Affirmed and Opinion filed May 11, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00659-CV

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DELANDO CONNER and
SOLOMON CONNER, Appellants

V.

WEST PLACE HOMEOWNERS ASSOCIATION, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 98-21323

O P I N I O N

Delando Conner and Solomon Conner (the "Conners") appeal a default judgment entered in favor of West Place Homeowners Association ("West Place") on the grounds that: (1) the substituted service of process on them was not in compliance with Texas Rule of Civil Procedure 106(b); and (2) the return of service was not in compliance with Texas Rule of Civil Procedure 107.[1] We affirm.

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[1] Any further reference to a "Rule," is to the Texas Rules of Civil Procedure.

Background

West Place filed suit on May 5, 1998, against the Conners for delinquent maintenance association fees. After several attempts to personally serve the Conners were unsuccessful, West Place filed a motion for substituted service. An order authorizing substituted service under Rule 106(b) was signed by the trial judge on August 6, 1998, and returns of the citations were executed by Dorothy Winograd, a private process server, reflecting substituted service on November 4, 1998. The Conners failed to file an answer, and a default judgment was entered in favor of West Place on January 7, 1999. The Conners filed a restricted appeal,[2] asserting that the default judgment was invalid because the service of citation and the return of process were not in compliance with Rules 106(b) and 107.

Substituted Service

The Conners' first point of error argues that service of process was deficient under Rule 106(b) because: (1) the order for substituted service did not specifically name any individual who was authorized to serve the citation; (2) the order for substituted service is vague as to the manner in which the Conners were to be served; and (3) the affidavit supporting the motion for substituted service (the "affidavit") is insufficient because it reflects that the address where service was attempted was not the Conners' usual place of abode.

In order for a default judgment to withstand a direct attack,[3] strict compliance with the Rules regarding the issuance of citation, the manner and mode of service, and the return of

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[2] The restricted appeal replaces the former writ of error appeal to the court of appeals. *See* TEX. R. APP. P. 30.

[3] A restricted appeal is a direct attack on a default judgment. *See Barker CATV Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 792 (Tex. App.–Houston [1st Dist.] 1999, no pet.). The elements necessary to succeed on a restricted appeal are: (1) a notice of restricted appeal must be filed within six months after the judgment is signed; (2) by a party to the lawsuit; (3) who did not participate in the hearing that resulted in the judgment complained of and did not file a timely post-judgment motion or request findings of fact and conclusions of law; and (4) error must be apparent on the face of the record. *See* TEX. R. APP. P. 26.1(c), 30; *Barker*, 989 S.W.2d at 791; *Agrichem, Ltd. v. Voluntary Purchasing Groups, Inc.*, 877 S.W.2d 851, 852 (Tex. App.–Fort Worth 1994, no writ) (dealing with writ of error practice, which the restricted appeal replaced). In this case, the only disputed element is whether error exists on the face of the record that would require reversal of the default judgment.

process must be shown on the face of the record. *See Wilson v. Dunn,* 800 S.W.2d 833, 836 (Tex. 1990); *Stankiewicz v. Oca*, 991 S.W.2d 308, 310 (Tex.App.–Fort Worth 1999, no pet.); *Barker*, 989 S.W.2d at 792. If strict compliance is not affirmatively shown, the service of process is invalid and has no effect. *See Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985). Further, the normal presumptions favoring valid issuance, service, and return of the citation do not apply to a direct attack on a default judgment. *See Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994).

When attempts at actual service have been unsuccessful, Rule 106(b) provides for substituted service as follows:

> Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either [Rule 106] (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service
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> (1) by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or
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> (2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

TEX. R. CIV. P. 106(b); *see State Farm Fire and Cas. Co. v. Costley*, 868 S.W.2d 298, 299 (Tex. 1993). Upon receipt of an affidavit satisfying Rule 106(b), the trial court may authorize substituted service which, as shown from the affidavit or other evidence, is reasonably calculated to provide notice. *See State Farm*, 868 S.W.2d at 298-99.

In this case, the trial court's order directed that service be made "by leaving a true copy of the citation with a copy of the Plaintiff's First Original Petition with anyone over sixteen years of age [ ][4] with a copy of the petition attached, to the front door at the defendants [sic] usual place of abode 8815 Deer Meadow. . . ." Although the Conners argue that this order was insufficient because it did not specify that Dorothy Winograd, or any particular process server,

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[4] The language following "sixteen years of age" and preceding "with a copy of" was crossed through and initialed by the trial judge, leaving the order to read as shown above.

was to serve the citations, they fail to cite any authority imposing such a requirement.[5] Therefore, this contention provides us no basis upon which it can be sustained.

Relying on *Rivers*, the Conners also contend that the order was vague because two methods of service were possible. *See Rivers v. Viskozki*, 967 S.W.2d 868, 870 (Tex. App.–Eastland 1998, no pet.). However, in *Rivers* the order in question directed that service be made by leaving the citation and petition with anyone over the age of sixteen or *"in any other manner which will be reasonably effective to give . . . notice. . . ."* *See Rivers*, 967 S.W.2d at 869. The *Rivers* Court concluded that in so authorizing the constable to determine what manner of service would be effective to give reasonable notice of the suit, the order was contrary to Rule 106(b), which requires the court to determine the method of service. *See id.* at 870. Although the order in this case might be read to allow the process server to choose between two methods of service, both were determined by the trial court, and the process server was not free to devise a method of service and then implement it. Further, the adequacy of substituted service has been upheld where the order contained alternative methods of service. *See Pao v. Brays Village East Homeowners Ass'n, Inc.*, 905 S.W.2d 35, 38 (Tex. App.–Houston [1st Dist.] 1995, no writ); *see also Stankiewicz*, 991 S.W.2d at 311 (finding that because the trial court's order authorizing substituted service did not expressly state that the specified method of service was the *exclusive* method, then a preferential method, such as personal service, was still an available alternative). Therefore, the order was not vague regarding the method of service.

Finally, the Conners contend that the affidavit does not support the motion for substituted service because the remarks of their mother, that they lived at 8815 Deer Meadow

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[5] There is authority indicating that if an order authorizing substituted service specifically directs a particular individual to serve process, then the return must reflect service was made in that manner. *Cf. Becker v. Russell*, 765 S.W.2d 899, 900-01 (Tex. App.–Austin 1989, no writ); *Pratt v. Moore*, 746 S.W.2d 486, 487 (Tex. App.–Dallas 1988, no writ). However, the Conners have cited, and we have found, no authority stating that an order must specify who is to serve process.

"off and on,"[6] established that that address was not the Conners' usual place of abode. The affidavit supporting a Rule 106(b) motion need only recite that the stated location is the usual place of abode; it need not state how the affiant reached that conclusion. *See Pao*, 905 S.W.2d at 37. In addition, Rule 106(b) allows substituted service at the defendant's usual place of abode or other place where the defendant "can probably be found." *See* TEX. R. CIV. P. 106(b).[7] The affidavit in this case does not establish that 8815 Deer Meadow was not the Conners' usual place of abode but only that it was not their *only* place of abode. *Compare Light v. Verrips*, 580 S.W.2d 157, 158-59 (Tex. Civ. App.–Houston [1st Dist.] 1979, no writ) (finding that substituted service was insufficient in part because a letter in the record stated that the address where service had been attempted was in fact not the defendant's place of abode). In any event, the trial court could properly conclude that the Conners' mother's house, where they resided "off and on," was a place where they could probably be found. Therefore, the Conners have not established that the manner and method of service failed to comply with Rule 106(b), and their first point of error is overruled.

Return of Service

The Conners' second point of error argues that the return of service does not comply with Rules 103 and 107 because: (1) there is nothing in the record to establish who was authorized to serve process; and (2) the return of citation does not name the principal on whose behalf Dorothy Winograd was acting. The Conners further argue that the Harris County Private

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6 Attached to West Place's motion for substituted service was an affidavit executed by Mitchell Winograd, a private process server, stating that it was impractical to secure service on the Conners because "they absent or secret themselves and/or otherwise evades [sic] service . . . at . . . 8815 Deer Meadow, Houston, . . . the [Conners] usual place of abode." The affidavit lists seven unsuccessful attempts of personal service at that address, one of which states: "I spoke to a woman who identified herself as being the mother of the two defendants. She stated they resided there off and on but were not in at that thime [sic]."

7 Thus, if a defendant conceals himself, frustrating personal service, and there is some doubt as to the defendant's usual place of abode, the court may authorize substituted service which, shown from the affidavit or other evidence, is reasonably calculated to provide notice. *See State Farm*, 868 S.W.2d at 299; *Sgitcovich v. Sgitcovich*, 150 Tex. 398, 406-07, 241 S.W.2d 142, 148 (1951).

Process Servers Order, dated February 25, 1994, and referred to in Winograd's return of service affidavit,[8] is not part of the record; therefore, the face of the record is insufficient to support the default judgment.

Citation may be served by any person authorized by law or written order of the court who is not less than eighteen years of age and is not a party to or interested in the outcome of a suit. *See* TEX. R. CIV. P. 103. In this case, the affidavit reflects that the process server was a person authorized by written order of the court and discloses that she was an agent for Excalibur Process Service.[9] The Conners cite no authority requiring either that: (1) the *record* of each case must independently establish the authority of the process server to serve process (*i.e.*, an order on file with the courts would be insufficient to do so); or (2) that a return of citation must name the principal on whose behalf a process server is acting.[10] Because the

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8 The affidavit states that Winograd is "approved through the Harris County Private Process Servers Order dated February 25, 1994."

9 The return of an authorized person executing the citation must: (1) be endorsed on or attached to the citation; (2) state when the citation was served and the manner of service; (3) be signed by the authorized person; and (4) verified. *See* TEX. R. CIV. P. 107. Further, the return of service is *prima facie* evidence of the facts asserted therein. *See Primate*, 884 S.W.2d at 152. In this case, the citations reflected the date, time, and manner of service, were signed by Dorothy Winograd, and were properly verified. *See Seib v. Bekker*, 964 S.W.2d 25, 28 (Tex. App.–Tyler 1997, no writ) (noting that the word "verified" within the context of Rule 107, means an acknowledgment of an instrument before a notary public). In addition, the returns each indicated that service had been made by leaving the citation and copy of the petition with "Ms. Conner, a female over the age of 16 at the defendant's usual place of abode . . . ." reflecting that service was made in accordance with the trial court's order for substituted service.

10 Relying on *Seib v. Bekker* and *Travieso v. Travieso*, the Conners assert that the return of service must state the name of the principal, Excalibur Process Service. However, unlike this case, the issue in *Seib* was the requirement that a return made by an "authorized person" *be verified*. *See Seib*, 964 S.W.2d at 28. In *Travieso*, the court examined the sufficiency of the signature on the return of service and concluded that when citation is served by a deputy, he must indicate for whom, *i.e.*, the sheriff or constable, he acted as deputy. *See Travieso v. Travieso*, 649 S.W.2d 818, 820 (Tex. App.–San Antonio 1983, no writ). However, *Travieso* was decided prior to the amendment of the rules allowing for private process servers. Here, service was made by a person authorized by written order of the court rather than a sheriff or constable, and Rule 103 now permits such service. No authority requires a Rule 106(b) order to even specify the server's name, let alone indicate the principal for whom an authorized private process server acted.

Conners' second point of error thus provides no basis upon which it can be sustained, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed May 11, 2000.

Panel consists of Justices Fowler, Edelman, and Frost.

Do not publish — TEX. R. APP. P. 47.3(b).