RENDERED: May 30, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002417-MR

DAKOTA ENTERPRISES, INC. — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL E. BRADEN, JUDGE
ACTION NO. 01-CI-00248

JIMMY CARTER, as next friend of
SHANE CARTER, a minor — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from an order entered by the Whitley Circuit Court denying appellant's motion to set aside a default judgment. For the reasons stated hereafter, we affirm.

Appellee Jimmy Carter, as the next friend of his minor son, Shane Carter, filed a verified complaint on April 25, 2001, asserting that Shane was injured through the negligent and careless operation, maintenance, and loading or unloading of

carnival equipment by the employees and agents of appellant, an Ohio corporation. The certified return receipt which was filed in the circuit court record on May 1 shows that the circuit court clerk forwarded a copy of the summons and complaint to the Kentucky Secretary of State. However, the record also contains the unopened envelope, postmarked May 2, on which were printed the Secretary of State's return address and a mailing address of "Dakota Enterprises, Inc., Kevin Nolan, 3500 Moxahala Park Rd., Zanesville, OH 43701." That envelope, which was filed in the record on June 7, bore a certified return receipt and was stamped "unclaimed."

Appellee filed a motion on June 19 seeking a default judgment. The court granted the motion on July 9, and on August 13 it entered a final judgment awarding damages in the amount of $85,934.45.

On September 14, 2001, appellant made its first appearance in the case by filing a CR 60.02 motion to set aside the default judgment on the ground of excusable neglect. More specifically, appellant asserted that it had never been served or given notice of the proceeding. The motion was accompanied by the affidavit of Kevin Nolan, who stated:

> 1. I, Kevin Nolan, am the President of Dakota Enterprises, Inc.
>
> 2. I, Kevin Nolan, was never served with a summons or complaint in this suit.

3. Because my wife and I are in the carnival business, we are routinely absent from our house from March to October.

4. Occasionally, my father bags the mail at our house for pickup.

5. Occasionally, I send a driver to pick up the mail at my father's house.

6. At all times that I either returned to my home or read the bagged mail, I never received any summons that was attempted to be served on me or any notice of this suit.

7. I had no knowledge of this suit until Wednesday, August 22, 2001.

The trial court denied appellant's motion, and this appeal followed.

Appellant contends on appeal that the trial court abused its discretion by denying appellant's motion to set aside the default judgment based on appellee's alleged failure to provide it with proper service of process. We disagree.

KRS 454.210(3)(a) provides that if personal jurisdiction is authorized, service of process against a nonresident corporation may be made on "the Secretary of State who, for this purpose, shall be deemed to be the statutory agent of such person or corporation." Further, KRS 454.210(3)(b) provides:

> The clerk of the court in which the action is brought shall issue a summons against the

> defendant named in the complaint. The clerk shall execute the summons by sending by certified mail two (2) true copies to the Secretary of State and shall also mail with the summons two (2) attested copies of plaintiff's complaint. The Secretary of State shall, within seven (7) days of receipt thereof in his office, mail a copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by certified mail, return receipt requested, and shall bear the return address of the Secretary of State. The clerk shall make the usual return to the court, and in addition the Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Rules of Civil Procedure[.] (Emphasis added.)

Here, there is no dispute that the procedural requirements described in KRS 454.210(3) were satisfied, and that the unopened summons was returned as "unclaimed." However, appellant relies on Cox v. Rueff Lighting Co., Ky. App., 589 S.W.2d 606 (1979), in asserting that the default judgment should be set aside based on appellant's failure to receive actual notice of the action.

Like the matter now before us, Cox involved the service of notice on a nonresident corporation. The parties did not dispute that the summons and complaint were properly sent by registered mail to Cox, d/b/a the corporation, and that the

corporation's process agent in fact received and opened the letter before discarding it as junk mail. Finding that Cox had notice of the registered letter or, at the least, that he was given "sufficient information to place him on a kind of inquiry notice to find out about the letter and its contents," a panel of this court declined to

> a fortiori create a rule that a showing of no actual notice may not constitute good cause sufficient to warrant the setting aside of a default judgment. The facts and circumstances of each individual case should be weighed. We think that in a case such as the instant one which is a simple one-on-one action for debt, a trial judge would be hard pressed to refuse to set aside a default judgment if he were truly convinced that the movant had no actual notice in fact and was possessed of an arguably meritorious defense.

Id. at 607. This panel therefore concluded that since Cox failed to take available steps to protect corporate interests after receiving notice of the pending action, the trial court did not abuse its discretion by refusing to grant the requested postjudgment relief.

Appellant asserts that the present circumstances are distinguishable from those described in Cox, as here there was no indication that appellant was placed either on actual notice as to the contents of the unopened, returned envelope, or on any type of "inquiry notice to find out about the letter and its contents." Id. at 607. However, appellant fails to acknowledge

that this argument was previously rejected in circumstances very similar to those now before us. In Davis v. Wilson, Ky. App., 619 S.W.2d 709, 710-11 (1980), summons

> was promptly served upon the Secretary of State who in turn promptly forwarded it by certified mail, return receipt requested, to Earl Clark d/b/a Modern Car Crushers, P.O. Box 12253, Knoxville, Tenn. 37912. The envelope containing that summons was returned to the Secretary of State marked "unclaimed." We conclude from Cox v. Rueff Lighting Company, Ky. App., 589 S.W.2d 606 (1979), that Clark was properly served under the long arm statute.

Thus, in Davis this court affirmed the circuit court's determination that under both the long arm statute and Cox, the nonresident corporation was properly served when the Secretary of State forwarded a properly-addressed summons by certified mail, return receipt requested, even though the unopened envelope was returned to it as "unclaimed." In view of that holding, we are not persuaded by appellant's argument herein that the trial court erred by failing to find that it was not properly served in accordance with Cox.

Further, we are not persuaded by appellant's assertion that for purposes of CR 60.02 relief, its failure to timely answer the complaint constituted excusable neglect because its listed agent for the service of process was absent from home when the post office attempted to serve process. As noted above, Kevin Nolan indicated by affidavit that he is absent from home on

business each year from March to October, that the mail at his house is occasionally collected by his father, and that he occasionally sends a driver to pick up the mail at his father's house. It is clear from these statements that although Nolan is appellant's named statutory agent for the service of process, there is no reliable and regular method in place for serving process upon Nolan or anyone else during the eight months when Nolan is away from his home each year. Obviously, the trial court concluded that Nolan's limited availability for the service of process did not constitute a valid excuse for appellant's failure to timely respond to an action filed against it. Having carefully reviewed the record, we cannot say that the trial court abused its discretion by reaching this conclusion.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Killian Brown
Jeri D. Barclay
Louisville, Kentucky

BRIEF FOR APPELLEE:

Todd K. Childers
Corbin, Kentucky