



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-17-00015-CV

JARED GILLMORE

APPELLANT

V.

EMMANUEL GBENJEN

APPELLEE

FROM COUNTY COURT AT LAW NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 2015-002543-3

MEMORANDUM OPINION¹

In a single issue in this restricted appeal, Appellant Jared Gillmore argues that a no-answer default judgment entered in favor of Appellee Emmanuel Gbenjen is void, and must be set aside, because Gbenjen failed to serve him in strict compliance with the rules governing service of process. We agree and will reverse and remand.

¹See Tex. R. App. P. 47.4.

A restricted appeal is available for the limited purpose of providing a party who did not participate at trial with the opportunity to correct an erroneous judgment. *Mandel v. Lewisville ISD*, 445 S.W.3d 469, 474 (Tex. App.—Fort Worth 2014, pet. denied). To prevail in a restricted appeal, an appellant must establish (1) that it filed notice of the restricted appeal within six months after the judgment was signed, (2) that it was a party to the underlying lawsuit, (3) that it did not participate in the hearing that resulted in the complained-of judgment and did not file any postjudgment motions or requests for findings of fact and conclusions of law, and (4) that error is apparent on the face of the record. Tex. R. App. P. 26.1(c), 30; *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004).

It is axiomatic that a trial court must have personal jurisdiction over a party to issue a binding judgment. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). A trial court does not have personal jurisdiction to render a default judgment against a non-answering defendant in the absence of proper service of process. *Furst v. Smith*, 176 S.W.3d 864, 868 (Tex. App.—Houston [1st Dist.] 2005, no pet.); see *In re E.R.*, 385 S.W.3d 552, 563 (Tex. 2012) (“Personal jurisdiction, a vital component of a valid judgment, is dependent ‘upon citation issued and served in a manner provided for by law.’”) (quoting *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990)). In reviewing a default judgment on restricted appeal, we do not presume that citation was validly issued, served, or returned. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994). Rather, the record must

show strict compliance with the rules of procedure governing service of process. *Id.* If the record fails to affirmatively show strict compliance with the rules of civil procedure, then error is apparent on the face of the record, and attempted service of process is invalid and of no effect. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985); *Mandel*, 445 S.W.3d at 474. Under those circumstances, the trial court acquires no personal jurisdiction over the defendant, and the default judgment is void. *Mandel*, 445 S.W.3d at 474.

Gbenjen sued Gillmore in May 2015 to recover damages for personal injuries that he allegedly sustained when he was involved in an automobile collision with Gillmore. Citation issued the same day that Gbenjen filed his original petition, and although the return indicates that service was executed on Gillmore about a week later, he never filed an answer. On July 15, 2016, the trial court signed a default judgment in favor for Gbenjen in the amount of \$105,925.95.

Gillmore argues in part of his only issue that the default judgment must be set aside because contrary to rule of civil procedure 107, the return of citation was not verified. Rule 107 provides in relevant part as follows:

The officer or authorized person who serves or attempts to serve a citation must sign the return. If the return is signed by a person other than a sheriff, constable, or the clerk of the court, the return must either be verified or be signed under penalty of perjury.

Tex. R. Civ. P. 107(e). “Verified,” in the context of rule of civil procedure 107, “requires some sort of acknowledgment before a notary public.” *Frazier v.*

Dikovitsky, 144 S.W.3d 146, 149 (Tex. App.—Texarkana 2004, no pet.); see *McGraw-Hill, Inc. v. Futrell*, 823 S.W.2d 414, 416 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (op. on reh’g) (stating that “[a]n acknowledgment of an instrument before a notary public . . . verifies it for [the] record”). Alternatively, a return signed under penalty of perjury must contain the statement set out in rule 107 in substantially the same form—identifying information about the declarant, details about the service, and a statement declaring, under penalty of perjury, that the foregoing is true and correct. Tex. R. Civ. P. 107(e). “The return of service is not a trivial . . . document.” *Primate Constr.*, 884 S.W.2d at 152. Failure to affirmatively show strict compliance with rule 107 renders attempted service invalid. *Uvalde Country Club*, 690 S.W.2d at 885.

The return of citation shows that Rafael Martinez, a private process server, served Gillmore with citation at 4:42 p.m. on May 16, 2015. Nothing in the record indicates that Martinez is “a sheriff, constable, or the clerk of the court.” See *Ameriquest Mortg. Co. v. Ashworth*, No. 01-08-00544-CV, 2010 WL 1491954, at *3 (Tex. App.—Houston [1st Dist.] Apr. 15, 2010, pet. denied) (mem. op.) (reasoning that private process server is an “authorized person” under rule 107). Therefore, to comply with rule 107, the return must have been either verified or signed under penalty of perjury, but neither was done; the return contains spaces for a notary’s signature and other relevant information, but they were left blank, and the return lacks a perjury statement as contemplated by rule 107.

Because the return did not strictly comply with rule 107, error is apparent on the face of the record, and service upon Gillmore was invalid.² See *Uvalde Country Club*, 690 S.W.2d at 885. The trial court therefore never acquired personal jurisdiction over Gillmore, and the default judgment is void. See *Wilson*, 800 S.W.2d at 836; *Mandel*, 445 S.W.3d at 474. We sustain this part of Gillmore’s only issue and do not reach his other sub-issues. See Tex. R. App. P. 47.1.

Having sustained part of Gillmore’s dispositive first issue, we reverse the trial court’s default judgment and remand this cause to the trial court for further proceedings. See Tex. R. App. P. 43.2(d).

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: October 19, 2017

²Gillmore also established the other elements of his restricted appeal. See *Alexander*, 134 S.W.3d at 848.