RENDERED: JULY 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001156-MR

LIST BROKERS, INCORPORATED;
and JOHN BAKER — APPELLANTS

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 00-CI-00542

PEAK ACHIEVEMENT TRAINING d/b/a
ATTENTION CONTROL TRAINING, INCORPORATED,
and JONATHAN D. COWAN — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE. This is an appeal from the Oldham Circuit Court's order setting aside a foreign default judgment based upon lack of personal jurisdiction. Specifically, the Oldham Circuit Court found that a Texas judgment was void when the defendant was improperly named, service of process was by certified mail and the return receipt was signed for by someone

other than the defendant or the defendant's agent. Finding no error, we affirm.

In November of 1998, Appellant, List Brokers, Incorporated (List Brokers) and Appellee, Peak Achievement Training d/b/a Attention Control Training, Inc. (Peak Achievement Training), entered into a written contract under which List Brokers printed and mailed advertising brochures for Peak Achievement Training. List Brokers is a Texas Corporation doing business in San Antonio, Bexar County, Texas. At the time, Peak Achievement Training was a Kentucky Corporation. A dispute arose under the contract. Ultimately, List Brokers sued Peak Achievement Training and Jonathan D. Cowan (Cowan), the president and CEO of Peak Achievement Training, in the Bexar County district court (the Texas court) seeking compensatory and punitive damages.

In the petition, List Brokers identified the defendants as follows: Peak Achievement Training d/b/a Attention Control Training, Inc. and John D. Cowan. As admitted by List Brokers, the defendants that they intended to sue are properly identified as Attention Control Training, Inc. d/b/a Peak Achievement Training and Jonathan D. Cowan. In accordance with the Texas long arm statute, List Brokers attempted to serve Peak Achievement Training and Cowan with notice of the suit by serving the Secretary of State of Texas (the Secretary). The

Secretary then forwarded a copy of the petition by certified mail, return receipt requested to the address of the registered agent for service of process. The Secretary further contributed to the misidentification of Cowan by addressing process to "John D. Cown." Despite the errors in identifying the proper names of the defendants, the street address was correct.

Leonard Barnes, an employee of a different company incorporated by Cowan named NeuroTechnology, signed both of the return receipts. The registered address for NeuroTechnology was the same as the registered address for Peak Achievement Training. When Cowan learned that Leonard Barnes had signed for letters addressed to "non-existent parties," Cowan asked him to return the envelopes to the post office without opening them, which Barnes later did.

In accordance with the sequence of events set out in the preceding paragraph, as to the petition forwarded to Peak Achievement Training, the Secretary issued a certification that it received the return receipt dated October 20, 1999, in its office bearing the signature of addressee's agent. As to the petition forwarded to "John D. Cown", the Secretary issued another certification that it received the return receipt dated October 20, 1999, in its office bearing the signature of addressee's agent. The Secretary later issued a subsequent certification that, as to the citation forwarded to Peak

Achievement Training, process was returned to the Secretary's office on October 26, 1999, "bearing the notation Addressee Unknown." Moreover, as to the citation forwarded to "John D. Cown", process was returned to the Secretary's office on October 26, 1999, "bearing the notation Attempted -- Not Known."

On December 14, 1999, a default judgment was entered against Peak Achievement Training and Cowan in the amount of $105,808.48 with post-judgment interest at 10% per annum. List Brokers then sought to enforce the judgment in Kentucky pursuant to the Uniform Enforcement of Foreign Judgments Act, KRS 426.950-.975, and filed the appropriate papers with the Oldham Circuit Court. In response, Cowan, who was represented by counsel at this point, filed a motion to set aside or stay enforcement of the Texas judgment. In support, Cowan asserted that there was no such Kentucky corporation and no such person as John D. Cowan. The trial court agreed with Cowan and issued an order setting aside the default judgment. List Brokers appeals from this order.

On appeal, List Brokers argues that the trial court erred in concluding that that the Texas court lacked personal jurisdiction. In addition, List Brokers claims that the trial court committed reversible error in setting aside the default judgment. Finally, List Brokers asserts that the default judgment should be enforced as a matter of equity.

The underlying action was filed in a Kentucky state court to recognize a default judgment rendered by a Texas state court. It is well-settled that "[t]he United States Constitution requires our courts to give full faith and credit to the judgments of the courts of all our sister states. A foreign judgment is presumptively valid and the party attacking it has the burden to demonstrate its invalidity." Waddell v. Commonwealth, Ky. App., 893 S.W.2d 376, 379 (1995) (internal citations omitted). To this end, Cowan insists that the 1999 Texas judgment is void due to improper service of process and not entitled to full faith and credit. See id. We determine the issue of whether Cowan and his corporation were properly served by applying Texas law. See Sunrise Turquoise, Inc. v. Chemical Design Co., Inc., Ky. App., 899 S.W.2d 856, 857-58 (1995) ("The law in Kentucky is that a sister state's judgment is entitled to full faith and credit and to registration if the judgment is valid under that state's own laws."); Morrel & West, Inc. v. Yazel, Ky. App., 711 S.W.2d 501, 502 (1986) ("Escape from obedience to a judgment of a sister-state can be had only if said judgment is void and entitled to no standing even in that state.").

To support a default judgment against a jurisdictional challenge, Texas law requires List Brokers to prove that (1) the pleadings established that the defendants were amenable to

service; and (2) evidence in the record demonstrates that the defendants were in fact served in the manner required by the Texas long arm statute. See Harper Macleod Solicitors v. Keaty & Keaty, 260 F.3d 389, 398 (5th Cir. 2001) (citing Whitney v. L & L Realty Corp., 500 S.W.2d 94, 95-96 (Tex. 1973). These requirements "reflect a strong policy that defendants ought not to be cast in personal judgment without notice." Whitney, 500 S.W.2d at 97. In this appeal, Peak Achievement Training and Cowan do not argue that they were not amenable to service, thus the inquiry before this Court implicates only the second prong of Whitney. See Harper Macleod, 260 F.3d at 398.

Under Section 17.045(a) of the Texas Civil Practice & Remedies Code, plaintiffs must comply with the following notice requirements when suing a nonresident defendant:

> If the secretary of state is served with duplicate copies of process for a nonresident, the documents shall contain a statement of the name and address of the nonresident's home or home office and the secretary of state shall immediately mail a copy of the process to the nonresident at the address provided.

"Texas courts have consistently required strict compliance with the terms of the Texas long arm statute." Harper Macleod, 260 F.3d at 398 (citing Mahon v. Caldwell, Haddad, Skaggs, Inc., 783 S.W.2d 769, 771 (Tex. App. 1990). Here, the statement of the name of the nonresident defendant was

incorrect. According to the Texas Supreme Court, an incorrect name is sufficient to show a citation is not in strict compliance. See Uvalde Country Club v. Martin Linen Supply Co., Inc., 690 S.W.2d 884, 886 (Tex. 1985); see also Mega v. Anglo Iron & Metal Co. of Harlingen, 601 S.W.2d 501, 504 (Tex. App. 1980)("A mistake in stating the defendant's name in the citation has been consistently held to be fatally defective." The same rule applies where the "citation states one name, but the same was mailed to and presumably served on a person with a different name.")

Although Uvalde Country Club did not involve a defendant being sued by way of the Texas long arm statute, it did involve a mistake as to the name of the defendant's registered agent for service of process. Specifically, the court held that attempted service of process was invalid and of no effect when the original petition alleged that the defendant could be served by serving its registered agent, "Henry Bunting, Jr.", and the citation and sheriff's return on the citation showed delivery to "Henry Bunting." See id. at 884.

In this case, List Brokers misidentified both the corporate defendant and the individual defendant; thus, the defendants were improperly identified in all respects. Not only were the corporate and individual names misidentified, but also, the Secretary addressed process to "John D. Cown." Moreover,

only a minimal amount of due diligence was required of List Brokers in correctly identifying Peak Achievement Training and Cowan as List Brokers had a contract signed by Jonathan Cowan and numerous written communications with Jonathan Cowan. Further, there is no dispute that Attention Control Training, Inc. d/b/a Peak Achievement Training was properly registered with the Kentucky Secretary of State.

In addition to the defendants' names being incorrect on the Texas default judgment, Cowan did not sign the return receipt. Under Texas law, if a citation is served by certified mail and someone other than the addressee signs the return receipt, then service of process is defective. See Ramirez v. Consolidated HGM Corp., 124 S.W.3d 914, 916 (Tex. App. 2004) (Service of process was held to be ineffective when the addressee of the certified mail was "Consolidated HGM Corporation serving its registered agent Dana T. White . . ." and the return illustrated that "Jack Danley" signed for the mailing.)

As a final point on the issue of service of process in strict compliance with the law, we note that in Texas, "[a]ctual notice to a defendant, without proper service, is not sufficient to convey upon the court jurisdiction to render default judgment against [the defendant]. Rather, jurisdiction is dependent upon citation issued and served in a manner provided for by law."

Wilson v. Dunn, 800 S.W.2d 833, 836 (Tex. 1990)(internal citations omitted). Thus, it is of no consequence to Cowan that the documents from the Secretary did arrive by U.S. Mail at his address. Further, it is of no consequence that Cowan knew the documents had arrived and he "could surmise some things" as to the contents of the documents. "[T]he Texas Supreme Court has expressly rejected an actual notice exception to strict compliance with the terms of the long arm statue." See Harper Macleod, 260 F.3d at 399 (citing Wilson, 800 S.W.2d at 836).

For the foregoing reasons, the Oldham Circuit Court properly determined that service was inadequate under Texas law and could not support a default judgment. Further, the trial court was correct in setting aside the foreign default judgment. Having concluded as such, we decline to consider List Brokers equitable arguments.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Douglas W. Becker Clarence A. Wilbon Wyatt, Tarrant & Combs, LLP Louisville, Kentucky	Jonathan D. Cowan, Ph.D., Pro Se Goshen, Kentucky