

**No. xx-xx-xxxx-CV**

**JAMES MADISON and M ENTERPRISES, INC.**

**Appellants,**

**vs.**

**JANE SMITH and MARY JONES**

**Appellees.**

May it please the court, my name is John Doe, attorney for the Defendants-Appellants. This is an appeal from a post-answer default judgment in the County Court at Law. The dispute arises from real estate transactions involving the parties.

**NEW TRIAL**

The threshold issue in this case is whether the County Court at Law erred in denying Madison and M Enterprises' Motion for New Trial because the default judgment taken without notice violated their due process rights. Madison and M Enterprises filed a renewed motion for new trial that, because of the court's tight schedule, could not be heard while the court had plenary power. At the hearing, the county court at law decided, upon further review, that Madison and M Enterprises did not receive notice of the trial setting. Judge Monroe was inclined to grant the renewed motion if he had jurisdiction to do so. We are here to ask this Court to do what the trial court wanted to do but couldn't, order a new trial because Madison and M Enterprises did not receive notice of the trial setting and were therefore denied due process.

## **No Notice equals New Trial**

Once a defendant makes an appearance, it is entitled to notice of the trial setting as a matter of due process under the Fourteenth Amendment to the United States Constitution. *LBL Oil Co. v. International Power Serv., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989); *Bradford v. Bradford*, 971 S.W.2d 595, 597 (Tex. App. – Dallas 1998, no pet.). In *Lopez*, the Texas Supreme Court established that when a defendant does not get the required notice in the manner set forth in the Texas Rules of Civil Procedure, a new trial is mandatory. *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

Here, the issue of notice comes down to two questions: (1) did Madison and M Enterprises receive actual notice, or (2) did their receive sufficient constructive notice? The answer to both of those questions is no.

## **Actual Notice and Presumption of Mailing**

Actual notice may be established by mailing notice of the trial setting pursuant to Texas Rule of Civil Procedure 21a. The clerk of court and plaintiff's counsel both mailed a notice to Madison at the address in the clerk's file. Such a mailing does not establish notice, however, it only creates a presumption of receipt. In *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987), the Texas Supreme Court stated that the presumption of receipt vanishes when the presumed recipient offers proof of

nonreceipt. *Cliff*, 724 S.W.2d at 780; *Platt v. Platt*, 991 S.W.2d 481, 484 (Tex. App. -- Tyler 1999, no writ).

Here, Madison testified, without rebuttal, that he and M Enterprises never received the notice. He had moved from the address listed in the clerk's records and put in a forwarding notice with the post office. The notice sent by the clerk of court was returned and is in the trial court's file – the clerk's letter to Madison addressed to the Shady Oak address was in the file stamped "return to sender." (8010 R.R. v. 4 p. 14; Smith Brief at 24.) And Smith and Jones Offered No Evidence of Receipt – no green card was ever introduced. Madison rebutted the presumption and established that he did not have actual notice of the trial setting. This is not a case where a defendant deliberately refused to pick up mail, like *Gonzales v. Surplus Insurance Services*, 863 S.W.2d 96 (Tex. App. – Beaumont 1993, writ denied). No evidence of deliberate deceit, at most negligent failure to update the address. While Madison may not have technically complied with Local Rule 4.05 and informed the clerk of his new address, he did tell counsel for Smith and Jones that he had moved.

### **Constructive Notice**

The next question is whether there was some form of constructive notice and whether such notice would be adequate. When the case was continued, the trial judge gave an instruction to see the court coordinator for a new trial setting. Madison testified that he interpreted the instruction as a directive to plaintiff's counsel to obtain a new trial

setting, of which he would receive notice, so it was unclear. Smith's argument is that this instruction constitutes constructive notice of the trial setting – if Madison had just done what the judge told him to do, he would have had notice.

That was the very situation in the Houston case of *Green v. McAdams*, 857 S.W.2d 816 (Tex. App. – Houston [1st Dist.] 1993, no writ). There, the plaintiff asserted that, because the trial setting itself resulted from a hearing of which the defendant did have notice, the defendant had constructive notice of the trial setting. *Green*, 857 S.W.2d at 819. If the defendant had just shown up at that hearing, like the court told him to, he would have had notice. The Houston court rejected this assertion, noting that the record was barren of any evidence that the defendant received notice of the trial setting itself pursuant to Rule 21a, and rejecting the notion that constructive notice was sufficient. Here, Madison, trusting that plaintiffs' counsel would notify him, did not go see the court coordinator where he could have obtained a trial setting. As in *Green*, there is no evidence that Madison and M Enterprises had any other notice of the subsequent trial setting, and they are therefore entitled to a new trial. This Court embraced *Green* in an unpublished decision, *Worthen v. Glatzer*, 1999 WL 150878 (Tex. App. - Dallas 1999, no writ), but has yet to issue a published opinion on the issue of whether such constructive notice may be deemed adequate.

### ***Craddock* Test**

If the Court determines that Madison did have some form of constructive notice, then a new trial should have been granted under the *Craddock* test. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). Under the *Craddock* test, a new trial should be granted because Defendants' failure to appear at trial was not intentional or the result of conscious indifference, but was due to mistake or accident, Defendants have set up meritorious defenses, and there will be no delay or injury to Plaintiffs as a result of granting a new trial. To be entitled to a new trial, a defendant is not required to prove a meritorious defense, but must only set up such a defense. *Director, State Emp. Workers Comp. Div. v. Evans*, 889 S.W.2d 266, 270 (Tex. 1994). Even if this arguably naive decision not to see the court coordinator constituted negligence, it still does not constitute a deliberate decision not to attend the trial. *See State and County Mutual Fire Ins. Co. v. Williams*, 924 S.W.2d 746, 748 (Tex. App. – Texarkana 1996, no writ) (“A defendant’s negligence will not bar a new trial so long as the failure to attend the trial was not the result of conscious indifference.”) Madison raised meritorious defenses and offer to pay costs made in motion for new trial.

### **THE BOND**

We are asking the Court to dissolve that portion of the temporary injunction that restrains Madison from using his personal or real property. The other portions of the injunction, relating to alleged harassment, were entered on consent. But with respect

to the property injunction, this portion of the order required Smith and Jones to post a \$5,000 bond. (5917 C.R. p. 94; App. Tab D.) The temporary injunction was issued on June 30, 2000, nearly six month ago. (5917 C.R. p. 93; App. Tab D.) The Texas Supreme Court has made it clear that “the failure of an applicant to file such a bond renders the injunction void ab initio.” *Goodwin v. Goodwin*, 456 S.W.2d 885, 885 (Tex. 1970); *see also Smith v. Smith*, 681 S.W.2d 793, 796-97 (Tex. App. -- Houston [14th Dist.] 1984, no writ). Smith and Jones had ample time to post a bond and have deliberately chosen not to do so for the last six months. Having not posted the required bond, the injunction order is therefore void and should be vacated.