

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0414

ADAIR ASSETS MANAGEMENT, LLC
D/B/A ADAIR ASSET MANAGEMENT, LLC

VERSUS

CLAUDE LEE PORTER, ET AL

C/W

2016 CA 0415

ERVIN & PAULETTE LABOSTRIE
AND CLAUDE PORTER

VERSUS

ADAIR ASSETS MANAGEMENT, LLC

DATE OF JUDGMENT: DEC 22 2016

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
NUMBER 72375-A, PARISH OF IBERVILLE
STATE OF LOUISIANA

HONORABLE JAMES J. BEST, JUDGE

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Claude Porter, Ervin LaBostrie, Jr., and
Paulette Porter LaBostrie

BEFORE: HIGGINBOTHAM, THERIOT, AND CHUTZ, JJ.

Disposition: MOTION TO DISMISS DENIED; JUDGMENT VACATED AND REMANDED.

Theriot, J. concurs *WV*

CHUTZ, J.

Defendants-appellants, Claude Porter, Ervin LaBostrie, Jr., and Paulette Porter LaBostrie¹ (collectively defendants),² appeal the trial court's judgment rendering "a judgment of default" against them and entering a preliminary default in favor of plaintiff-appellee, Adair Assets Management, LLC (Adair). The appealed judgment additionally found Mrs. LaBostrie in contempt of court for failing to comply with an order compelling her to provide more complete answers to interrogatories and assessed attorney fees and costs for the motion to compel and for a motion for new trial against her. Finding insufficient service of the pleading setting the motion to compel for hearing, we vacate the judgment.³

FACTUAL AND PROCEDURAL BACKGROUND

Adair instituted this litigation on February 27, 2013, by filing a petition to quiet tax sale title, averring entitlement to judgment recognizing Adair as the owner of a 100% interest in immovable property located in Iberville Parish.⁴ Adair attached to its petition a certified copy of the tax sale certificate, indicating it had acquired the tax sale title for the subject property on June 12, 2009, after the ad valorem taxes for 2008 were not paid. Alleging more than three years had elapsed from the date

¹ Mrs. LaBostrie, who is a Louisiana attorney, represented defendants throughout these proceedings.

² Ervin Alcee LaBostrie, III, who is the son of Mr. and Mrs. LaBostrie, and the City of St. Gabriel were named as additional defendants with interests in the property. These defendants are not parties to this appeal and we do not include them in our reference to defendants. Although Mrs. LaBostrie has subsequently undertaken representation of her son, she was not entered as counsel of record until after rendition of the appealed judgment.

³ Since the appealed judgment is one that imposes sanctions against defendants, it is correctly before us. See La. C.C.P. art. 1915A(6); see also *Capital City Press, LLC v. Louisiana State University System Bd. of Sup'rs*, 2013-1994 (La. 8/28/13), 120 So.3d 250, citing *In re: Jones*, 2010-0066 (La. App. 5th Cir. 11/9/10), 54 So.3d 54, 58 (appeal is a proper remedy for judgment imposing sanctions for contempt). Accordingly, Adair's motion to dismiss the appeal is denied.

⁴ The property is described in part as "One (1) certain lot or parcel of ground, together with all the buildings and improvements thereon, situated in the Parish of Iberville, State of Louisiana, being designated as LOT SEVENTEEN (17), LANDS OF LEBLANC BROTHERS AND IBERVILLE SCHOOL BOARD AT ST. GABRIEL, LOUISIANA," and is located on land fronted by La. Highway 74.

the tax deed was recorded and that no one had redeemed the tax sale, Adair sought a judgment decreeing that defendants had no further interests in the subject property. Adair also sought cancellation of all encumbrances, judgments, liens, and mortgages secured on or against the subject property relative to defendants.

On August 14, 2013, defendants filed a petition to annul the tax sale. In a subsequent amendment to their petition, defendants clearly alleged that they were not provided with notice of the tax sale as required by law. Thus, they maintained, they were entitled to have the tax sale annulled.

After the two matters were consolidated, on November 6, 2014, Adair filed a motion to compel discovery, when interrogatories and requests for production forwarded to defendants in July 2014 were not initially answered; and the subsequent responses provided in September 2014 were incomplete and unsigned and when further attempts to obtain completed responses were unresolved. In that motion, Adair sought its reasonable expenses, including attorney fees. A hearing date set for January 7, 2014 was continued by Adair based on its understanding that defendants may provide the deficient discovery responses.

On March 20, 2015, Adair moved to reset the hearing on the motion to compel, and the trial court signed an order setting the previously continued matter for a hearing on April 1, 2015. Defendants failed to attend the hearing and on the trial court rendered judgment on April 21, 2015, granting Adair's motion to compel, ordering defendants to respond to outstanding discovery requests. An attorney fee of \$600.00 and costs were assessed against defendants. The order was apparently served on Mrs. LaBostrie at her law office at 440 N. Foster in Baton Rouge.

On May 21, 2015, defendants filed a motion for new trial averring that: they had not been served; Mrs. LaBostrie had a previously scheduled hearing in another district court; because of the lack of notice, defendants had been unable to file responsive pleadings; the ruling was contrary to law and evidence; and that attorney

fees were inappropriate since Adair was represented by in-house counsel. The new trial motion was heard on June 30, 2015. Because defendants failed to file a memorandum with their motion, the trial court did not allow Mrs. LaBostrie to argue.⁵

The trial court signed a judgment on July 20, 2015, denying defendants' motion for new trial; imposing sanctions against Mrs. LaBostrie which included holding her in contempt and assessing attorney fees and costs in the amount of \$3,080.00 against Mrs. LaBostrie related to the motion to compel and the motion for new trial; and entering a preliminary default against the defendants.⁶ Defendants appeal challenging the lack of service.

DISCUSSION

When a pleading or order sets a court date, service upon the adverse party shall be made either by registered or certified mail or as provided in La. C.C.P. art. 1314. La. C.C.P. art. 1313C. When service is made by mail, delivery, or electronic means, the party or counsel making the service shall file in the record a certificate of the manner in which service was made. La. C.C.P. art. 1313B.

According to the certificate of service executed by Adair in its motion to reset, a copy of the order setting the court date for April 1, 2015 was mailed "by depositing [it] in the U.S. mail, postage prepaid, and properly addressed," to Mrs. LaBostrie at

⁵ See La. District Court Rules, Rule 9.9.

⁶ At the hearing on the motion for new trial, the trial court indicated that it was granting a "judgment of default" as a sanction against defendants for the failure to provide complete discovery. See La. C.C.P. art. 1471A(3) (if a party or an officer fails to obey an order to provide discovery, the court may make such orders in regard to the failure as are just, including rendition of a judgment of default against the disobedient party). The trial court explained that it interpreted "judgment of default" to reference the default procedure set forth in La. C.C.P. arts. 1701-1702. Accord *Clark v. Clark*, 358 So.2d 658 (La. App. 1st Cir. 1978). Thus, the trial court required the parties to return to court to allow Adair the opportunity to establish a prima facie case of entitlement to judgment quieting the tax sale. Mrs. LaBostrie was provided notice of the October 6, 2015 hearing in open court on June 30, 2015. When no one appeared on behalf of defendants at the subsequent hearing, the trial court rendered judgment as prayed for by Adair. Defendants have appealed that judgment which we address in a companion opinion also rendered this day. See *Adair Assets Management, LLC v. Porter*, 2016-0416 (La. App. 1st Cir. --/--/2016) (an unpublished opinion).

“440 N. Foster” in Baton Rouge. Thus, the record clearly establishes that the order setting the April 1, 2015 hearing date was not sent by either registered or certified mail as required under La. C.C.P. art. 1313C, to which Adair admitted at the April 1, 2015 hearing. And at the April 1, 2015 hearing, Adair admitted as much.

A pleading which is required to be served, but which may not be served under Article 1313, shall be served by the sheriff by personal service on the counsel of record of the adverse party. La. C.C.P. art. 1314A(2)(a). The record establishes that Mrs. LaBostrie was not personally served. The service return, executed by L. Torres of the East Baton Rouge Sheriff’s Office on March 31, 2015, indicated “numerous attempts” to serve Mrs. LaBostrie at “440 N. Foster” in Baton Rouge. No other evidence was admitted in conjunction with service of the order setting the motion for hearing. Therefore, Mrs. LaBostrie has correctly pointed out that proper service was not effectuated on defendants.

The obvious purpose of Articles 1313 and 1314 is to fulfill the constitutional requirements of due process notice. *Adair Asset Management, LLC/US Bank v. Honey Bear Lodge, Inc.*, 2012-1690 (La. App. 1st Cir. 2/13/14), 138 So.3d 6, 11. Due process at a minimum requires deprivation of life, liberty, or property be preceded by notice and an opportunity to be heard at a meaningful time. *Spiers v. Roye*, 2004-2189 (La. App. 1st Cir. 8/8/07), 965 So.2d 489, 494. The trial of a case is unquestionably one of the meaningful occasions at which the parties must be given an opportunity to be heard, and adequate notice thereof is one of the most fundamental requirements of procedural due process. *Spiers*, 965 So.2d at 494.

A judgment rendered against a party who has not been served, when service is required, and who has not appeared is an absolute nullity. La. C.C.P. art. 2002(A)(2); *Adair Asset Mgmt., LLC/US Bank*, 138 So.3d at 11.

Adair urges this court not to allow Mrs. LaBostrie to defeat the relief given on the motion to compel by avoiding service, citing *Trusty v. Allstate Ins. Co.*, 2003-

289 (La. App. 5th Cir. 11/12/03), 861 So.2d 634. In *Trusty*, defendant had been unsuccessful in contacting plaintiffs' attorney either by telephone or written correspondence for the purpose of receiving responses to discovery requests. When discovery went unanswered for four months, defendant filed a motion to compel. After a court appointed private process server was unsuccessful in serving the motion, the sheriff attempted service. The sheriff's return showed that plaintiffs' attorney "was never in his office" despite five attempts to serve him with the motion. Another private process server was appointed and service was made by putting the motion in the mail slot. Because none of the applicable manners for service had been utilized by defendant, service was improper and the *Trusty* court found the judgment was an absolute nullity. *Id.*, 861 So.2d at 636-37.

In *Trusty*, defendant asserted that plaintiffs' attorney should not have been able to defeat service by refusing to "effectively have a legal office which he purport[ed] to have." *Id.* Based on the facts before it, the *Trusty* court remanded the matter noting that an evidentiary showing to determine whether plaintiffs' attorney was avoiding service was necessary before a valid judgment on the motion to compel could be entered noting that it was not apparent from the record that defendant had attempted to serve plaintiffs' attorney via certified or registered mail as provided by La. C.C.P. art. 1313C. *Id.*

Adair suggests to this court that a remand is unnecessary in this case because the record contains an evidentiary showing that Mrs. LaBostrie had actual notice of the hearing and was "essentially dodging service." Adair claims that Mrs. LaBostrie was sent notice of the hearing by email "which she *actually read*," pointing to an email tracking notification. But our review of the February 18, 2015 email does not show that Mrs. LaBostrie read the email; it was the carbon copy recipient who read the email at 8:36 a.m. Adair further maintains the record establishes Mrs. LaBostrie was avoiding service because Adair mailed the motion to Mrs. LaBostrie at "440 N.

Foster”; the sheriff had attempted to serve her at that address; and the Clerk of Court also sent her a copy of the motion at that same address. We find this an insufficient evidentiary showing to conclude that Mrs. LaBostrie was purposefully avoiding service. Adair unequivocally did not comply with La. C.C.P. art. 1313C since it admitted it did not send the motion to Mrs. LaBostrie by certified or registered mail. The sheriff’s return does not establish when service was attempted or the number of times. And the service by the Clerk of Court was nothing more than a repeat of the improper service that Adair had undertaken.

DECREE

Because service of the motion to reset the hearing on Adair’s motion to compel discovery was improper, the July 20, 2015 judgment, denying defendants’ motion for new trial; imposing sanctions against Mrs. LaBostrie; and entering a preliminary default against the defendants is vacated. The matter is remanded for further proceedings consistent with this opinion. Adair’s motion to dismiss the appeal as a partial judgment not immediately appealable is denied. Appeal costs are assessed against plaintiff-appellee, Adair Assets Management, LLC.

MOTION TO DISMISS DENIED; JUDGMENT VACATED AND REMANDED.