2016 WL 240761
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas,
Beaumont.

Jerome William Pekar, Appellant
v.
Marian Louise Graves Pekar, Appellee

NO. 09–14–00464–CV
|
Submitted on May 22, 2015
|
Opinion Delivered January 21, 2016

On Appeal from the 317th District Court, Jefferson County, Texas, Trial Cause No. C–220,542

Attorneys and Law Firms

Barrett Lindsay, for Appellant.

Sonya B. Coffman, for Appellee.

Before McKeithen, C.J., Kreger and Horton, JJ.

MEMORANDUM OPINION

HOLLIS HORTON, Justice

***1** Jerome William Pekar appeals from a default judgment in a suit for divorce filed by Marian Louise Graves Pekar. In two issues, Jerome asserts the trial court erred in failing to grant his motion for new trial and erred by amending the judgment of divorce without first notifying him that the court was considering altering the terms of the original decree. Jerome asks that we overturn the amended decree and grant his request for a new trial. Finding no error in the trial court's decision denying Jerome's motion for new trial, we affirm the amended final decree of divorce.

Background

Marian Louise Graves Pekar and Jerome William Pekar married in 2003. In March 2014, Marian filed an original petition for divorce and had Jerome personally served with citation. The record includes a return of service and an affidavit, both of which are signed by the person who served Jerome with the petition for divorce. The return shows that Jerome was served with citation on March 31, 2014, and the citation informed Jerome that he was required to file a written answer on the Monday following twenty days of the date he was served.

Jerome failed to answer the petition for divorce before the trial court conducted a final hearing on Marian's petition, which occurred on June 25, 2014. At the conclusion of the hearing, the trial court declared the parties divorced and rendered a judgment dividing the parties' marital estate.

Within thirty days of the date that the trial court rendered the original decree of divorce, it signed an amended final decree, altering the method used to divide two brokerage accounts. In the original decree, these two accounts were divided by monetary value without identifying how the stocks held in each account were to be divided. However, in the amended decree, the trial court divided the two accounts by specifying the shares and cash awarded to Marian, with the balances of the accounts awarded to Jerome. Both the original and the amended decrees state that the trial court's division of the parties' marital estate were "just and right" divisions, and both decrees state that the trial court divided the marital estate with "due regard for the rights of each party." Jerome does not challenge the sufficiency of the evidence supporting these findings in his appeal.

On July 23, 2014, Jerome made a formal written appearance by filing a post-judgment motion for new trial.[1] In his motion, Jerome requested the trial court grant his motion because he had attempted to retain an attorney after he was sued and before he suffered the default, and he explained his delay in responding to the suit was because he wanted to reconcile and did not want the divorce. Jerome also alleged that before the default judgment, he was advised over the telephone by the trial court that he would receive forty-five days' notice of the trial. He also alleged that he was never told that if he failed to file a written answer, that he would not receive notice of the date for the trial. Additionally, Jerome's motion asserts that the final decree is unclear regarding the distribution of the assets and property of the marital estate, that the distribution of the assets of the marital estate was not fair or equitable, that the decree fails to properly account for

all the parties' marital property, and that the decree fails to properly account for the parties' separate property.

***2** The trial court conducted a hearing on Jerome's motion for new trial approximately two months after it was filed. Jerome and Marian testified during the hearing. According to Jerome, he called the trial court on June 17, 2014, and spoke to a female who told him that he would receive forty-five days' notice of the hearing on his divorce. Jerome also testified that he was never called and advised that the court was considering amending the decree. Jerome also addressed his claim that he had attempted to reconcile with Marian before the trial court granted her petition for divorce. According to Jerome, he sent an electronic message to Marian in early May 2014 regarding his proposal that they reconcile. Ten days after his initial proposal, Jerome indicated that he sent Marian another electronic message proposing several specific ways that he thought he could improve their marriage. Jerome also described the efforts that he made in June 2014 to hire an attorney to represent him in the divorce; however, Jerome's testimony indicates he never hired an attorney before the trial court rendered either the original decree of divorce or the amended final decree.

During the hearing on his motion, Jerome described how the trial court's division of the parties' property included some property that he claimed the trial court should have characterized as his separate property. According to Jerome, the 2001 SUV, which he was awarded as a part of the marital estate, was property that he purchased before he married Marian. Jerome also produced several brokerage statements, dated prior to the date he and Marian married, that show the brokerage accounts were valued at more than $500,000 as of the dates of those statements. Jerome contends that in dividing the parties' marital estate, the trial court failed to properly trace the separate property that he held in the brokerage accounts, and improperly characterized all of the property in the brokerage accounts as community property. During the hearing, Jerome also stated that he was ready to pay the expenses Marian had incurred in obtaining the default judgment, and he indicated that he was ready for trial.

On cross-examination, Jerome acknowledged that he was served with the citation that accompanied Marian's petition for divorce on March 31, 2014. Jerome indicated that after being served, he did not read the citation that accompanied the petition for divorce for "[p]robably 60 days." According to Jerome, he was not aware that a response to Marian's lawsuit was required, and when he finally read the citation, he did not understand that a default judgment might be taken if he failed to file an answer.

Marian also testified during the hearing on Jerome's motion for new trial. In her testimony, Marian explained how her proposed division of the parties' marital estate had accounted for the separate property Jerome held in the various brokerage accounts. Thus, Jerome's testimony that the trial court treated the entire value of the brokerage accounts as community property was disputed by Marian during the hearing on Jerome's motion. Marian also explained why she needed to have the original decree amended; according to Marian, the brokerage firms holding the accounts containing the parties' community property refused to divide the accounts by value, as stated in the original decree. Marian indicated that the purpose of amending the decree was to divide the accounts by identifying specific shares, and that the change was necessary to get the brokerages to comply with the decree dividing the parties' marital estate. According to Marian, the change in the way the brokerage accounts were divided did not change the monetary value that she and Jerome were awarded under the decrees. Marian indicated that after the trial court amended the decree, one of the brokerage firms complied with the provisions of the amended decree but that the other had not. According to Marian, Jerome was trying to prevent her from obtaining the shares awarded to her under the terms of the amended decree. Marian also addressed Jerome's claim that she had indicated she desired to reconcile: Marian testified that she never considered reconciling with Jerome after the date she filed the petition for divorce.

***3** At the conclusion of the hearing on Jerome's motion, the trial court informed the parties: "I believe that [Jerome] consciously did disregard [the citation] because of his moral beliefs that he didn't want the divorce." That same day, the trial court rendered an order denying Jerome's motion for new trial. [2]

Discussion

In his first issue, Jerome argues that the trial court abused its discretion by denying his motion because the evidence he presented during the hearing on his motion established that he was entitled to a new trial. Under Texas law, three elements are required to be proven to demonstrate that a party who has been defaulted should be awarded a new trial. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex.2009) (citing *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126

(Tex.1939)). To obtain a new trial, a party who has been defaulted must establish all of the following elements: "(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.* We apply an abuse-of-discretion standard to determine whether the trial court's ruling on a motion for new trial should be reversed on appeal. *See Old Republic Ins. Co. v. Scott*, 873 S.W.2d 381, 382 (Tex.1994) (per curiam).

In determining whether Jerome's failure to appear was due to his intentional disregard or conscious indifference, we look to his knowledge and his acts. *See Dir., State Employees Worker's Comp. Div. v. Evans*, 889 S.W.2d 266, 269 (Tex.1994). Generally, a defendant's testimony that explains why the defendant failed to answer a lawsuit will support a trial court's finding that the defendant did not fail to answer because he did not care. *See Sutherland v. Spencer*, 376 S.W.3d 752, 755 (Tex.2012). Therefore, where the factual allegations that are contained in a movant's affidavits are not controverted, the defendant's affidavit explaining his excuse for failing to file will be sufficient to allow the trial court to grant the motion for new trial if the motion and affidavit set forth facts that, if true, negate the inference that the defendant acted intentionally or with conscious indifference to his responsibility to file a written answer in response to the plaintiff's suit. *Strackbein v. Prewitt*, 671 S.W.2d 37, 38–39 (Tex.1984). However, when the trial court conducts an evidentiary hearing on a motion for new trial and the party that obtained the default judgment presents evidence at the hearing to show that the defaulted party acted intentionally or with conscious disregard to his rights, the question of why the defaulted party failed to answer presents a question of fact, which is resolved by the factfinder. *See Utz v. McKenzie*, 397 S.W.3d 273, 278 (Tex.App.–Dallas 2013, no pet.); *Freeman v. Pevehouse*, 79 S.W.3d 637, 641 (Tex.App.–Waco 2002, no pet.). When a trial court acts as a factfinder, it may generally believe " 'all, none, or part of a witness's testimony.' " *Utz*, 397 S.W.3d at 279 (quoting *Stein v. Meachum*, 748 S.W.2d 516, 517 (Tex.App.–Dallas 1988, no writ)).

***4** In this case, the trial court conducted an evidentiary hearing on Jerome's motion for new trial and both parties presented evidence at the hearing to address why Jerome failed to timely file an answer. The trial court concluded that Jerome consciously disregarded his rights by failing to file a written response to Marian's petition, and that finding is reasonable based on the testimony introduced during the hearing on Jerome's motion. For example, as the factfinder, the trial court was entitled to reject Jerome's testimony that he never read the citation that was served on him, as well as his testimony that he called the trial court and was allegedly advised by a female who answered the phone that he would be notified of any hearings. On the date Jerome alleges he called the court, the record shows that he had no answer on file. As the factfinder, the trial court was also entitled to reject Jerome's testimony that he did not read or understand the information provided to him by the citation, which contains language that informs defendants they must file a written answer by a certain date. Given the information provided to Jerome by the citation, the trial court could reasonably conclude that Jerome was aware he could be defaulted without receiving any further notice[3] if he chose not to answer Marian's petition for divorce.[4]

The trial court was also entitled to reject Jerome's excuse that he thought that Marian was interested in reconciling to explain why he failed to answer her petition for divorce. During the hearing on the motion for new trial, Marian testified that she never talked to Jerome about reconciling, and that she made it clear to him from the beginning that the "divorce is going to happen." Because the trial court was entitled to accept Marian's testimony and to reject Jerome's, its finding that Jerome consciously disregarded his rights was reasonable and does not constitute an abuse of discretion. We hold the trial court did not abuse its discretion by denying Jerome's motion for new trial. *See Dolgencorp*, 288 S.W.3d at 926; *Old Republic Ins. Co.*, 873 S.W.2d at 382.

In his second issue, Jerome argues that the amended decree is void and unenforceable. Although Jerome argues that he was entitled to notice of the hearings that led to the decrees at issue in the appeal, the record shows that Jerome had not filed a written answer before the date the trial court rendered the original and the amended decrees. Under the Texas Rules of Civil Procedure, Jerome was not entitled to receive notice of any hearings before the date he first appeared. *See* Tex.R. Civ. P. 239.

Moreover, we are not persuaded that the amended decree is void and unenforceable. According to Jerome, section 9.007 of the Texas Family Code limits the power of a court to amend, modify, alter, or change a division of property approved in the decree of divorce or annulment. *See* Tex. Fam.Code Ann. § 9.007 (West 2006). The record shows that the trial court signed the initial decree of divorce on June 25,

2014, and that it signed the amended decree on July 21, 2014, which was less than thirty days later.

When the trial court signed the amended decree, the original decree had not yet become final. "Property adjudications in a divorce decree become final the same as in other judgments relating to title and possession of property." *Schwartz v. Jefferson*, 520 S.W.2d 881, 887 (Tex.1975). Given the trial court's plenary power over the original decree that it rendered in June, the decree was not yet final, so it was subject to the trial court's decision to modify it. *See*Tex.R. Civ. P. 329b(d) (providing a trial court with plenary power to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed); *see also*Tex.R. Civ. P. 329b(e) (providing trial courts in cases where motions for new trial are timely filed to vacate, modify, correct, or reform a judgment until thirty days after all such timely-filed motions are overruled).

***5** Section 9.007 of the Texas Family Code, which provides that a court may not amend, modify, alter, or change a decree of divorce, concerns decrees that have matured into final judgments; section 9.007 does not apply to interlocutory judgments over which trial courts maintain their plenary power. *See**In re Provine*, 312 S.W.3d 824, 829 (Tex.App.–Houston [1st Dist.] 2009, no pet.)(explaining that after the trial court's plenary power expires, section 9.007 of the Family Code prevents a court from altering, modifying, correcting, or reforming a judgment); *In re Garz* a, 153 S.W.3d 97, 102 (Tex.App.–San Antonio 2004, no pet.)(noting that the trial court "retains plenary power over its decree and may modify its property division" for the periods in which it has plenary power under Rule 329b); *In re Marriage of Clark*, No. 07–02–0285–CV, 2004 WL 350988, at *2 (Tex.App.–Amarillo Feb. 25, 2004, no pet.)(explaining that under section 9.007 of the Texas Family Code, a trial court "may not change the division once its plenary jurisdiction over the decree expires"); *see also**Quijano v. Quijano*, 347 S.W.3d 345, 353 (Tex.App.–Houston [14th Dist.] 2011, no pet.). Because the trial court had plenary power over the June 2014 decree when it signed the amended decree in July 2014, we disagree with Jerome that the amended final decree is void and unenforceable.

Jerome contends that by designating the specific stocks to be transferred, Marian received an additional $150,000–$200,000 of the parties' marital estate as compared to the division she obtained under the provisions of the original decree. We are also not persuaded the evidence before the trial court supports Jerome's argument that the changes in the amended decree substantially altered the division of the parties' marital estate when compared to the division of property achieved under the original decree.

The brokerage statements from July 2014 were not admitted into evidence during the hearing the trial court conducted on Jerome's motion for new trial, so the evidence introduced during the hearing on Jerome's motion for new trial does not contain sufficient information to properly evaluate Jerome's claim that the amendment substantially altered the value of the property each party received under the decrees. Moreover, the testimony and evidence introduced during the trial court's hearing on Jerome's motion for new trial do not address the fairness of the overall division of the parties' marital estate. *See**Pletcher v. Goetz*, 9 S.W.3d 442, 446 (Tex.App.–Fort Worth 1999, pet. denied) (noting that the party complaining of the trial court's division of property must demonstrate that the division was so unjust, based on the evidence in the record, that it constituted an abuse of discretion). Given the explanation that the change was required to permit the brokerages to divide the marital property in the brokerage accounts, Jerome has not shown that the trial court acted arbitrarily or unreasonably by the manner that it amended the decree. *See id.*

Jerome's claim that Marian received a more favorable division of the parties' marital estate in the amended decree was a disputed fact that the trial court resolved in Marian's favor following the hearing the trial court conducted on Jerome's motion for new trial in September 2014. During the hearing, Marian testified that dividing the accounts by designating the shares to be removed from the accounts left the parties with an equal division of the community property. [5] Marian also explained that specifying the shares in the amended decree was needed to allow the brokerages to comply with the court's decree.

***6** Finally, Jerome argues the trial court improperly characterized some of his separate property as community property. While Jerome's testimony about what was his separate property addresses whether he had a meritorious defense, it is not a matter that concerns the enforceability of the trial court's judgment. In this case, Jerome failed to file an answer, so at the time the trial court divided the parties' property, the trial court was entitled to presume that all the property in Jerome's possession should be characterized as community property. *See*Tex. Fam.Code Ann. 3.003(a) (West 2006) (creating a presumption that the property

possessed by either spouse is community property); *Anderson v. Anderson*, 282 S.W.3d 150, 155 (Tex.App.–El Paso 2009, no pet.)(noting that a "general denial properly raises the issue of ownership of the property"). In our opinion, Jerome's argument that the parties' property was mischaracterized relates to the question of whether he has a meritorious defense, and is a matter that we need not reach given the trial court's finding that Jerome consciously disregarded his rights by failing to file a written answer to Marian's petition for divorce.

We hold the record fails to substantiate Jerome's claim that the amended decree substantially altered the values of the property the parties were awarded under the original decree. Because Jerome has not shown the trial court abused its discretion by denying his motion for new trial, his issues are overruled. The judgment of the trial court is affirmed.

AFFIRMED.

All Citations

Not Reported in S.W.3d, 2016 WL 240761

Footnotes

1 Jerome filed a supplemental motion for new trial on August 13, 2014, stating that he had just learned on July 21, 2014, that the trial court had rendered an amended decree. Jerome's supplemental motion raises the same complaints about the amended decree that he raised in his initial motion about the original decree, and no additional complaints are found in the supplemental motion that are not included in Jerome's original motion.

2 We treat the order denying the motion for new trial as having denied both Jerome's motion and supplemental motions, even though the order does not specifically refer to the supplemental motion. Jerome's filing clearly indicates that he was seeking relief from the final decree, which in this case is the amended decree that the trial court rendered in July 2014, not the interlocutory decree rendered in June 2014.

3 Rule 239 of the Texas Rules of Civil Procedure allows a court to default a defendant who has not filed a timely written answer, provided the return of service has been on file with the clerk of the court for ten days, exclusive of the day of filing and the day the judgment is rendered. Tex.R. Civ. P. 239 (Judgment by Default); Tex.R. Civ. P. 107 (Return of Service). Under Rule 239, trial courts are allowed to render a default judgment upon the call of the docket or "at any time after a defendant is required to answer[.]" The rule does not require that additional notice of future proceedings be given to a defendant who was served but has not answered, so a defendant in default is not entitled to notice of further proceedings. Tex.R. Civ. P. 239.

4 The citation served on Jerome advised that he had been sued, the date he was required to answer, and that if he did not answer, he could be defaulted. The record before the trial court shows that Jerome was served with citation on March 31, 2014, so his answer was due on or before April 21, 2014. *See*Tex.R. Civ. P. 99(b).

5 Additionally, during the June 2014 hearing the trial court conducted before entering the original decree of divorce, Marian testified that the division she requested would result in an equal division of the parties' community property.