

April 19, 2007

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Attorney for Plaintiff Wesley College

Curtis G. Smith, Jr.
117 East Beaver Court
Bear, DE 19701
Pro-Se Defendant

Re: *Wesley College v. Curtis G. Smith, Jr.*
Case No.: 2004-03-735

Letter Opinion on Defendant's Motion to Vacate Judgment

Dear Mrrs. Scanlon and Smith:

(i.) Procedural Posture

On Friday, April 13, 2007, the Court heard after due notice Defendant, Curtis G. Smith, Jr.'s ("defendant") Motion to Vacate filed with the Civil Clerk on March 22, 2007. Following an evidentiary hearing on the issue of whether the defendant was the person served in the Return of Service Affidavit filed with the Civil Clerk on October 4, 2006 by Robert Delay, the Court reserved decision.¹

The Court previously denied the balance of defendant's Motion to Vacate Judgment because no good cause or excusable neglect was set forth in the record by the defendant. Nor did defendant assert in his motion a meritorious defense or whether the non-defaulting party would not be substantially prejudiced. *See e.g., McMartin v. Quinn*, 2004 Del. Super. LEXIS 28, Stokes, J., (February 3, 2004).

¹ This Court incorporates by reference the Court's oral bench ruling this date in this opinion as the basis for denial of the balance of the Motion.

(ii) The Facts

Defendant's Motion alleged he was not served a Summons or Complaint and was never notified that a bona fide debt exists. ¶ 1, Motion. According to paragraph two, defendant claims he was never provided a validation of the debt. Defendant also raised at oral argument the issue of whether he was the person actually served in the Return of Service Affidavit filed with the Civil Clerk of this Court.

Plaintiff Wesley College filed a written response to defendant's Motion to Vacate Judgment. Plaintiff alleged in paragraph one that the defendant was personally served with the Summons and Complaint on October 2, 2006 at 117 East Beaver Court, Bear, Delaware 19701 as shown in the Return of Service Affidavit. (Attached as Exhibit A to the Answer).

In paragraph two, plaintiff alleged the defendant was also sent a validation letter, attached as Exhibit B and incorporated by reference into his Answer. The January 29, 2004 validation letter specified the underlying debt to Wesley College, a time to respond to the validity of the debt; and asserted \$8,359.46 was due Wesley College. The validation letter also requested a written response within thirty (30) days of the letter and advised the defendant it was an attempt to collect the above mentioned debt. The validation letter also advised the defendant to contact Wesley College's counsel if the debt was disputed.

At the evidentiary hearing the main process server, Robert Delay, Jr. ("Delay") testified. Delay testified he personally served the defendant on October 2, 2006 and observed his motor vehicle with Delaware tags in front of the residence, re-served the summons and complaint, 117 East Beaver Court, Bear, Delaware ("the residence"). Plaintiff's Exhibit No.: 1, a Department of Transportation, Division of Motor Vehicles letter was received into evidence indicating that Mr. Smith's 2002 Dodge, with serial number ID 7HA16K72J131122 and an expiration date of

February 28, 2009 was parked in front of the residence where the defendant was served with the summons and complaint. Delay testified that he knocked on the front door of the residence and identified the defendant Curtis G. Smith, Jr. as the person who answered the door. According to Delay, defendant told him “I don’t know Smith” and slammed the door on Delay. Delay also testified that he was certain it was the defendant in court who he personally served on the date listed in the return and left a summons at his residence, inside the door, after identifying the defendant in the Courtroom. Delay described the defendant’s demeanor as hostile and listed the person served as a male, black race, age 45, with a height of 6 feet and a weight of 230 pounds. The Return of Service Affidavit was also received into evidence listing the defendant as 117 Beaver Court, Bear, Delaware and as the person personally served by Delay.

On cross-examination, Delay indicated he wrote the age wrong on the service return because he is a bad guesser at “ages”. Delay testified on cross-examination that the defendant told him “I’m not talking with you” and slammed the door. Delay also stuck with his story at the evidentiary hearing that he was absolutely certain that the defendant in the Courtroom, Curtis G. Smith, Jr. was the person he served personally with the summons and complaint on October 2, 2006. Delay conceded the defendant was not actually 45 years old, but because of his weight and height the defendant appeared to be 45 years of age. Delay also testified that he also believed the defendant was the person actually served because of plaintiff’s Exhibit No. 1, a DelDot letter confirming it was Curtis Gerard Smith’s 2002 Dodge with tag no., C11041 parked near the residence.

Plaintiff rested and the defendant, Curtis G. Smith, Jr., (defendant) presented his case-in-chief. He claims he was not the person served and had “no knowledge of the debt” as it existed. He testified that he has now acquired property and wants to reopen the debt because he is not the

person served in the record or the Return of Service Affidavit. He testified he is not 45 years of age and was not at 117 East Beaver Court, Bear, Delaware, nor was he personally served.

The Law

In civil cases proof by a preponderance of the evidence means the burden of proof means proof that something is more likely true than not or “the side on which be greater weight of evidence is found.” *Asset Recovery Servs. v. Process Sys., Integration*, 2002 Del. C.P. LEXIS 55 Welch, J. (February 6, 2002) . *See Drabold v. Kenny*, 2005 C.P. Lexis 32, Welch, J. (August 25, 2005). *Blades v. Owens*, 2005 C.P. Lexis 5, Welch J. (March 2, 2005).

The Court as trier of fact is the sole judge of the credibility of each fact witness and any other information provided.

If the Court finds the evidence presented to be in conflict, it is the Court’s duty to reconcile these conflicts, if reasonably possible, as to make one harmonious story of it all.

If the Court cannot reconcile the differences, the Court must give credit to that portion of the testimony, which, in the Court’s judgment is the most worthy of credit and disregard any portion of the testimony which the Court’s judgment is unworthy of credit.

In doing so, the Court takes into consideration the demeanor of the witness, their apparent fairness in giving their testimony, their opportunities in hearing and knowing the facts about which they testified, and any bias or interest they may have concerning the nature of the case.

Opinion and Order.

The Court has carefully scrutinized the testimony of the various fact witnesses and the exhibits offered into evidence by plaintiff Wesley College and the testimony of the defendant. The Court has also scrutinized the credibility of each fact witness who testified, including the defendant and Mr. Robert Delay. As a matter of law, the Court finds that a preponderance of

evidence exists that the defendant, Curtis G. Smith, Jr. was the person actually served as detailed in the return of service in the Affidavit of Service filed with this Court and that defendant actually received a copy of the summons and complaint.

The Court therefore declines to enter an Order Vacating the Judgment entered on November 3, 2006. The Court has also previously denied the balance of the factual basis set in Defendant's Motion to Vacate including, but not limited to, that he failed to offer any valid defense to the debt and that he did not receive a validation letter at oral argument. The Court finds the defendant, Curtis G. Smith, Jr. was properly served and denies his Motion to Vacate Judgment. As to the balance of the Motion, the same has already been denied by this Court.

IT IS SO ORDERED this 19th day of April, 2007.

John K. Welch
Judge

/jb

cc: Karen Gallagher, Supervisor
CCP Civil Division