

**JUDITH RABITO**

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**NO. 2018-CA-0824**

**VERSUS**

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**COURT OF APPEAL**

**MCLAIN INVESTMENTS,  
LLC, SYLVIA MCCLAIN,  
DOUGLAS COOK**

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**FOURTH CIRCUIT**

**ENTERPRISES, ABC  
SUBCONTRACTOR, JOHN  
DOE AND XYZ INSURANCE  
COMPANY**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2015-08775, DIVISION "L-6"  
Honorable Kern A. Reese, Judge

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**Judge Tiffany G. Chase**

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(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Tiffany G. Chase)

**LOBRANO, J., CONCURS IN THE RESULT.**

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**REVERSED AND REMANDED  
January 23, 2019**

Defendant-appellant, Douglas Cook Enterprises, LLC (hereinafter “DCE”), appeals a default judgment in favor of plaintiff-appellee, Judith Rabito (hereinafter “Ms. Rabito”), awarding Ms. Rabito \$571,730.00 for injuries she alleged in her tort action. For the following reasons, we reverse the June 28, 2018 default judgment and remand the matter for further proceedings.

### **FACTUAL AND PROCEDURAL HISTORY**

Ms. Rabito filed this instant tort action alleging she fell into an open elevator shaft sustaining injuries resulting from the negligence of DCE, McClain Investments, LLC (hereinafter “McClain, LLC”), Sylvia McClain (hereinafter “Ms. McClain”), unknown subcontractors, and defendants’ various insurers.<sup>1</sup> Service of the petition was requested on the named defendants including DCE through its registered agent, Douglas Cook (hereinafter “Mr. Cook”).

On September 18, 2015, service was attempted by the Jefferson Parish Sheriff’s Office (hereinafter “JPSO”) at the registered address provided for Mr. Cook, as listed in the Secretary of State’s database. The deputy attempting service

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<sup>1</sup> Ms. Rabito was a tenant and previous owner of the building now owned by McClain, LLC. Both McClain, LLC and Ms. McClain have since been released from this litigation. DCE was the general contractor performing extensive renovations to the property.

was advised that Mr. Cook did not reside at the address and indicated such on the back of the citation cover sheet. In January 2016, Ms. Rabito requested the Clerk of Court reissue service at the regular business location of DCE. After five attempts at that location, the JPSO was still unable to effectuate service on Mr. Cook. These attempts by the deputy were noted on the back of the January 26, 2016 citation.

Ms. Rabito filed a motion to appoint a private process server, John Huck (hereinafter “Mr. Huck”), which the trial court granted. On April 7, 2016, Mr. Huck allegedly made additional unsuccessful attempts at service on Mr. Cook, both at DCE’s place of business and the registered address. The next day, Mr. Huck returned to DCE’s place of business and tendered the petition and citation to Mike Labat (hereinafter “Mr. Labat”) who accepted and signed the service papers.

Ms. Rabito filed a motion for a preliminary default which was entered on November 13, 2017. A motion to confirm the default was subsequently filed on June 25, 2018. Attached to the motion to confirm were two exhibits. Exhibit A was a Certification of Counsel which asserted “Mr. Huck perfected service of the Petition on April 8, 2016.” It included a copy of the trial court’s order appointing Mr. Huck as private process server and copies of the citations and sheriff’s returns. Exhibit B was the Affidavit of Judith Rabito which attested to various assertions regarding the underlying tort at issue.

At the hearing to confirm the default, Ms. Rabito introduced additional evidence into the record although none of it pertained to the issue of service. Ruling from the bench, the trial court stated:

Service was made on Douglas Cook Enterprises, LLC on April 8, 2016, at the Offices of Douglas Cook Enterprises, LLC, 125 Zinnia

Street, Metairie, Louisiana, placed in the hands of Mike Labat, manager/employee of Douglas Cook Enterprises, LLC.

The judgment was reduced to writing and signed by the trial court on June 28, 2018, entering judgment in favor of Ms. Rabito against DCE in the amount of \$571,753.00.

On July 31, 2018, DCE filed a motion to annul the default judgment primarily on the grounds that service was not properly effectuated. Ms. Rabito filed a response/exception detailing the prior service attempts by the JPSO, Mr. Huck's service attempts on Mr. Cook, and Mr. Huck's service on Mr. Labat. Attached to the response/exception was a series of email correspondence between Mr. Huck and counsel for Ms. Rabito. The emails were introduced into the record. Mr. Huck testified at the annulment hearing, over the objection of DCE, on his attempts to make service on Mr. Cook. On cross-examination, Mr. Huck admitted he did not prepare or sign an affidavit attesting to the facts regarding the service attempts on Mr. Cook. Mr. Huck further admitted he did not testify at the hearing confirming the default.

The trial court took the matter under advisement and on August 7, 2018 issued its judgment denying DCE's motion to annul along with accompanying written reasons. The trial court stated that DCE failed to meet its burden to show service was not properly effectuated. The written reasons further explained that "the Court heard the testimony of Mr. Huck, the private process server, and found his testimony regarding the service of Mr. Labat to be persuasive." DCE filed a motion for a suspensive appeal of the trial court's June 28, 2018 judgment confirming the default. We denied Ms. Rabito's motion to dismiss the appeal and converted the suspensive appeal to a devolutive appeal.

## STANDARD OF REVIEW

“In reviewing default judgments, the appellate court is restricted to determining the sufficiency of the evidence offered in support of the judgment. This determination is a factual one governed by the manifest error standard of review.” *Arias v. Stolthaven New Orleans, LLC*, 2008-1111, p. 5 (La. 5/5/09), 9 So.3d 815, 818 (internal citations omitted).

## DISCUSSION

While DCE raises both procedural and substantive arguments, the former is immediately dispositive of this appeal. Valid service of process by a private process server must be sufficiently proven on the record prior to a trial court’s confirmation of a default judgment.<sup>2</sup> La. C.C.P. arts. 1293(A) and 1702(A). The requirements of service of process on an LLC are set forth in La. C.C.P. art. 1266 which, in relevant part, provides:

A. Service of citation or other process on a domestic or foreign limited liability company is made by personal service on any one of its agents for service of process.

B. If the limited liability company has failed to designate an agent for service of process, if there is no registered agent by reason of death, resignation, or removal, or if the person attempting to make service certifies that he is unable, after due diligence, to serve the designated agent, service of the citation or other process may be made by any of the following methods:

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(2) Personal service on any employee of suitable age and discretion at any place where the business of the limited liability company is regularly conducted.

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<sup>2</sup> “A preliminary default must be confirmed by proof of the demand that is sufficient to establish a prima facie case *and that is admitted on the record prior to the entry of a final default judgment.*” La. C.C.P. art. 1702(A) (emphasis added).

As the trial court ruled that service was properly perfected by La. 1266(B)(2), the question before us is whether Ms. Rabito offered sufficient proof of compliance with one of the threshold requirements of Article 1266(B).

As cited above, La. C.C.P. art. 1266(B) sets forth specific circumstances where the alternate forms of service, other than on the LLC's registered agent, are acceptable. Circumstances that are not specifically enumerated in the statute are excluded. *Washington v. Premiere Auto., LLC*, 2003-1614, p. 3 (La.App. 4 Cir. 3/17/04), 872 So.2d 1187, 1189. The relevant circumstance in the case *sub judice* is one where “the person attempting to make service certifies that he is unable, after due diligence, to serve the designated agent.” La. C.C.P. art. 1266(B). Although this Court has never directly addressed the proper interpretation of the “person attempting to make service,” we have evinced an understanding that such person is the process server.<sup>3</sup> *See Kallauner v. One Source Const., LLC*, 2008-0883, p. 3 (La.App. 4 Cir. 10/8/08), 995 So.2d 59, 61 (“the process server must certify that he was ‘unable, after due diligence, to serve the designated agent’ before an alternative means of service becomes acceptable”); *see also Washington*, 2003-1614, pp. 3-4, 872 So.2d at 1190. Where, as here, service is made by a

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<sup>3</sup> Acts 1995, No. 859 amended La. C.C.P. art. 1261 by inserting “or if the officer making service certifies that he is unable, after diligent effort, to have service made on the agent,” presumably borrowing the officer’s diligence requirement from La. C.C.P. art. 1262. Subsequently, Acts 1995, No. 1257 was merged into the amended Article 1261 by substituting “person attempting to make” for “officer making,” and by substituting “due diligence, to serve the designated agent” for “diligent effort, to have service made on the agent.” La. C.C.P. art. 1266, was added by Acts 1999, No. 145 and essentially copied the language of the corporate statute verbatim save for terms specific to the two distinct juridical entities. *See Washington*, 2003-1614, pp. 4-5, 872 So.2d at 1190 (finding that cases under 1261 may serve as authority for cases arising under 1266 given the “striking similarity of language and purpose” between the two). “Personal service is made when a proper officer tenders the citation or other process to the person to be served.” La. C.C.P. art. 1232. Official Revision Comment (a) to Article 1232 directs the reader to La. C.C.P. arts. 1291 and 1293 “with reference to persons who may make service, who, within the intent of [Article 1232] are ‘proper officers.’” Thus, the Official Comment contemplates “persons who may make service” as the sheriff (Article 1291) or a private process server (Article 1293).

private process server on an employee of an LLC, Article 1266(B) necessarily mandates the proof required by Article 1293(A) include evidence of the process server's inability, after due diligence, to serve the LLC's registered agent.

DCE argues the only evidence which may be considered in the trial court's rendering of the June 28, 2018 default judgment would be contained in Ms. Rabito's Motion to Confirm Default Judgment and Incorporated Memorandum or otherwise introduced into the record at the hearing. We agree. Ms. Rabito may not rely on any evidence submitted into the record after the June 28, 2018 confirmation of default. La. C.C.P. art. 1702(A); *Arias*, 2008-1111, p. 5, 9 So.3d at 818. Accordingly, we find the only evidence regarding service that the trial court could properly consider in confirming the default judgment was the Certification of Counsel, the order appointing Mr. Huck as private process server, and the returns signed by Mr. Huck and Mr. Labat.

The Certification of Counsel's assertion that "Mr. Huck perfected service on April 8, 2016," is, at best, a legal conclusion.<sup>4</sup> Service could only be perfected on an LLC when the requirement of La. C.C.P. art. 1266(B) is met. Nowhere in the Certification, the attached exhibits, or other documents timely submitted prior to the confirmation of default is there evidence that Mr. Huck made the requisite due diligence attempts at service on DCE's registered agent, Mr. Cook. Ms. Rabito argues that under a broader interpretation of "the person attempting to make

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<sup>4</sup> Ms. Rabito argues that this form of certification is sufficient pursuant to La. C.C.P. arts. 1702 and 1702.1. However, as DCE counters, Article 1702.1, by its own terms, is limited in application to 1702(B)(1) and 1702(C): defaults taken when the suit is on an open account, promissory note, other negotiable instrument, a check dishonored for nonsufficient funds, or a conventional obligation. Delictual obligations, such as the tort at issue in the instant case, are covered by 1702(B)(2) which is not referenced in Article 1702.1.

service,” the signed sheriff stamps on the returns, reflecting the deputies’ inability to serve Mr. Cook, can be substituted for Mr. Huck’s due diligence. We disagree.

Our appreciation of La. C.C.P. 1266(B) requires evidence of Mr. Huck’s attempts to make service on Mr. Cook. The evidence of the JPSO’s inability to make service, in this instance, is only relevant to the appointment of a private process server.<sup>5</sup> Ms. Rabito used the deputies’ stamps on the returns to receive court authorization for the appointment of Mr. Huck. Once Mr. Huck was appointed as the process server, the requirements of Article 1266(B) were reset.<sup>6</sup>

“Proper citation is the cornerstone of all actions. The law is, moreover, patently clear that actual knowledge cannot supplant the need for strict compliance with the requisites of proper citation.” *Gordon*, 2017-0048, p. 8, 226 So.3d at 499 (quoting *Elkins v. Louisiana Dep’t of Agric. & Forestry*, 36,829, p. 2 (La.App. 2 Cir. 3/5/03), 839 So.2d 992, 993). Where “[t]he essential requirement of ‘diligent effort’ has not been satisfied ... any judgment rendered thereon without subsequent personal appearance by the defendant may be annulled.” *Silvestri v. Beaver Productions, Inc.*, 394 So.2d 836, 838 (La.App. 4 Cir. 1981). Although requiring proof of diligence on the part of a private process server in the wake of past attempts by the sheriff may seem rote, it is not duplicative. Under the facts of the

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<sup>5</sup> “[W]hen a return is made certifying that the sheriff has been unable to make service, ... on motion of a party the court shall appoint a person ... to make service of process in the same manner as is required of sheriffs.” La. C.C.P. art. 1293(A); *see also Gordon v. A-1 St. Bernard Taxi & Delivery*, 2017-0048, p. 8 (La.App. 4 Cir. 8/9/17), 226 So.3d 494, 499 (“when service on an agent for service of process cannot be effectuated with due diligence, a process server must be appointed” and “[a]fter the process server certifies his inability to make service in accordance with Article 1266, a plaintiff may alternatively serve the Secretary of State”) (interpreting La. C.C.P. art. 1267).

<sup>6</sup> Mr. Huck was required “to make service of process in the same manner as is required of sheriffs.” La. C.C.P. art. 1293(A). Pursuant to La. C.C.P. art. 1266(B), this same manner requires Mr. Huck to make due diligence attempts to serve Mr. Cook. These attempts must be proven like any other fact in the case. La. C.C.P. art. 1293(A).



instant case, these attempts serve distinct evidentiary purposes. Proof of diligence must be established on the part of the person who ultimately effectuates service.

### **DECREE**

For the foregoing reasons we find the trial court erred in determining that Ms. Rabito sufficiently proved service of the petition on DCE pursuant to the requirements of La. C.C.P. art. 1266(B). Because we find the default judgment should be reversed for failure to prove valid service of process, we pretermitt discussion of whether there was sufficient evidence adduced on the record to support a prima facie case of the underlying tort. Accordingly, we reverse the June 28, 2018 default judgment of the trial court and remand for further proceedings.

**REVERSED AND REMANDED**