

RENDERED: May 15, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2250-MR

DON GIBSON; JOAN SMITH;
ROSE PASCHALL; SHARON NELSON;
CATHY HANEY; MARILYN GIBSON;
ROBIN SMITH; JAMES PASCHALL;
BUDDY NELSON; and DAVID HANEY

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE JEFFREY R. HINES, JUDGE
ACTION NO. 96-CI-000374

BONNIE SHOULTA and
PHILIP SHOULTA

APPELLEES

OPINION
REVERSING AND REMANDING

* * *

BEFORE: BUCKINGHAM, DYCHE, and KNOX, Judges.

KNOX, JUDGE: Appellants appeal from a default judgment entered by the McCracken Circuit Court and that court's subsequent order denying appellants' motion to vacate or set aside the default judgment.

Appellees, husband and wife (the Shoultras), filed this quiet title action alleging that Mrs. Shoultra was married, prior to January 8, 1970, to George Moss Gibson. They further alleged

that, on January 8, 1970, Mrs. Shoulta and Mr. Gibson took title jointly, with right of survivorship, to the parcel of real estate at issue in this case. The Shoultas alleged that, on June 28, 1974, Mrs. Shoulta and Mr. Gibson were divorced, and further stated that Mr. Gibson passed away on February 23, 1992.

Mrs. Shoulta subsequently married Mr. Shoulta. In their complaint, the Shoultas alleged that, by deed of conveyance dated July 24, 1992, they conveyed the property in issue to themselves with benefits of survivorship.

The Shoultas claim title to the property by way of adverse possession from June 29, 1974, the day after Mrs. Shoulta's divorce from Mr. Gibson, until February 23, 1992, the date of Mr. Gibson's death.

Among the defendants named in the Shoultas' complaint were the natural children of Mr. Gibson and their spouses. In their complaint, the Shoultas included the following paragraph:

That the Defendants named herein to the best knowledge of the Plaintiffs are non-residents of the Commonwealth of Kentucky and that pursuant to the provisions of Kentucky Rule Of Civil Procedure 4 et seq said Defendants should be summoned by Warning Order Attorney with an Affidavit of the Plaintiff, BONNIE SHOULTA, being attached hereto setting forth such information as the Plaintiff has with respect to the addresses of the aforementioned Defendants. To the best knowledge of the Plaintiffs the last known point of contact or address by which the Defendants could be contacted was in care of Hon. David Wrinkle, 333 Broadway, Suite 1001, Paducah, Kentucky 42003, with said David Wrinkle having informed Plaintiffs and Plaintiffs' counsel that all addresses previously provided by the Plaintiff for said Defendants were incorrect.

On the same date the complaint was filed, Mrs. Shoulta filed an affidavit for the appointment of a warning order attorney, stating that the addresses of the defendants were unknown to her, and that the best address last known "would have been in care of General Delivery, Paducah, Kentucky with the Affiant to her best knowledge believing that said persons are absent from the Commonwealth of Kentucky."

On April 11, 1996, Hon. Louis Zimmerman was appointed as warning order attorney. On June 17, 1996, Mr. Zimmerman filed his report to the court, stating that, on May 3, 1996, he sent a letter to the Paducah Sun directing that paper to run a classified ad notifying appellants to contact the warning order attorney with respect to litigation involving the property in issue. That ad ran in the Paducah paper on May 12, 1996. In his report, Mr. Zimmerman also stated that he sent a copy of his May 3, 1996 letter to Mr. Ullerich, the attorney for the Shoultas, Mr. David Wrinkle, the attorney for appellants, and Mr. Bard Brian, the attorney for the individuals purchasing the property from the Shoultas.

On June 20, 1996, the Shoultas filed their motion for default judgment, which was granted on that same date. The judgment restated the warning order attorney's notification efforts, and further noted that the warning order attorney had forwarded a copy of the May 3, 1996 letter, addressed to the Paducah Sun, to appellants Don Gibson and Marilyn Gibson at an address of 808 Irma Drive, Antioch, Tennessee 37013.

On June 28, 1996, appellants moved to set aside the court's default judgment. On July 11, 1996, Mr. Zimmerman, the warning order attorney, filed a pleading called NOTICE OF FILING, wherein he informed the court that a letter that he had mailed to Don Gibson or Marilyn Gibson at the Tennessee address was returned to him stamped "unknown." On July 24, 1996, the McCracken Circuit Court entered an order overruling appellants' motion to set aside that court's default judgment.

Various pleadings and affidavits filed on behalf of the parties and the warning order attorney in conjunction with appellants' motion to set aside the default judgment reflect that an issue was made about appellants' counsel's lack of cooperation with requests by counsel for the Shoultas to furnish appellants' addresses.

The issues raised by this appeal are whether the requirements of CR 4.06 and CR 4.07 were met sufficiently to vest the circuit court with jurisdiction to enter its default judgment. Appellants argue that those requirements were not met in that: (1) the Shoultas and their attorney had sufficient address information for appellants and failed to disclose that information in their affidavit for the appointment of a warning order attorney; and, (2) the warning order attorney did not comply with CR 4.07 by making diligent efforts to inform the appellants by mail of the pendency and nature of the action against them.

Because we cannot discern from the record a sufficient basis to determine whether the Shoultas or their counsel possessed a more certain knowledge of appellants' addresses, we do not believe that we are in a position to determine that the requirements of CR 4.06 were not met. However, we do not believe that the requirements of CR 4.07 were met, and for that reason, we reverse.

CR 4.07(1) states that the warning order attorney ". . . must make diligent efforts to inform the defendant, by mail, concerning the pendency and nature of the action against him" Here, the only letters sent by the warning order attorney to any of the appellants were those sent to Don and Marilyn Gibson on June 19, 1996, some two days after his report was filed. No other letters were mailed to any of the other appellants notifying them of the nature or pendency of the action.

We believe that Potter v. Breaks Interstate Park Comm'n, Ky., 701 S.W.2d 403 (1985) compels a conclusion that the effort made by the warning order attorney in this case was not sufficient to vest the circuit court with jurisdiction over appellants. While the warning order attorney did cause a notice to be published in the Paducah Sun, we believe, by the clear terms of CR 4.07, constructive service must be attempted by mail.

We acknowledge that the record reflects some issue as to whether or not appellants' attorney was cooperative in disclosing any of appellants' addresses that he may have had in

his possession. However, we believe that we must conclude that, since belated letters were sent by the warning order attorney to only two of the appellants, and none to the other eight, insufficient effort was made by the warning order attorney to comply with CR 4.07.

While the Shoultas argue that appellants had consulted with the Shoultas' own attorney at some point prior to the entry of the default judgment, we again believe that the Potter case addresses that issue by acknowledging authority that mere knowledge of the pendency of an action is not sufficient to give the court jurisdiction.

For the foregoing reasons, we rule that the default judgment entered against the appellants should be set aside.

ACCORDINGLY, the judgment of the McCracken Circuit Court is reversed and remanded for further consideration consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David B. Wrinkle
Paducah, Kentucky

BRIEF FOR APPELLEES:

David K. Ullerich
Paducah, Kentucky