From: Jaclyn Daumerie
To: Pauline Easley
Subject: Fw: SCAC - Proposal re: Service of Citation -- Rule 16-165a Subcommittee Recommendation
Date: Monday, June 1, 2020 10:25:09 AM
Attachments: Texas Industries Inc v Sanchez.doc
Texas Industries Inc v Sanchez Sup. ct.(1).doc
Summersett v Jaiyeola.doc
Rogers v Moore.doc
Berkley v Williams.doc

From: Richard Orsinger [redacted]
Sent: Friday, May 22, 2020 3:38 PM
To: [redacted]
Subject: SCAC - Proposal re: Service of Citation -- Rule 16-165a Subcommittee Recommendation

Marti—here are the results of Rule 16-165a Subcommittee meeting on 5-22-2020.

The Subcommittee recommends that TRCP 106 and TRCP 176 not be amended.

The Subcommittee recommends that the Supreme Court issue a Covid-19 Order of limited duration saying:

(1) Under Rule 106 and Rule 176, delivery does not require personal touching of the person being served;

(2) Under Rule 106 and Rule 176, delivery includes leaving the document being served in the presence of the person being served, while verbally identifying the document being served.

We have attached some cases provided by Professor Elaine Carlson on service of process.

Thanks.

Richard R. Orsinger
Subcommittee Chair

2019 WL 639026
Only the Westlaw citation is currently available.
United States District Court, W.D. Tennessee, Western Division.

Drayton D. BERKLEY d/b/a Berkley Law Firm, PLLC, Plaintiff,
v.
Joseph WILLIAMS, Defendant.

No. 17-2909
|
Signed 02/14/2019

Attorneys and Law Firms

Drayton D. Berkley, Memphis, TN, pro se.

Andre B. Mathis, Glankler Brown, PLLC, Memphis, TN, for Defendant.

ORDER

SAMUEL H. MAYS, JR., UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant Joseph Williams's September 28, 2018 Motion to Vacate and Set Aside Clerk's Entry of Default Judgment (the "Motion"). (ECF No. 19.) Plaintiff Drayton D. Berkley filed a response on October 10, 2018. (ECF No. 20.) Plaintiff filed a corrected response containing additional exhibits on October 11, 2018. (ECF No. 21.) Defendant replied on October 12, 2018. (ECF No. 24.)

For the following reasons, Defendant's Motion is GRANTED. The default judgment is VACATED, and the entry of default is SET ASIDE. Plaintiff may serve process on Defendant's attorney within fourteen days of the entry of this Order.

I. Background

On December 16, 2017, Plaintiff filed a Complaint against Defendant. (ECF No. 1.) Plaintiff asserts Tennessee state law claims for breach of contract, unjust enrichment, and quantum meruit. (See id. ¶¶ 6–7.) Plaintiff alleges that Defendant has failed to pay for legal services that Plaintiff performed on Defendant's behalf. (See id. ¶¶ 1–5.)

The Clerk issued a summons for Defendant on December 18, 2017. (ECF No. 6.) The Court granted two extensions to serve Defendant. (ECF Nos. 8, 10.) The summons was returned unexecuted on July 13, 2018. (ECF No. 11.) In a report attached to the returned summons, an official from the Tarrant County, Texas Constable's office stated that he attempted to serve Defendant at "multiple locations," but that "[Defendant] is avoiding service." (ECF No. 11-1 at 33.) The summons was reissued on July 20, 2018, and was returned executed on August 22, 2018. (ECF No. 12, 13.) In the Proof of Service attached to the return, the process server stated that she had served Defendant by leaving the summons with a resident of suitable age and discretion at his home in Texas. (See ECF No. 13 at 37.) Defendant denies the process server's account. (See ECF No. 19 at 51.)

On September 9, 2018, Plaintiff filed a motion for entry of default. (ECF No. 14.) The Clerk entered default against Defendant on September 10, 2018. (ECF No. 15.)

On September 13, 2018, Plaintiff filed a motion for default judgment against Defendant. (ECF No. 16.) The Clerk entered a default judgment against Defendant on September 18, 2018. (ECF No. 17.)

Defendant filed the Motion on September 28, 2018. (ECF No. 19.)

II. Jurisdiction

The Court has diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff is a resident and citizen of Shelby County, Tennessee. (See Compl., ECF No. 1 ¶ 1.) Defendant is a

resident and citizen of Texas. (See id. ¶ 2.) The parties are completely diverse.

Plaintiff alleges that the amount in controversy exceeds $75,000. (See id. ¶ 8.) "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith." St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288 (1938); see also Mass. Cas. Ins. Co. v. Harmon, 88 F.3d 415, 416 (6th Cir. 1996). The requirements of diversity jurisdiction are satisfied.

III. Standard of Review

Federal Rule of Civil Procedure 55(c) provides that a default judgment may be set aside in accordance with Rule 60(b).[1] Rule 60(b) permits a court to set aside a judgment under six circumstances, including: "(1) mistake, inadvertence, surprise, or excusable neglect ... (3) fraud ..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void ...; or (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).

***2** The decision to vacate a judgment is usually left to the court's discretion. See In re Walter, 282 F.3d 434, 440 (6th Cir. 2002). When a defendant seeks to set aside a judgment because it is void under Rule 60(b)(4), however, the court must grant the motion if it determines the judgment is void. See Burrell, 434 F.3d at 831 ("[D]enying a motion to vacate a void judgment is a per se abuse of discretion."). It may not deny the motion based on a weighing of the equities. Id.

A judgment is void under Rule 60(b)(4) only " 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.' " Antoine v. Atlas Turner, Inc., 66 F.3d 105, 108 (6th Cir. 1995) (quoting In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992)). Due process requires valid service of process for a federal court to exercise personal jurisdiction over a defendant. See Friedman v. Estate of Presser, 929 F.2d 1151, 1156 (6th Cir. 1991). Consequently, "[a] judgment is void if service of process is insufficient or defective." In re Cook, 421 B.R. 446, 455 (Bankr. W.D. Tenn. 2009) (citing LSJ Inv. Co., Inc., v. O.L.D., Inc., 167 F.3d 320, 325 (6th Cir. 1999)). If a court determines a default judgment is void, it must also set aside the entry of default. See Soloway v. Huntington Nat'l Bank, No. 1:12-CV-507, 2013 WL 12122008, at *3 (W.D. Mich. June 5, 2013).

Default judgments are disfavored, and there must be "strict compliance with the legal prerequisites establishing the court's power to render the judgment." Walton v. Rogers, 860 F.2d 1081 (6th Cir. 1988). A default judgment "is a drastic step which should be resorted to only in the most extreme cases." United Coin Meter Co. v. Seaboard Coastline RR., 705 F.2d 839, 845 (6th Cir. 1983). "In general, [the Sixth Circuit's] cases discussing motions to set aside default under Rule 55(c) are extremely forgiving to the defaulted party...." United States v. $22,050.00 U.S. Currency, 595 F.3d 318, 322 (6th Cir. 2010).

IV. Analysis

Under Federal Rule of Civil Procedure 4(e), a party may serve an individual by: (1) delivering a copy of the summons and complaint to the individual personally; (2) leaving a copy of the summons and complaint at the individual's dwelling or usual place of abode with a resident of suitable age and discretion; (3) delivering a copy of the summons and complaint to an agent authorized to receive service; (4) any manner of service permitted by the state where the district court is located; or (5) any manner of service permitted by the state where service is made. See Fed. R. Civ. P. 4(e). A plaintiff bears the burden of perfecting service and of demonstrating proper service. See Sawyer v. Lexington–Fayette Co., 18 F. App'x 285 (6th Cir. 2001) (citing Byrd v. Stone, 94 F.3d 217, 219 (6th Cir. 1996)).

Defendant argues that the default judgment is void because he did not receive valid service under federal or Texas law. (See ECF No. 19 at 50; ECF No. 24 99—101.) He contends that Plaintiff's process server did not attempt service in the manner she represents in her affidavit. (See ECF No. 19 at 51.) According to Defendant, the process server merely left documents near the front door of his house after knocking on the door. (See ECF No. 24 at

100.) Alternatively, Defendant argues that service of process was invalid under Plaintiff's version of the facts. (Id.) Defendant also contends that service was invalid because it was not at his " 'dwelling house or usual place of abode....' " (Id. (quoting Fed. R. Civ. P. 4(e)(2)).)

***3** Plaintiff argues the default judgment is valid because his process server properly served Defendant under federal and Texas law. (See ECF No. 21-1 at 82–83.) Plaintiff relies on the affidavit of his process server as evidence of proper service. (Id.) Plaintiff represents that "Defendant was properly served when [Defendant's] spouse refused to accept the process and the process server left the process at [Defendant's] doorstep." (Id. at 82.)

The parties provide conflicting factual accounts of Plaintiff's alleged service on Defendant. Plaintiff represents that he hired Shanita Fobbs, a private process server, to serve process on Defendant. (See ECF No. 21-3.) In an affidavit attached to Plaintiff's response, Fobbs states that on August 15, 2018, she arrived at Defendant's work address in Arlington, Texas, and found the doors of Defendant's business locked. (Id.) Fobbs knocked on the door and a "woman named Kim answered." (Id.) The woman denied knowing Defendant. (Id.) Fobbs states the following happened next:

> I went back to my car to call my headquarters. As I was making my phone call I notice Kim and another person were leaving.... I left shortly after to make an attempt at [Defendant's] home address.... I pulled up in front of [Defendant's] house then Kim came out of the house screaming at me, "What do you want from me? He is not here, he is in California! He has prostate cancer." I told her to take the paperwork. She reached out her hand as if she was going to receive it, but she let it fall to the ground. She went in and locked the door. She went to her window to check if I was still there and through the window I yelled, "I am not coming into your house. I am leaving [ ] now, but those documents will stay there for you. [A]nd I left.

(Id.)

Defendant represents that this version of the facts is incorrect. (See ECF No. 19.) Defendant attaches a declaration by Kim Williams to his Motion. (ECF No. 19-1.) In her declaration, Williams states that she is Defendant's wife, and that she and Defendant reside in Arlington, Texas. (Id.) She declares that:

> [On] the evening of August 15, 2018, I was at my residence. I heard a knock on my door. By the time I arrived at the door, no one was there. I noticed that documents were left on my porch.... I have come to learn that the documents left on the porch included a complaint.... These documents were not handed to me by anyone or otherwise left with me personally. I do not know who left the document[s] on my porch.

(Id.)

The parties' accounts of service cannot be reconciled. On a motion to vacate a default judgment, "[a]ny doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits." United Coin Meter, 705 F.2d at 846 (internal quotation marks and citations omitted); see also Dassault Systemes, SA v. Childress, 663 F.3d 832, 841 (6th Cir. 2011). The Court must construe all ambiguous or disputed facts in the light most favorable to Defendant. See INVST Fin. Grp., Inc. v. Chem–Nuclear Sys., Inc., 815 F.2d 391, 398 (6th Cir. 1987).

Although the Court must generally accept a defendant's facts at this juncture, a defendant's self-serving affidavit denying service is not always sufficient to counter proof of service. For example, in Audi AG & Volkswagen of America, Inc. v. Izumi, the court held that the defendant's declaration that he was out of town and found documents on his doorstep when he returned were "bare allegations [that], without more, were insufficient to establish that service was not properly effected." 204 F. Supp. 2d 1014, 1018 (E.D. Mich. 2002); see also Nolan v. City of Yonkers, 168 F.R.D. 140, 144 (S.D.N.Y. 1996) ("The mere denial of receipt of service ... is insufficient to overcome the presumption of validity of the process server's affidavit." (citations omitted)); Greater St. Louis Constr. Laborers Welfare Fund v. Little, 182 F.R.D. 592, 595–596 (D. Mo. 1998); Trs. of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48, 52 (N.D. Ill. 1989).

***4** Williams's declaration is self-serving and lacks corroborating details. However, the declaration was made under penalty of perjury, it purports to be based on Williams's personal knowledge, and it is not inherently implausible. (See ECF No. 19-1.) The Court must also consider the possibility that disregarding Williams's declaration would result in denying Defendant's Motion seeking to vacate the default judgment. See Am. Inst. of Certified Pub. Accountants v. Affinity Card, Inc., 8 F. Supp. 2d 372, 377 (S.D.N.Y. 1998) ("Given the courts' preference for resolution on the merits, the procedural posture is of paramount importance."). The Court has found only one case in which a court disregarded an affidavit denying service on a motion to vacate a default judgment. In Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., the defendants filed affidavits disputing the plaintiffs' account of proper service. 126 F.R.D at 52. The court nonetheless denied the defendants' motion to vacate a default judgment because their evasion of service and refusal to appear after service was "grossly negligent or even willful." Id. at 53–54. The defendants "refused to accept service by certified mail, ignored personal service, ignored an unambiguous notice of a status hearing set by the court, claimed that they never received notice of a motion for default mailed to an address supplied by defendants and at which they had previously received mail, and failed to appear at a citation to discover assets." Id. The Court cannot conclude on this record that Defendant's conduct rises to the same level.

If the Court were to disregard Williams's declaration, the Court would have to decide whether Defendant ignored valid service. A deliberate decision to ignore service may be grounds for a default judgment. See Poyner v. Erma Werke Gmbh, 618 F.2d 1186, 1192 (6th Cir. 1980). Because a default judgment is a disfavored "drastic step" and the Court must be "extremely forgiving" to Defendant, the Court should not disregard Williams's declaration. United Coin Meter, 705 F.2d at 845; $22,050.00 U.S. Currency, 595 F.3d at 322.

"A defendant's sworn denial of receipt of service ... rebuts the presumption of proper service established by the process server's affidavit...." Old Republic Ins. Co. v. Pac. Fin. Servs. of Am., Inc., 301 F.3d 54, 57 (2d Cir. 2002). "When the parties' accounts [of service] differ but are both inherently plausible and there is nothing in the record upon which the court can resolve the dispute," the court should resolve doubts in favor of the party seeking to vacate the default judgment. Nature's First Inc. v. Nature's First Law, Inc., 436 F. Supp. 2d 368, 374 (D. Conn. 2006). The Court must credit Defendant's version of events.

Under Defendant's facts, Williams, Defendant's wife, heard a knock on the door of her and Defendant's home. (See ECF No. 19-1 at 60.) When she opened the door, no one was there, but she saw documents had been left on the porch. (Id.) She later learned that the documents included the complaint in this action. (Id.)

"[I]t is well-established that personal service does not require 'in hand' delivery and acceptance of the papers." See Project X Enter., Inc. v. Karam, No. 14-CV-10761, 2014 WL 3385101, at *3 (E.D. Mich. July 10, 2014) (citations omitted). If a defendant attempts to evade service by refusing to take the papers proffered to him, "it is sufficient if the server is in close proximity to the defendant, clearly communicates intent to serve court documents, and makes reasonable efforts to leave the papers with the defendant." Id. (citing Travelers Cas. & Sur. Co. of Am. v. Brenneke, 551 F.3d 1132, 1136 (9th Cir. 2009)). Merely leaving process at or near the door of the defendant's residence is insufficient. See Project X, 2014 WL 3385101, at *3. Assuming that leaving the documents with Defendant's spouse would be sufficient, the process server and Williams were not in "close proximity" when she left the documents on Defendant's porch. The process server did not "clearly communicate" that she was attempting to serve court documents. The process server's attempt at service was insufficient under federal law.

Texas law provides that "[a] defendant who does not physically accept [service] is held to have been personally served as long as the return affirmatively shows the papers were deposited in an appropriate place in his presence or near him where he is likely to find them, and he was informed of the nature of the process and that service is being attempted." Summersett v. Jaiyeola, 438 S.W.3d 84, 92 (Tex. App. 2013). The process server's return states that she "left the summons at the individual's residence or usual place of abode with Kim Williams...." (ECF No. 13.) The return does not state that the process server told Williams that she was attempting service when she left the documents on the porch. Plaintiff's attempted service of Williams does not comply with Texas law.[2] See Summersett, 438 S.W.3d at 92.

***5** Because Plaintiff has failed to effect proper service of process, the Court has no jurisdiction over Defendant. See LSJ Inv., 167 F.3d at 325. "Entry of default and default judgment must be set aside ... where service of process was improper...." Tkt-Nectir Glob. Staffing, LLC v. Managed Staffing, Inc., No. 3:18-CV-099-CHB, 2018 WL 5636163, at *2 (W.D. Ky. Oct. 31, 2018). The Court must vacate the default judgment and set aside the entry of default. Defendant's Motion is GRANTED.

The Court may grant relief under Rule 60(b) on "just terms". Fed. R. Civ. P. 60(b). Given Plaintiff's credible and apparent good faith effort to serve Defendant, this vacatur is conditioned upon Defendant's agreement to accept service on his attorney. See Nature's First, 436 F. Supp. 2d at 377 (vacating default judgment for improper service and requiring defendant to accept service on its attorney); Affinity Card, 8 F. Supp. 2d at 377 (same). That service shall be made within fourteen (14) days of the entry of this Order.

V. Conclusion

For the foregoing reasons, Defendant's Motion is GRANTED. The default judgment is VACATED, and the entry of default is SET ASIDE. Plaintiff may serve process on Defendant's attorney within fourteen (14) days of the entry of this Order.

So ordered this 14th day of February, 2019.

All Citations

Slip Copy, 2019 WL 639026

Footnotes

1 When the Clerk has entered default but there is not yet a default judgment, a defendant need only show "good cause" to set aside the entry of default. Fed. R. Civ. P. 55(c). Because the Clerk has entered a default judgment, the stricter requirements of Rule 60(b) apply. See Burrell v. Henderson, 434 F.3d 826, 831–32 (6th Cir. 2006).

2 Because neither party has argued that service of process was valid under Tennessee law, the Court will not consider that issue sua sponte.

2006 WL 3259337
Only the Westlaw citation is currently available.

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

MEMORANDUM OPINION
Court of Appeals of Texas,
Dallas.

Roy Seton ROGERS, Individually and d/b/a National Auto Purchasing and Sales, Appellants
v.
James MOORE, Appellee.

No. 05–05–01666–CV.
|
Nov. 13, 2006.

On Appeal from the County Court at Law No. 3, Collin County, Texas, Trial Court Cause No. 003–2366–04.

Attorneys and Law Firms

Gerardo Rojas, for Roy Seton Rogers.

Sharon Campbell, for James Moore.

Before Justices WRIGHT, O'NEILL, and LANG–MIERS.

MEMORANDUM OPINION

Opinion by Justice WRIGHT.

***1** Roy Seton Rogers appeals the default judgment rendered against him in favor of James Moore. In two issues, appellant contends (1) the trial court did not acquire service over him because he was improperly served, and (2) the record does not show a return of service was filed. We overrule appellant's issues and affirm the trial court's judgment.

In his first issue, appellant contends the trial court erred by denying his motion for new trial because appellee failed to show appellant was personally served. We disagree.

Rule 103 of the rules of civil procedure provides, among other things, that the citation shall be served by any person authorized by rule 103 by "delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto." TEX.R. CIV. P. 106(a)(1). Generally, a person within the jurisdiction has the obligation to accept service of process when it is reasonably attempted. *See* *Dosamantes v. Dosamantes,* 500 S.W.2d 233, 237 (Tex.Civ.App.-Texarkana 1973, writ dism'd). He is usually held to have been personally served if he physically refuses to accept the papers and they are then deposited in an appropriate place in his presence or near him where he is likely to find them, if he is also informed of the nature of the process and that service is being attempted. *Id.; see also* *Texas Industries, Inc. v. Sanchez,* 521 S.W.2d 133, 135 (Tex.Civ.App.-Dallas), *writ ref'd n.r.e.,* 525 S.W.2d 870 (Tex.1975).

At the hearing on appellant's motion for new trial, John Smith testified he made numerous attempts to serve appellant with the original petition in this case. Eventually, the trial court issued an order for substitute service and Smith delivered the original petition by leaving a copy of the petition at appellant's place of business. Thereafter, he was asked to serve appellant with the amended petition. Smith went to appellant's business, National Auto Purchasing, and asked if appellant was there. An employee indicated that appellant "was in a gold car just outside the door." Smith went to the car where he saw a man wearing a shirt with the name "Roy Rogers" stenciled on it. Smith told the man he was there to serve papers and attempted to hand them to the man. The man denied being Roy Rogers and instructed Smith to leave the papers in the office, which Smith did.

Thus, the record shows that after Smith informed appellant he was attempting to serve him, appellant physically refused the papers. At appellant's direction, Smith left the papers at the front desk of appellant's business, an appropriate place near appellant, where he

was likely to find the papers. In reaching this conclusion, we necessarily reject appellant's argument that because Smith did not personally know appellant, he could not be certain that was the man he encountered. An employee of appellant's business indicated the man who refused the papers was appellant and the man had on a shirt with appellant's name stenciled on it. Under these circumstances, we cannot conclude the trial court erred by denying appellant's motion for new trial. We overrule appellant's first issue.

***2** In his second issue, appellant contends we must reverse the trial court's judgment because the record does not contain a return of citation. After appellant filed his brief, the clerk's record was supplemented with the return. Consequently, we overrule appellant's second issue because it is moot.

Accordingly, we affirm the trial court's judgment.

All Citations

Not Reported in S.W.3d, 2006 WL 3259337

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Distinguished by Hicks v. Group & Pension Administrators, Inc., Tex.App.-Corpus Christi, September 3, 2015

438 S.W.3d 84
Court of Appeals of Texas,
Corpus Christi–Edinburg.

James SUMMERSETT III, Appellant,
v.
Remi JAIYEOLA, M.D., Appellee.

No. 13–12–00442–CV.
|
July 18, 2013.

Synopsis

Background: Physician brought suit against hospital executive for tortious interference with existing and prospective business relationships, unfair competition, defamation, and conspiracy, stemming from allegedly false statements made by executive about physician. The 93rd District Court, Hidalgo County, Rodolfo Delgado, J., denied executive's motion for leave to file motion for dismissal pursuant to Texas Citizens Participation Act (TCPA). Executive filed interlocutory appeal.

[Holding:] The Court of Appeals, Rogelio Valdez, C.J., held that as a matter of first impression, TCPA did not grant right to interlocutory appeal from denial of motion for leave.

Dismissed.

West Headnotes (10)

[1] **Appeal and Error** On motions relating to pleadings

Texas Citizens Participation Act (TCPA) did not grant right to interlocutory appeal of denial of motion for leave to file motion to dismiss; specific language allowing for appeal was limited to trial court's ruling, or lack there of, on motion to dismiss. V.T.C.A., Civil Practice & Remedies Code §§ 27.001, 27.011.

4 Cases that cite this headnote

[2] **Appeal and Error** Interlocutory and Intermediate Decisions

Appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if statute explicitly provides such jurisdiction.

[3] **Appeal and Error** Interlocutory and Intermediate Decisions

Court of Appeals strictly construes statutes that provide for interlocutory appeal as narrow exceptions to general rule that only final judgments are appealable.

[4] **Appeal and Error** On motions relating to pleadings

Trial court's denial of motion for leave or motion for extension of time to file motion to dismiss is neither ruling on merits of motion to dismiss, nor denial "by operation of law" of motion to dismiss, appealable under Texas Citizens Participation Act (TCPA). V.T.C.A., Civil Practice & Remedies Code §§ 27.001, 27.011.

7 Cases that cite this headnote

[5] **Process** Weight and sufficiency

Return of service, stating that defendant was served in person, constituted prima facie evidence of facts recited. Vernon's Ann.Texas Rules Civ.Proc., Rule 120.

[6] **Process** Nature and necessity in general
Process Weight and sufficiency

Return of service is not a trivial, formulaic document, but is prima facie evidence of facts recited therein.

[7] **Process** Presumptions and burden of proof

Recitations in return of service carry so much weight that they cannot be rebutted by uncorroborated proof of moving party.

[8] **Process** Acceptance or acknowledgment of service

Person within jurisdiction of a court generally has obligation to accept service of process when it is reasonably attempted.

2 Cases that cite this headnote

[9] **Process** Acceptance or acknowledgment of service

Defendant who does not physically accept service of citation of claims filed against him is held to have been personally served as long as return of service affirmatively shows papers were deposited in appropriate place in his presence or near him where he is likely to find them, and he was informed of nature of process and that service is being attempted.

1 Cases that cite this headnote

[10] **Appearance** Defects in service in general

Any defect in service is cured by a general appearance. Vernon's Ann.Texas Rules Civ.Proc., Rule 120.

3 Cases that cite this headnote

Attorneys and Law Firms

***85** Jordan K. Mullins, Austin, Mark Domel, Patton G. Lochridge, McGinnis, Lochridge & Kilgore, Austin, for Appellant.

Javier Pena, The Pena Law Firm, Edinburg, Rebecca Vela, Yzaguirre & Vela, PLLC, McAllen, for Appellee.

Before Chief Justice VALDEZ and Justices GARZA and LONGORIA.

OPINION

Opinion by Chief Justice VALDEZ.

Remi Jaiyeola, M.D., brought suit against James Summersett III and Ruben Garza for tortious interference with existing and prospective business relationships, unfair competition, defamation, and conspiracy. At the time of suit, Summersett was the president and chief executive officer of Knapp Medical Center ("Knapp") and Garza was the vice president of administrative services of Knapp.[1] Jaiyeola is a board-certified gastroenterologist who has privileges and performs surgical procedures at Knapp. She alleged that the defendants made false statements about her regarding patient complaints and her willingness to "take call" for Knapp in order to "cause her [economic] harm, force her out of business and so that both Defendants, individually, could profit through a conspiracy designed to reduce income to their own hospital in order to justify sale ***86** of said hospital." Jaiyeola did not bring suit against Knapp Medical Center.

Summersett moved to dismiss the lawsuit pursuant to the Texas Citizens Participation Act ("TCPA"), which provides for the dismissal of actions involving the exercise of certain constitutional rights, and subsequently filed a motion for leave to file the motion for dismissal. *See* TEX. CIV. PRAC. & REM.CODE ANN. §§ 27.001–27.011 (West Supp.2011). The trial court denied the motion for leave, and this appeal ensued. Summersett appeals by two issues contending that: (1) the trial court erred by allowing appellant's motion to dismiss to be denied by operation of law; and (2) if the trial court ruled that the motion to dismiss was not timely filed under section 27.003(b), the trial court erred.

Concluding we lack jurisdiction over this interlocutory appeal, we dismiss the appeal as stated herein.

I. TEXAS CITIZENS PARTICIPATION ACT

The TCPA is a recently enacted statute that provides for the early dismissal of legal actions that involve the exercise of certain constitutional rights. *See generally* TEX. CIV. PRAC. & REM.CODE ANN. §§ 27.001–27.011.[2] The TCPA is considered to be anti-SLAPP legislation. *Jennings v. WallBuilder Presentations, Inc.*, 378 S.W.3d 519, 521 n. 1 (Tex.App.-Fort Worth 2012, pet. filed). "SLAPP" stands for Strategic Lawsuit Against Public Participation. *See id.*

The purpose of the TCPA is "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM.CODE ANN. § 27.002; *Avila v. Larrea*, 394 S.W.3d 646, 653 (Tex.App.-Dallas 2012, pet. filed). The TCPA provides a means for a defendant, early in the lawsuit, to seek dismissal of certain claims identified in the act, including defamation. *See id.* §§ 27.003, 27.008. The act is to be "construed liberally to effectuate its purpose and intent fully." *Id.* § 27.011(b). "Exercise of the right of free ***87** speech" is defined by the act as "a communication made in connection with a matter of public concern." *Id.* § 27.001(3). "Matter of public concern" includes, inter alia, an issue related to "health or safety" or "a good, product, or service in the marketplace." *Id.* § 27.001(7)(E).

"If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action." *Id.* § 27.003(a). Such motion must be filed not later than the 60th day after the date of service of the legal action unless the court extends the time for filing on a showing of good cause. *Id.* § 27.003(b). On the filing of a motion to dismiss pursuant to section 27.003(a), all discovery in the legal action is suspended until the court has ruled on the motion to dismiss, except as provided by section 27.006(b). *Id.* § 27.003(c). Section 27.006(b) states, "[o]n a motion by a party or on the court's own motion and on a showing of good cause, the court may allow specified and limited discovery relevant to the motion." *Id.* § 27.006(b).

A hearing on a motion under section 27.003 must be set not later than the thirtieth day after the date of service of the motion unless the docket conditions of the court require a later hearing. *Id.* § 27.004. Section 27.005 of the TCPA, titled "Ruling," states, in part, as follows:

> (a) The court must rule on a motion under Section 27.003 not later than the 30th day following the date of the hearing on the motion.
>
> (b) Except as provided by Subsection (c), on the motion of a party under Section 27.003, a court shall

> dismiss a legal action against the moving party if the moving party shows by a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of:
>
> (1) the right of free speech;
>
> (2) the right to petition; or
>
> (3) the right of association.

Id. § 27.005(a)-(b). A trial court "may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." *Id.* § 27.005(c). In determining whether a legal action should be dismissed under the TCPA, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." *Id.* § 27.006(a).

Section 27.008 of the TCPA is titled "Appeal." *Id.* § 27.008. That section provides:

> (a) If a court does not rule on a motion to dismiss under Section 27.003 in the time prescribed by Section 27.005, the motion is considered to have been denied by operation of law and the moving party may appeal.
>
> (b) An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005.
>
> (c) An appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable.

Id. Finally, where a court orders dismissal of a legal action under the TCPA, the court shall award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses incurred in defending ***88** against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions. *Id.* § 27.009(a).

II. BACKGROUND

Jaiyeola filed the instant lawsuit on March 1, 2012. The return of service states that Summersett was personally served with citation on March 5, 2012. Summersett and Garza filed a general denial on March 23, 2012. Summersett filed a first amended answer on April 16, 2012 raising additional defenses, including the assertion that the injunctive relief sought by Jaiyeola constituted an unconstitutional restraint on speech, that Summersett's conduct was privileged, that Jaiyeola committed breach of contract, and that Jaiyeola's claims were barred by the peer review privilege and the release doctrine, and that Jaiyeola failed to exhaust her administrative remedies. On May 7, 2012, Summersett filed a motion to dismiss under the TCPA.

On May 11, 2012, Summersett filed a motion for leave to file the motion to dismiss. In his motion for leave, Summersett asserted that because he "was never properly served" with Jaiyeola's petition, he did not believe that a motion for leave was required in order for his motion to dismiss to be considered properly filed; however, he was filing the motion for leave "out of an abundance of caution." According to the motion for leave:

> ... Summersett's Anti–SLAPP Motion to Dismiss involves a statutory deadline to file sixty days after being served. On Monday, May 7, 2012, Summersett learned that the return of service indicates he was personally served on March 5, 2012. If that service was proper (Summersett believes it was not), then sixty days from that date was May 4, 2012. Summersett filed his anti-SLAPP Motion to Dismiss on Monday, May 7, 2012.
>
> ... To date, Summersett has never been properly served with the summons in this case. While Summersett's ability to contest service of process through a Motion to Quash is no longer an option because he has made an appearance, the fact remains that he was never properly served with Plaintiff's Original Petition. Summersett received his citation and a copy of Plaintiff's Original Petition from co-defendant, Ruben Garza, whom is not Summersett's agent and, therefore, not authorized to accept service on his behalf.

> ....
>
> ... Defendant Ruben Garza received Plaintiff's Original Petition on March 5, 2012, for Summersett .... It is in the course of Knapp Medical Center's (the "Hospital's") business that Garza routinely accepts service on behalf of the Hospital .... After receipt of Plaintiff's Original Petition, Garza then realized that he and Summersett were being sued in their individual capacity .... Though he was never personally served, sometime later, Summersett received Plaintiff's Original petition from Garza.

(footnote omitted). In a footnote, Summersett alleged that he had made his appearance in the suit on March 19, 2012, when he had filed an agreed order. In so alleging, Summersett provided citation to Texas Rule of Civil Procedure 120. *See* TEX.R. CIV. P. 120. Summersett thus requested an extension of time to file the motion to dismiss.

Summersett supported his motion for leave with his personal affidavit in which he stated that he had "never been personally served by a process server," that "in the regular course of business," Garza regularly ***89** accepted service on behalf of Knapp, and that on March 5, "Garza received a citation intended for me," and "[s]ometime later, I received the citation and Petition from Mr. Garza." Summersett also included the executed officer's return for the citation stating that personal service was made on Summersett on March 5, 2012. Summersett also included an affidavit filed by one of his lawyers discussing the foregoing matters, disagreeing that the statutory deadline for filing the motion to dismiss had expired but stating that if the motion to dismiss was filed after the deadline, the error was not intentional and the "uncertainty" regarding the "effective date of service contributed to the mistake."

In response to the motion to dismiss, Jaiyeola filed a motion for sanctions against Summersett's counsel under Rule 13 of the Texas Rules of Civil Procedure. *See* TEX.R. CIV. P. 13 (providing sanctions for pleadings that are groundless or brought in bad faith or for the purposes of harassment). Jaiyeola contended that the motion to dismiss was groundless and Summersett's attorney was "using a motion with an automatic discovery stay provision to further delay this case and the Plaintiff from obtaining information necessary to the prosecution of her case."[3]

The trial court held a hearing on the motion to dismiss that began on May 21, 2012, but was recessed and concluded on June 6, 2012. The court took judicial notice of the contents of its file and admitted evidence pertaining to the issue of service of citation and the merits of the motion to dismiss. Included in the evidence was an affidavit from Garza stating that Summersett did not authorize him to accept service on "his personal behalf."

The trial court informed the parties that he was denying the motion for leave, and questioned whether that disposed of the motion for sanctions. The court ultimately ruled that the motion for sanctions "is denied if it's not moot."

With regard to the motion to dismiss, the trial court initially stated that "I will rule that it is dismissed by operation of law." After subsequent argument by counsel for Jaiyeola, the trial court stated "I have specifically ruled that the Motion for Leave is denied. And my thought was that that rendered the matter of the Motion to Dismiss moot, or alternatively, that it was by operation of law." After further discussion, the court retracted its earlier oral ruling and stated that "[t]he only order I'm entering today is that the Motion for Leave is denied." The trial court entered a written order denying the motion for leave that same day. The trial court did not enter a ruling, either orally or in writing, on the motion to dismiss itself.

III. JURISDICTION

Jaiyeola has filed a motion to dismiss this appeal on grounds that (1) there is no statutory right to appeal the denial of a motion for leave or motion for extension of time, or alternatively, (2) the appeal was not timely filed because if such a right to appeal existed, it would be governed by the general rules for interlocutory appeals rather than the statutory rules for appeals under the TCPA. *Compare* TEX.R.APP. P. 26.1(b) (requiring the notice of appeal in an accelerated appeal to be filed within twenty days), *with* TEX. CIV. PRAC. & REM.CODE ANN. § 27.008(c) (requiring the notice of appeal under the statute to be filed within sixty days). Summersett has filed a response ***90** to the motion to dismiss, and Jaiyeola has filed a reply thereto.

The cases that have discussed the statutory right to appeal under this section to date have not addressed whether or not the statute provides for an appeal of a denial of a motion for leave or motion for extension of time. Currently, the cases that have addressed the scope of the right to appeal have disagreed regarding whether the statute provides for interlocutory appeals when the motion to dismiss is overruled both by express order and by operation of law. *Compare* *San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP,* No. 13–12–00352–CV, —— S.W.3d ——, ——, 2013 WL 1786632, at *6, 2013 Tex.App. LEXIS 5081, at *15 (Tex.App.-Corpus Christi April 25, 2013, no pet. h.) (motion for rehearing pending) (concluding that the statute allows an interlocutory appeal whether the motion to dismiss is determined by express order or by operation of law), *and* *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC,* No. 14–12–00896–CV, 2013 WL 407029, at *3, 2013 Tex.App. LEXIS 1898, at *8 (Tex.App.-Houston [14th Dist.] Jan. 24, 2013, no pet.) (op. on order) (same), *with* *Jennings,* 378 S.W.3d at 529 (concluding that the statute does not allow an interlocutory appeal when the motion to dismiss is determined by express order), *and* *Lipsky v. Range Prod. Co.,* No. 02–12–00098–CV, 2012 WL 3600014, at *1, 2012 Tex.App. LEXIS 7059, at *2 (Tex.App.-Fort Worth Aug. 23, 2012, pet. filed) (same). Based on statutory construction, we have already determined that an appellant may appeal either the express denial of a motion to dismiss or the trial court's failure to rule on a motion to dismiss within the statutory time limit. *San Jacinto Title Servs. of Corpus Christi, LLC,* 2013 WL 1786632, at *6, 2013 Tex.App. LEXIS 5081, at *15. The statute does not expressly address whether there is a right to appeal motions for extension of time.

In construing a statute, our primary objective is to give effect to the legislature's intent. *See* *Tex. Lottery Comm'n v. First State Bank of DeQueen,* 325 S.W.3d 628, 635 (Tex.2010) (citing *Galbraith Eng'g Consultants, Inc. v. Pochucha,* 290 S.W.3d 863, 867 (Tex.2009)). In determining the legislature's intent, we begin by looking to the plain meaning of the statute's words. *Tex. A & M Univ. Sys. v. Koseoglu,* 233 S.W.3d 835, 840–41 (Tex.2007); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.,* 966 S.W.2d 482, 484 (Tex.1998). "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell,* 356 S.W.3d 407, 411 (Tex.2011); *Tex. Lottery Comm'n,* 325 S.W.3d at 635.

[1] In the instant case, the statute expressly provides that if the trial court does not rule on "a motion to dismiss" in the time prescribed by section 27.005, that is, "not later than the 30th day following the date on the hearing on the motion," the motion is "denied by operation of law" and "the moving party may appeal." TEX. CIV. PRAC. & REM.CODE ANN. § 27.008(a). The statute directs the appellate courts to "expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action under Section 27.003 or from a trial court's failure to rule on that motion in the time prescribed by Section 27.005." *See id.* § 27.008(b). The statute includes an express and specific deadline for appeals under the statute: an "appeal or other writ under this section must be filed on or before the 60th day after the date the trial court's order is signed or the time prescribed by Section 27.005 expires, as applicable." *See id.* § 27.008(c). The statute ***91** makes no appellate provisions regarding motions for extension of time to file a motion to dismiss, and the specific language allowing for an appeal is limited to the trial court's ruling, or lack thereof, on the motion to dismiss itself.

[2] [3] Appellate courts have jurisdiction to consider immediate appeals of interlocutory orders only if a statute explicitly provides such jurisdiction. *Koseoglu,* 233 S.W.3d at 840; *Stary v. DeBord,* 967 S.W.2d 352, 352–53 (Tex.1998). We strictly construe statutes that provide for interlocutory appeal as "narrow exception[s] to the general rule that only final judgments are appealable." *Koseoglu,* 233 S.W.3d at 841 (quoting *Bally Total Fitness Corp. v. Jackson,* 53 S.W.3d 352, 355 (Tex.2001)). The question of jurisdiction is a question of law, which we review de novo. *Koseoglu,* 233 S.W.3d at 840; *State v. Holland,* 221 S.W.3d 639, 642 (Tex.2007).

Thus, while we construe the substantive provisions of the TCPA "liberally" to "fully" effectuate its purpose and intent, *see* TEX. CIV. PRAC. & REM.CODE ANN. § 27.011(b), we narrowly and strictly construe the interlocutory right to appeal under the TCPA.

Koseoglu, 233 S.W.3d at 841. Thus, we conclude that the statute does not "explicitly" grant the right to appeal from the denial of motions for leave to file a motion to dismiss. *See* *Koseoglu,* 233 S.W.3d at 840–41. Our inquiry does not end here, however, because on appeal, Summersett contends that the trial court "expressly ruled that he would allow the Motion to Dismiss to be denied 'by operation of law' under Texas Civil Practice and Remedies Code § 27.008(a)."

This contention is rebutted by the hearing transcript. At the hearing, the trial court expressly ruled that "I'm denying the Motion for Leave," then questioned the parties regarding whether or not that ruling rendered Jaiyeola's motion for sanctions moot. The trial court then ruled that the motion for sanctions was denied "if it's not moot." Counsel for Summersett requested that the trial court affirmatively rule on the motion to dismiss in order to avoid "confusion" regarding when the appellate time table began. The trial court responded that "I will rule that it is dismissed by operation of law," then after further discussion, stated that "I have specifically ruled that the Motion for Leave is denied. And my thought was that that rendered the matter of the Motion to Dismiss moot or, alternatively, that it was [overruled] by operation of law. Is that not the view?" Counsel for Summersett again requested that the trial court "enter an order disposing of the Motion to Dismiss," and the trial court finally concluded that "[t]he only order I'm entering today is that the Motion for Leave is denied." Summersett raised this issue again at a subsequent hearing and the trial court again reiterated that the motion for leave was denied.

[4] We disagree with Summersett's premise that the trial court allowed the motion to dismiss to be filed so that it could be overruled by operation of law. First, the foregoing colloquy indicates that the trial court retracted his original statement that he would "rule that it is dismissed by operation of law," thus the record does not show an express ruling that the motion to dismiss was denied by operation of law and it certainly does not invoke the right to appeal embodied in section 27.008 as suggested by Summersett. Second, even if we were to conclude otherwise, we are not bound by a trial court's conclusion on an issue of law. *See* *BMC Software Belg., N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex.2002) (holding that appellate courts may review trial court's legal conclusions to determine their correctness). A trial court's denial of a motion ***92** for leave or a motion for extension of time to file a motion to dismiss is neither a ruling on the merits of the motion to dismiss, nor a denial "by operation of law" of a motion to dismiss. And third, as stated previously, the trial court did not grant the motion for leave and did not render an order denying the motion to dismiss. In such circumstances, where the record shows that the motion to dismiss was filed after the expiration of the statutory deadline for filing such a motion, we do not infer or presume that the motion to dismiss was overruled based on the operation of law.

[5] [6] [7] [8] [9] Finally, even if we were to conclude that the statute allows an interlocutory appeal from the denial of a motion for leave to file a motion to dismiss, which we do not, we would conclude that the trial court did not abuse its discretion in denying the motion for leave. In this regard, Summersett asserts that the trial court reversibly erred by not finding "good cause" to file the motion to dismiss late. The trial court was presented with conflicting evidence regarding whether Summersett was served on March 5, 2012. "The return of service is not a trivial, formulaic document," but is "prima facie evidence of the facts recited therein." *Primate Constr. v. Silver,* 884 S.W.2d 151, 152 (Tex.1994). The return of service in the record, which states that Summersett was served in person, constitutes prima facie evidence of the facts recited, and the recitations "carry so much weight that they cannot be rebutted by the uncorroborated proof of the moving party." *See id.* Moreover, a person within the jurisdiction of a court generally has an obligation to accept service of process when it is reasonably attempted. *See* *Dosamantes v. Dosamantes,* 500 S.W.2d 233, 237 (Tex.Civ.App.-Texarkana 1973, writ dism'd); *see also* *Red Hot Enters. LLC v. Yellow Book Sales & Distrib. Co.,* No. 04–11–00686–CV, 2012 WL 3025914, at *2, 2012 Tex.App. LEXIS 5967, at *5 (Tex.App.-San Antonio July 25, 2012, no pet.) (mem. op.); *Rogers v. Moore,* No. 05–05–01666–CV, 2006 WL 3259337, at *1, 2006 Tex.App. LEXIS 9819, at **1–2 (Tex.App.-Dallas Nov. 13, 2006, no pet.) (mem. op.). A defendant who does not physically accept citation is held to have been personally served as long as the return affirmatively shows the papers were deposited in an appropriate place in his presence or near him where he is likely to find them, and he was informed of the nature of the process and that service is being attempted. *Dosamantes,* 500 S.W.2d at 237; *see also Red Hot Enters. LLC,* 2012 WL 3025914, at **2, 2012 Tex.App. LEXIS 5967, at **5–6; *Rogers,* 2006 WL 3259337, at **1, 2006 Tex.App. LEXIS 9819, at **1–2. In the instant case, the evidence is undisputed that Summersett was informed of the nature of the process

and of the fact that service was being attempted.

[10] Finally, and significantly, Summersett has explicitly recognized that he made a general appearance in this case in March. Although Summersett contends that the general appearance prohibits him from contesting service of process through a motion to quash, he contends that "the fact remains that he was never properly served." However, when a defendant's attorney enters an appearance in open court, such appearance "shall have the same force and effect as if the citation had been duly issued and served as provided by law." *See* TEX.R. CIV. P. 120. Any defect in service is cured by a general appearance. *See* *Baker v. Monsanto Co.*, 111 S.W.3d 158, 160–61 (Tex.2003). Stated otherwise, the filing of an answer or entering some other appearance generally waives any defect in the service of citation. *Id.* Here, Summersett made a general appearance through filing an agreed order ***93** and filing his answer in the case, and therefore cured or waived any alleged defect in service of citation.

IV. CONCLUSION

The Court, having examined and fully considered the briefs, the motion to dismiss and the response and reply thereto, is of the opinion that we lack jurisdiction over this appeal. Accordingly, we grant Jaiyeola's motion to dismiss. This appeal is dismissed.

All Citations

438 S.W.3d 84

Footnotes

1 Garza is not a party to this appeal.

2 Even though the TCPA is of recent origin, it has been the genesis for numerous appeals and original proceedings. *See, e.g.*, *Wholesale TV & Radio Adver., LLC v. Better Bus. Bureau of Metro. Dallas, Inc.*, No. 05–11–01337–CV, 2013 WL 3024692, 2013 Tex.App. LEXIS 7348 (Tex.App.-Dallas June 14, 2013, no pet. h.); *Rehak Creative Servs., Inc. v. Witt*, 404 S.W.3d 716 (Tex.App.-Houston [14th Dist.] 2013, no pet. h.); *Better Bus. Bureau of Metro. Dallas, Inc. v. Ward*, 401 S.W.3d 440 (Tex.App.-Dallas 2013, no pet. h.); *Better Bus. Bureau of Metro. Dallas, Inc. v. BH DFW, Inc.*, 402 S.W.3d 299 (Tex.App.-Dallas 2013, no pet. h.); *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, No. 01–12–00581–CV, 2013 WL 1867104, 2013 Tex.App. LEXIS 5407 (Tex.App.-Houston [1st Dist.] May 2, 2013, no pet. h.); *San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Props., LP*, No. 13–12–00352–CV, ——S.W.3d ——, 2013 WL 1786632, 2013 Tex.App. LEXIS 5081 (Tex.App.-Corpus Christi April 25, 2013, no pet. h.); *In re Lipsky*, 411 S.W.3d 530 (Tex.App.-Fort Worth 2013, orig. proceeding.); *Jain v. Cambridge Petroleum Grp., Inc.*, 395 S.W.3d 394 (Tex.App.-Dallas 2013, no pet.); *Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC*, No. 14–12–00896–CV, 2013 WL 407029, 2013 Tex.App. LEXIS 1898 (Tex.App.-Houston [14th Dist.] Jan. 24, 2013, no pet.) (op. on order); *Avila v. Larrea*, 394 S.W.3d 646 (Tex.App.-Dallas 2012, pet. filed); *Lipsky v. Range Prod. Co.*, No. 02–12–00098–CV, 2012 WL 3600014, 2012 Tex.App. LEXIS 7059 (Tex.App.-Fort Worth Aug. 23, 2012, pet. filed); *Jennings v. Wallbuilder Presentations, Inc.*, 378 S.W.3d 519 (Tex.App.-Fort Worth 2012, pet. filed); *see also* *Ramsey v. Lynch*, No. 10–12–00198–CV, 2013 WL 1846886, 2013 Tex.App. LEXIS 5554 (Tex.App.-Waco May 2, 2013, no pet.) (mem. op.); *In re Thuesen*, No. 14–13–00255–CV, 2013 WL 1461818, 2013 Tex.App. LEXIS 4636 (Tex.App.-Houston [14th Dist.] Apr. 11, 2013, orig. proceeding) (mem. op.).

3 Jaiyeola ultimately filed a motion to compel discovery against Summersett. The trial court's order on discovery is the

subject of an original proceeding in this Court. *See In re Summersett,* No. 13–12–00431–CV, 438 S.W.3d. 74, 2013 WL 3757083, 2013 Tex.App. LEXIS —— (Tex.App.-Corpus Christi July 18, 2013, orig. proceeding).

KeyCite Yellow Flag - Negative Treatment
Distinguished by Prevot v. BancorpSouth Bank, Tex.App.-Hous. (1 Dist.), August 29, 2014

525 S.W.2d 870
Supreme Court of Texas.

TEXAS INDUSTRIES, INC., Petitioner,
v.
Henry SANCHEZ, Respondent.

No. B—5293.
|
July 16, 1975.

Synopsis
Defendant instituted bill of review proceeding to set aside judgment rendered in favor of plaintiff. The 191st District Court, Dallas County, Spencer Carver, J., set aside the default judgment and rendered judgment that the plaintiff take nothing. The Court of Civil Appeals, Fifth Supreme Judicial District, 521 S.W.2d 133, Guittard, J., affirmed. The plaintiff applied for writ of error. The Supreme Court held that proof of defendant not having been served with citation obviates the necessity of pleading and proving that the defendant was prevented from making his meritorious defense by fraud, accident, or wrongful act of the opposite party in order to obtain bill of review setting aside default judgment.

Application denied.

West Headnotes (1)

[1] **Judgment** Pleading and Evidence

Proof of the defendant not having been served with citation obviates the necessity of pleading and proving that the defendant was prevented from making his meritorious defense by fraud, accident, or wrongful act of the opposite party in order to obtain bill of review setting aside default judgment.

29 Cases that cite this headnote

Attorneys and Law Firms

***871** Bagby, McGahey, Ross & DeVore, Phillip C. McGahey and Stewart DeVore, Jr., Arlington, for petitioner.

Bean, Francis, Ford, Francis & Wills, Judson Francis, Jr., Dallas, Joe W. Walsh & Associates, Lee Arnett, Brownsville, for respondent.

Opinion

PER CURIAM.

This is an appeal from a Bill of Review judgment setting aside a default judgment against the defendant and rendering a judgment that plaintiff take nothing. The court of civil appeals affirmed. 521 S.W.2d 133. In denying the application for writ of error, no reversible error, we specifically approve the holding of the court of civil appeals that proof of defendant not having been served with citation obviates the necessity of pleading and proving the second Hagedorn requirement: that the defendant was 'prevented from making (his meritorious defense) by fraud, accident, or wrongful act of the opposite party . . ..'[1] See Petro-Chemical Transport, Inc. v. Carroll, 514 S.W.2d 240, 243—244 (Tex.1974) and Hanks v. Rosser, 378 S.W.2d 31 (Tex.1964).

All Citations

525 S.W.2d 870

Footnotes

[1] Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950).

521 S.W.2d 133
Court of Civil Appeals of Texas,
Dallas.

TEXAS INDUSTRIES, INC., Appellant,
v.
Henry SANCHEZ, Appellee.

No. 18547.
|
March 13, 1975.
|
Rehearing Denied April 3, 1975.

Synopsis
Defendant instituted bill of review proceeding to set aside judgment rendered in favor of plaintiff. The 191st District Court, Dallas County, Spencer Carver, J., set aside the judgment and the plaintiff appealed. The Court of Civil Appeals, Guittard, J., held that evidence sustained determination that officer had not actually delivered citation to defendant; that, in absence of proper service, defendant was not required to show that he was prevented from answering by fraud in order to have judgment set aside; and that decision rendered in prior writ of error proceeding was not res judicata of issue of sufficiency of service.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (7)

[1] **Process**—Mode and Sufficiency of Service

"Reasonable man" standard was inapplicable in determining whether defendant had been validly served with process when officer placed envelope containing citation on desk in front of him where defendant took no action by way of avoidance of service indicating that he recognized that service was being attempted. Rules of Civil Procedure, rule 106.

2 Cases that cite this headnote

[2] **Process**—Mode and Sufficiency of Service

To validly serve process by placing envelope containing citation on desk before defendant, defendant would have to have been informed of nature of the process and of the fact that service was being attempted. Rules of Civil Procedure, rule 106.

3 Cases that cite this headnote

[3] **Process**—Weight and Sufficiency

Evidence that officer placed envelope containing citation on desk in front of defendant and that defendant was not informed that envelope contained citation or that officer was attempting to serve it on him sustained determination that citation was not delivered to defendant in person as required by rule. Rules of Civil Procedure, rule 106.

2 Cases that cite this headnote

[4] **Judgment**—Pleading and Evidence

Defendant who had not been served with citation was not required to establish that he had been prevented from making his defense by fraud, accident or wrongful act of opposite party in order to obtain bill of review setting aside default judgment.

[5] **Judgment** What Constitutes Diversity of Issues

Decision rendered in writ of error proceeding that service of citation on defendant was shown by return reciting service was not res judicata of issue of sufficiency of service because, in the writ of error proceeding, defendant was limited to review of record made at time of judgment by default and he had no opportunity to show by evidence outside original record that return was false because citation was never delivered to him. Rules of Civil Procedure, rule 106; Vernon's Ann.Civ.St. art. 2249a.

1 Cases that cite this headnote

[6] **Judgment** Appeal, Error, or Certiorari

Review by writ of error is not an adequate remedy to secure relief from a default judgment on the ground of defect of service unless the defect appears in the original record.

1 Cases that cite this headnote

[7] **Judgment** What Constitutes Diversity of Issues

Decision in writ of error proceeding that service of citation is properly shown by return reciting service is not res judicata of issue raised by evidence outside original record showing that citation was not served. Rules of Civil Procedure, rule 106; Vernon's Ann.Civ.St. art. 2249a.

Attorneys and Law Firms

***134** Stewart DeVore, Jr., Philip C. McGahey, Bagby, McGahey, Ross & DeVore, Arlington, for appellant.

Lee Arnett, Brownsville, for appellee.

Opinion

GUITTARD, Justice.

In this bill-of-review proceeding the trial court set aside its earlier judgment in favor of appellant Texas Industries, Inc., against appellee Henry Sanchez on the ground that Sanchez was never served with citation. We affirm because we hold: (1) that the evidence supports the trial court's implied finding that the officer did not actually deliver the citation to defendant Sanchez; (2) that in absence of proper service the defendant was not required to show that he was prevented from answering by fraud; and (3) that the question of delivery of citation to the defendant was not raised or decided on writ of error from the earlier judgment.

1. Delivery of Citation

Although appellant requested the trial judge to file findings of fact, and none appear in the record, appellant makes no complaint concerning the lack of findings. Consequently, we must presume that the judge resolved all questions of fact in favor ***135** of appellee Sanchez. We find the evidence sufficient to support an implied finding that the citation was not delivered to Sanchez in person, as required by Texas Rules of Civil Procedure, rule 106.

The original suit was brought by appellant to recover a debt against Gregg Asphalt Company, Inc. Henry Sanchez was served with citation as president of Gregg Asphalt. Appellant then filed an amended petition in

which it sought to pierce the corporate veil of Gregg Asphalt and hold Sanchez individually liable for the debt. Citation for Sanchez, individually, with the amended petition attached, was sent to the sheriff of Cameron County and was assigned to deputy Robert Hernandez for service. Hernandez testified that he called Sanchez on the telephone and told him that he 'had some more papers involving Gregg Asphalt,' and Sanchez said to 'go ahead and take them to the office.' After attempting unsuccessfully to contact Sanchez as his office, Hernandez happened to see Sanchez at the courthouse and told him he 'has some papers to serve.' Hernandez then went to the sheriff's office to get the papers. After he picked them up he found Sanchez in a room near the sheriff's office. Sanchez, who was a member of the State Legislature, was accompanied by two news reporters and was talking on the telephone. Hernandez testified that he 'filled out the citation' and put it down on a table next to Sanchez. The citation was in an unsealed envelope with no writing on it except, perhaps, the 'attorney's heading.' Hernandez admitted that he said nothing further to Sanchez because he assumed Sanchez knew what the papers were.

Sanchez testified that he remembered a telephone call from Hernandez several days before the occasion in question, but did not recall that anything was said about a citation. He remembered being in the courthouse on the occasion in question and talking to reporters, but he did not recall seeing Hernandez. Sanchez testified that he was in the 'press room' next to the sheriff's office and made several telephone calls to Austin in an attempt to get information for the reporters. He said he received no papers pertaining to Gregg Asphalt and had no recollection of anyone dropping something before him on the table as he talked.

The reporters who were with Sanchez at the time of the alleged service were called as witnesses. They testified that as they and Sanchez were walking towards the press room, Hernandez spoke to Sanchez and said 'I am glad I saw you. You saved me a trip.' They said that later when Sanchez was talking on the telephone, Hernandez walked into the room, put an envelope on the table, and left without saying a word. According to these witnesses, Sanchez had his head down and did not interrupt his telephone conversation. Neither of the reporters saw Sanchez with the envelope in his hand, but they did see him make some notes while talking, probably on the envelope which was dropped before him.

[1] Appellant contends that Sanchez was validly served with process because the undisputed facts would put a reasonable man on notice that he was being served. We conclude that the 'reasonable man' standard should not be applied here. No decision is cited applying that standard unless defendant has taken some action by way of avoidance of service, thus indicating that he recognized that service was being attempted. The cases cited by appellant are of that sort. See Ex parte Ball, 2 Cal.App.2d 578, 38 P.2d 411 (1934); Haney v. Olin Corp., 245 So.2d 671 (Fla.App.1971); Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737 (1963).

[2] [3] We need not go so far as to accept appellee's contention that in the absence of physical refusal to accept service, the evidence must show that the officer actually put the citation in the defendant's hand. Here, it is only necessary to hold, and we do hold, that the evidence must at ***136** least show that the defendant was informed of the nature of the process and of the fact that service was being attempted. Dosamantes v. Dosamantes, 500 S.W.2d 233, 237 (Tex.Civ.App.—Texarkana 1973, writ dism'd). The testimony of Sanchez and of the two reporters is amply sufficient to support a finding that Sanchez was never informed that the envelope in question contained a citation or that Hernandez was attempting to serve it on him. Even Hernandez's testimony does not exclude this inference. Consequently, the trial judge was justified in finding, and we presume that he did find, that the citation was not delivered to Sanchez in person, as Rule 106 requires.

2. Prevention of Defense by Frand

[4] Appellant contends that appellee has failed to satisfy one of the requirements for a bill of review stated in Alexander v. Hagedorn, 148 Tex. 565, 226 S.W.2d 996 (1950). Apparently appellant concedes that appellee's evidence in support of the bill of review satisfies the requirement of a meritorious defense in that it tends to show that appellee was not personally liable for the debt of Gregg Asphalt. Likewise, appellant does not argue that appellee has failed to meet the requirement to establish freedom from negligence in permitting the judgment to be taken against him. Appellee's contention is that appellee failed to establish the remaining Hagedorn requirement,

that he was prevented from making his defense by fraud, accident or wrongful act of the opposite party. We conclude that this requirement does not apply to a defendant who has not been served with citation. Lack of notice of the proceedings is sufficient in itself to show that the defendant had no opportunity to present his defense. Kelly Moore Paint Co. v. Northeast National Bank, 426 S.W.2d 591, 593 (Tex.Civ.App.—Fort Worth 1958, no writ); and See Petro-Chemical Transport, Inc. v. Carroll, 514 S.W.2d 240, 244 (Tex.1974).

3. Decision on Writ of Error

[5] Finally, appellant contends that the trial court erred in setting aside the judgment because the decision of the court of civil appeals on writ of error from the original judgment is res judicata of the issue of sufficiency of service. We hold it is not res judicata because the issue concerns a matter outside the record of the writ-of-error proceeding.

In the original action, judgment by default was rendered in appellant's favor against both Gregg Asphalt and Sanchez, and within six months, the defendants filed a petition for writ of error, as permitted to defendants who did not participate in the trial. Tex.Rev.Civ.Stat.Ann. art. 2249a (Vernon's 1971). Among other grounds, they asserted that the record did not affirmatively reflect jurisdiction over the person of defendant Sanchez. This contention was overruled. Sanchez v. Texas Industries, Inc., 485 S.W.2d 385, 387 (Tex.Civ.App.—Waco 1972, writ ref'd n.r.e.). The question now before us was not presented, since the only question on the writ of error was whether the record then before the court showed proper service. Since the return on the citation recited service on Sanchez, and was filed as part of the record, the court correctly held that service was properly shown.

[6] [7] In that proceeding, Sanchez was limited to review of the record made at the time of the judgment by default. He had no opportunity to show, as he now shows in the bill-of-review proceeding by evidence outside the original record, that the return was false because the citation was never delivered to him. Review by writ of error is not an adequate remedy to secure relief from a default judgment on the ground of a defect of service unless the defect appears in the original record. American Standard Life Insurance Co . v. Denwitty, 256 S.W.2d 864, 869 (Tex.Civ.App.—Dallas 1953, writ dism'd); and See ***137** McEwen v. Harrison, 162 Tex. 125, 345 S.W.2d 706, 710 (1961). Consequently, a decision on writ of error is not res judicata of an issue raised by evidence outside the original record showing that citation was not served.

Affirmed.

All Citations

521 S.W.2d 133

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