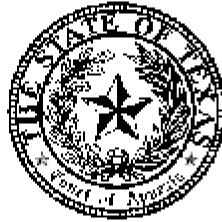
Affirmed and Opinion filed June 28, 2001.



In The

Fourteenth Court of Appeals

NO. 14-98-00485-CV

EUGENE SMITH, Appellant

V.

IVORY AND LAVERNE SOILEAU, Appellees

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 97-01046

O P I N I O N

Appellees, Ivory and Laverne Soileau, brought a boundary line dispute against appellant, Eugene Smith, to have the trial court issue a new boundary line and order appellant to remove a fence. On the date set for trial, appellant's attorney did not appear. The appellees presented their case, and the judge entered a judgment in their favor. Subsequently, appellant filed a motion for new trial, which was denied. In one point of error, appellant argues the trial court erred in denying his motion for new trial. We affirm.

To qualify for an equitable motion for new trial, the defaulting party must satisfy the following three elements:

1. Present facts showing that the failure to appear was not intentional or the result of conscious indifference but was due to accident or mistake;
2. Set up a meritorious defense; and
3. File the motion for new trial when it would not cause delay or otherwise injure the prevailing party.

Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124 (1939); *Lowe v. Lowe*, 971 S.W.2d 720, 723 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Although *Craddock* was a no-answer default judgment, the Supreme Court has held that it applies to post-answer default judgments as well. *See LeBlanc v. LeBlanc*, 778 S.W.2d 865, 865 (Tex. 1989).

Because appellant does not satisfy the second element of the *Craddock* test, we will address it first. The second prong of *Craddock* requires the appellant to set up a meritorious defense. *Craddock* does not require proof of a meritorious defense in the accepted sense to entitle one to a new trial after default; "the motion should be granted if it sets up a meritorious defense." *Ivey v. Carrell*, 407 S.W.2d 212, 214 (Tex.1966). However, a new trial should not be granted when the movant merely alleges that he or she has a meritorious defense. *See id*.

A meritorious defense may be set up by including in the motion for new trial facts which would constitute a defense and which are supported by affidavits or other evidence constituting prima facie proof of such defense. *See id*.; *Europa Cruises Corp. v. AFEC Intern.*, 809 S.W.2d 783, 786 (Tex. App.—Houston [14th Dist.] 1991, no writ). A meritorious defense is one that, if found, would cause a different result upon a retrial of the case, although it need not be a totally opposite result. *Owens v. Neely*, 866 S.W.2d 716, 719 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

Appellant's motion for new trial does not contain any proof of facts constituting a meritorious defense. Although appellant's counsel states in his motion that appellant would testify at the motion for new trial hearing regarding a meritorious defense, there is no record of such testimony. Additionally, the affidavit of appellant's counsel, attached to the motion for new trial, contains no proof tending to support a meritorious defense. Thus, because there

was no proof of a meritorious defense in appellant's motion for new trial, the trial court did not err in overruling it.

Accordingly, we overrule appellant's sole point of error and affirm the judgment of the trial court.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed June 28, 2001.

Panel consists of Justices Lee, Draughn, Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Norman R. Lee, Joe L. Draughn, and D. Camille Hutson-Dunn sitting by assignment.