04-15-00821-CV, 2016 WL 5795179, at *2 (Tex. App.—San Antonio Oct. 5, 2016, no pet.) (mem. op.) (counsel's unsworn statements to court did not constitute evidence when neither opponent of testimony nor opponent's counsel was present at default judgment hearing). Even had they been present, nothing in the record indicates that the statement by appellees' counsel constituted testimony such that they would know or should know to object to it. *See, e.g.*, *Marquez v. Providence Mem'l Hosp.*, 57 S.W.3d 585, 593 (Tex. App.—El Paso 2001, pet. denied) (it would not have been apparent that objection was required, and therefore there was no waiver of oath requirement when counsel did not preface remarks by stating that he was making them as officer of court or refer to his argument as testimony); *In re Wallingford*, 64 S.W.3d 22, 25 (Tex. App.—Austin 1999, orig. proceeding) (per curiam) (same).

On this record, we conclude that appellees' counsel's unsworn statement indicating that the balance due on the vehicle was $75,000 does not constitute evidence. Because there was no evidence of the amount Estrada owed Boss Exotics for the vehicle, we further conclude that there was insufficient evidence to uphold

the trial court's general award of $90,000 in unliquidated damages. We sustain Estrada's second issue.

Conclusion

We affirm the trial court's default judgment against Estrada. However, we reverse its award of damages and attorney's fees to appellees and remand for further proceedings consistent with this opinion. *See Argyle Mech.*, 156 S.W.3d at 688 (if no evidence point sustained as to unliquidated damages resulting from no answer default judgment, appropriate disposition is remand for new trial on issue of unliquidated damages); *Barker v. Eckman*, 213 S.W.3d 306, 315 (Tex. 2006) (remanding for new trial on attorney's fees when damages reduced significantly).

/Craig Smith//
CRAIG SMITH
JUSTICE

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Pedersen, III, J., dissenting.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MAURICIO ESTRADA, Appellant	On Appeal from the 95th District Court, Dallas County, Texas
No. 05-23-00990-CV V.	Trial Court Cause No. DC-23-06469. Opinion delivered by Justice Smith.
BOSS EXOTICS, LLC AND RODNEY MCGAFFEY, Appellees	Justices Pedersen, III, and Garcia participating.

In accordance with this Court's opinion of this date, the trial court's Order Granting Plaintiff's Motion for Default Judgment is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's order awarding damages and attorney's fees to appellees BOSS EXOTICS, LLC AND RODNEY MCGAFFEY. We **REMAND** this cause to the trial court for further proceedings on damages and attorney's fees. In all other respects, the trial court's order is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 18th day of December, 2024.