In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-09-00036-CV

LEONARD MANOR, INC., Appellant

V.

CENTURY REHABILITATION OF TEXAS, L.L.C., Appellee

On Appeal from the 336th Judicial District Court
Fannin County, Texas
Trial Court No. 38,843

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Moseley

MEMORANDUM OPINION

Century Rehabilitation of Texas, L.L.C., filed suit against Leonard Manor, Inc., alleging breach of contract and caused citation to be issued. The citation was served at Leonard Manor's principal place of business and registered office on Brenda Litton, identified on the citation's return as the "business manager." Leonard Manor neither filed an answer to the suit nor made any other appearance and the trial court granted Century Rehabilitation a default judgment against Leonard Manor on January 15, 2009.

After the expiration of the plenary jurisdiction of the trial court, but within six months of the date of entry of the judgment, Leonard Manor filed a restricted appeal, contending that the default judgment is void because the trial court lacked personal jurisdiction over Leonard Manor at the time the default judgment was entered.

There is No Evidence that Litton Was An Agent or Officer Upon Whom Proper Service Could be Made.

Leonard Manor contends that the record fails to show that Litton, Leonard Manor's business manager, was a proper agent for service of process, and, therefore, the judgment reached based upon such service is void.

When determining whether the case is ripe for default judgment, the trial court has a duty to determine that the defendant was properly served with citation and has no answer on file. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985). It is well settled that in order for a default judgment to stand, the record must affirmatively show strict compliance with

the Texas Rules of Civil Procedure relating to the issuance, service, and return of citation. *Hubicki v. Festina*, 226 S.W.3d 405, 408 (Tex. 2007); *Wachovia Bank of Del., N.A. v. Gilliam*, 215 S.W.3d 848, 849–50 (Tex. 2007); *see Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990). When serving an agent for a corporation, the citation must affirmatively show that the individual served is in fact the agent for service. *Pharmakinetics Labs., Inc. v. Katz*, 717 S.W.2d 704, 706 (Tex. App.—San Antonio 1986, no writ). In a restricted appeal from a default judgment, no presumptions in favor of valid service are made. *Hubicki*, 226 S.W.3d at 407; *Uvalde Country Club*, 690 S.W.2d at 885; *Bronze & Beautiful, Inc. v. Mahone*, 750 S.W.2d 28, 29 (Tex. App.—Texarkana 1988, no writ). Unless the record affirmatively reflects that at the time the default judgment is entered the defendant has made an appearance, has been properly served with citation, or has executed a written memorandum of waiver of citation, the trial court does not have in personam jurisdiction to enter a default judgment against the defendant. *Mahone*, 750 S.W.2d at 29. Receiving suit papers or actual notice through an unauthorized procedure or process for service renders the attempted service invalid and of no effect. *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 n.1 (Tex. 2006) (citing *Wilson*, 800 S.W.2d at 836).

A direct attack on a judgment by a restricted appeal must be brought by a party to the suit who did not participate (either personally or by attorney) in the trial within six months after the court signs the judgment and the complained-of error must be apparent from the face of the record. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.013 (Vernon 2008); *DSC Fin. Corp. v. Moffitt*, 815

S.W.2d 551 (Tex. 1991); *see* TEX. R. APP. P. 30.[1] Our review is limited to the record as it existed before the trial court at the time the default judgment was rendered. *Armstrong v. Minshew*, 768 S.W.2d 883, 884 (Tex. App.—Dallas 1989, no writ); *see also Gerdes v. Marion State Bank*, 774 S.W.2d 63 (Tex. App.—San Antonio 1989, writ denied) (record cannot be changed after defaulting party has perfected writ of error); *Laidlaw Waste Sys., Inc. v. Wallace*, 944 S.W.2d 72 (Tex. App.—Waco 1997, writ denied). The face of the record, for purposes of a restricted appeal, consists of all the papers on file in the appeal, including the statement of facts. *Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269 (Tex. 1997); *DSC Fin. Corp.*, 815 S.W.2d at 551.

The record reflects that Leonard Manor brought this restricted appeal within six months of the judgment and did not participate in the default hearing; the only remaining issue is whether error is apparent on the face of the record.[2] *See Wachovia Bank of Del.*, 215 S.W.3d at 850.

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[1]*See also Stubbs v. Stubbs*, 685 S.W.2d 643, 644 (Tex. 1985); *Brown v. McLennan County Children's Protective Servs.*, 627 S.W.2d 390, 392 (Tex. 1982); *Avila v. Avila*, 843 S.W.2d 280 (Tex. App.—El Paso 1992, no writ).

[2]The parties spend considerable effort arguing over who has the burden of requesting and producing the reporter's record and the legal consequences of failing to do so. While Century Rehabilitation argues that Leonard Manor has the burden of requesting the reporter's record, it is notable that Century Rehabilitation failed to confirm whether such a record even exists. Even without a reporter's record or statement of facts, we may still review errors apparent on the face of pleadings. *See Brooks v. Assocs. Fin. Servs. Corp.*, 892 S.W.2d 91 (Tex. App.—Houston [14th Dist.] 1994, no writ); *see Protechnics Int'l, Inc. v. Tru-Tag Sys., Inc.*, 843 S.W.2d 734, 735 (Tex. App.—Houston [14th Dist.] 1992, no writ).

In their respective briefs, the parties debate whether the Texas Business Organizations Code or the Texas Business Corporations Act governs service of process.[3] There are distinctions between the two, but they are without a difference in the outcome here. Both the Texas Business Organizations Code and the Texas Corporations Act provide that service of process, notice, or demand may be made upon a corporation's registered agent, president, or vice president. TEX. BUS. ORGS. CODE ANN. §§ 5.201, 5.255(1) (Vernon Supp. 2008); TEX. BUS. CORP. ACT ANN. art. 2.11 (Vernon Supp. 2008).

As the party requesting service, it was the responsibility of Century Rehabilitation to make certain that service of process was properly accomplished. *Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 153 (Tex. 1994) (per curiam); *see* TEX. R. CIV. P. 99(a). "This responsibility extends to seeing that service is properly reflected in the record." *Primate Constr., Inc.*, 884 S.W.2d at 153. In *Harvestons Securities, Inc. v. Narnia Investments, Ltd.*, 218 S.W.3d 126, 134–35 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), there is a recitation of a litany of cases similarly situated:

> *Reed Elsevier, Inc. v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 180 S.W.3d 903, 905 (Tex. App.—Dallas 2005, pet. denied) (concluding that return of service was

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[3]Leonard Manor's brief includes, and partially relies upon, a copy of its articles of incorporation. However, the record does not indicate that the articles were before the trial court at the time of the default judgment. "'Evidence not before the trial court prior to final judgment may not be considered' in a restricted appeal." *Ins. Co. of State v. Lejeune*, 261 S.W.3d 852 (Tex. App.—Texarkana 2008, no pet.) (quoting *Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 442, 444 (Tex. 1991)). Therefore, we do not consider the articles of incorporation for any purpose.

> defective because it did not indicate the capacity of "Danielle Smith" or why she was served with process); *and Benefit Planners L.L.P. v. RenCare, Ltd.*, 81 S.W.3d 855, 861 (Tex. App.—San Antonio 2002, pet. denied) (holding that service was defective because the return did not recite that the citation was delivered to "Benefit Planners through its registered agent."); *Barker CATV Constr., Inc. v. Ampro, Inc.*, 989 S.W.2d 789, 793 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that the return showing service on "James Barker" does not establish that he was defendant's agent or that Barker CATV Construction, Inc. was served); and *Galan Enter. v. G. Wil-Tex Co., Inc.*, No. 01-92-01246-CV, 1993 WL 471403, at *1–2 (Tex. App.—Houston [14th Dist.], Nov. 18, 1993, no pet.) (concluding that return of service was invalid because party failed to establish that Barbara Galan was in fact a person authorized to accept service) (not designated for publication).

In this case, service was made upon Litton at Leonard Manor's principal place of business. However, nothing in the record indicates that Litton held any capacity (e.g., registered agent for service, president, or vice president) which would allow service of citation on her to be deemed service of citation on Leonard Manor. Therefore, the face of the record fails to reflect proper service; without proper service of citation, the trial court lacked the requisite jurisdiction over Leonard Manor to grant the default judgment.

Because service of citation was defective, we reverse the judgment of the trial court and remand to the trial court for further proceedings.

Bailey C. Moseley
Justice

Date Submitted: August 19, 2009
Date Decided: September 10, 2009