Reversed and Remanded and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00554-CV

DOUGLAS WISDOM, Appellant

V.

DENNIS CAIN AND PEGGY CAIN, Appellee

On Appeal from the County Court at Law No. 1
Fort Bend County, Texas
Trial Court Cause No. 16,267

O P I N I O N

In this restricted appeal from a post-answer default judgment, Appellant, Douglas Wisdom, complains that the trial court failed to serve notice of trial at his last known address in violation of his right to due process of law. For the reasons set forth below, we reverse the default judgment and remand this case for additional proceedings.

BRIEF FACTS

From September of 1992, through August of 1997, the Appellees, Dennis and Peggy Cain, leased a house from Wisdom that was located at 18 Dartmoor Court in Sugar Land, Texas. On February 13, 1998, the Cains filed suit against their former landlord in County Court at Law No. 1 for Fort Bend County, Texas, alleging that Wisdom failed to return their security deposit following the termination of their lease. The Cains' original petition listed Wisdom's place of business, "Nashua Ford, 291 Main Street, Nashua, New Hampshire 03061," as the address for service. Wisdom, who had since returned to Texas, filed an answer with the court on April 13, 1998, listing "18 Dartmoor Ct., Sugar Land, TX 77479" as his address.

On December 15, 1998, the case against Wisdom was called to trial. After Wisdom failed to appear for trial, the court entered a default judgment against him on January 7, 1999, and awarded the Cains $7,960.00. It is undisputed that the Fort Bend County Clerk's Office sent Wisdom's notice of trial to the Nashua, New Hampshire address listed in the petition, and not to the current address that Wisdom provided in his answer. Wisdom claims that he had no notice of the trial setting until May 10, 1999, when he learned of the default judgment against him. The Cains have not contested this claim. On May 19, 1999, Wisdom filed this restricted appeal complaining that this lack of notice violated his right to due process. Wisdom asks therefore that the default judgment be reversed, and that this cause be remanded for trial.

STANDARD OF REVIEW: RESTRICTED APPEALS

Restricted appeals, formerly known as writs of error, are governed by Rule 30 of the Texas Rules of Appellate Procedure and by Sections 51.012–51.013 of the Texas Civil Practice and Remedies Code. To prevail on a restricted appeal, an applicant must demonstrate the following required elements: (1) the petition must be brought within six months of the date of judgment; (2) by a party to the suit; (3) who did not participate in the trial; and (4) error must be apparent from the face of the record. *See Norman Communications v. Texas Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997); *Stubbs v. Stubbs*, 685 S.W.2d 643, 644 (Tex. 1985). In this instance, Wisdom, the defendant below, filed his notice of

restricted appeal less than six months after the default judgment in dispute was entered against him for failing to appear at trial. Thus, the only issue in this case is whether error is apparent from the face of the record. In this context, the "face of the record" consists of "all the papers on file in the appeal, including the statement of facts." *Norman*, 955 S.W.2d at 270.

NOTICE REQUIREMENTS

The Texas Rules of Civil Procedure require "reasonable notice of not less than forty-five days" of a first setting for trial in a contested case. *See* TEX. R. CIV. P. 245. Those rules further require that such notice "may be served by delivering a copy to the party to be served" at that party's "last known address." TEX. R. CIV. P. 21a. Here, Wisdom complains that he did not receive notice of trial because the court clerk served it to the wrong address. A review of the record shows that, although Wisdom alerted the clerk's office of his Texas address, it served his notice of trial to his former place of business in Nashua, New Hampshire.

It is well established that "a judgment entered without notice or service is constitutionally infirm." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Id.* (quoting *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Failure to give such notice "violates 'the most rudimentary demands of due process of law.'" *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Thus, "[o]nce a defendant has made an appearance in a cause, he 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 Servs., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989) (per curiam). Because evidence in the record indicates that Wisdom was not served with notice of the trial setting at his last known address and did not receive it, error is apparent on the face of the record. *See* TEX. R. CIV. P. 21a. Accordingly, Wisdom's

sole point of error is sustained. The default judgment entered by the trial court is therefore reversed, and this cause is remanded for additional proceedings.

PER CURIAM

Judgment rendered and Opinion filed May 18, 2000.
Panel consists of Justices Yates, Fowler and Edelman.
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