STATE OF MICHIGAN

COURT OF APPEALS

LAPEER COUNTY FAMILY INDEPENDENCE AGENCY f/k/a DEPARTMENT OF SOCIAL SERVICES, and CHRISTINE A. MOYERS a/k/a CHRISTINA A. SHERMAN,

Plaintiffs-Appellees,

v

TONY R. BRAZEEL,

Defendant-Appellant.

UNPUBLISHED
December 7, 1999

No. 213481
Lapeer Circuit Court
LC No. 88-012887 DP

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a July 9, 1998 order, entitled "stipulation of dismissal" in this protracted paternity proceeding. We reverse and remand.

This case stems from a paternity action filed by plaintiff Lapeer County Department of Social Services on March 15, 1988, on behalf of Christine Anne Moyers and her one-year-old son, who was born on January 26, 1987. The complaint alleged that defendant was the biological father of the child, requested a determination of paternity, requested that defendant pay retroactive child support, medical expenses, the child's health care expenses, and attorney fees. A motion accompanying the complaint also requested that defendant submit to blood tests to determine paternity and that defendant pay the cost of the blood tests if the tests verified his paternity.

Following plaintiff's motion for ex parte order for substituted service of process[1] filed May 5, 1988, the trial court ordered that service of process could be obtained by attempting to serve defendant with five documents: the summons, a verified complaint of paternity, an advise of rights to an attorney, a friend of the court handbook, and an order for substituted service. Three methods were to be used to effectuate service: (1) by mailing the five documents to defendant at his last known address by regular, first-class mail; (2) by mailing the five documents to defendant at his last known address by certified mail, return receipt requested; and (3) by posting the five documents in a conspicuous place at the premises of defendant's last known address.

A hearing was held on July 11, 1988, and defendant did not appear. The trial court ultimately ordered that Christine, her son, and defendant submit to blood or tissue tests for the purpose of determining paternity. On August 24, 1988, the trial court found that defendant had been properly served with a copy of the complaint and had failed to answer within twenty-eight days. The trial court entered a default judgment and ordered defendant to pay $60 a week in child support, $4,852.67 for pregnancy and childbirth costs, $780 a week to reimburse plaintiff for past assistance on behalf of the child, and other court costs. Later, a bench warrant was entered for defendant's arrest for failure to appear and for being in arrears of $8,801.67. Defendant was ultimately arrested and taken into custody on March 16, 1990. According to defendant, this was his first notice of the paternity action and he voluntarily submitted to the jurisdiction of the court.

Numerous hearings ensued and it was not until 1994 that blood tests concluded that defendant was not the father of the child. Defendant then attempted to set aside the default judgment; however plaintiff continued to file petitions to show cause for contempt for failure to pay child support. The trial court issued its order and opinion regarding defendant's motion to set aside the default judgment on March 5, 1998. The trial court ordered that the default judgment would be set aside and the case dismissed only upon defendant's payment of $3,500 in costs and sanctions within thirty days of the order. Defendant did not pay within thirty days. Further show cause hearings ensued and on July 9, 1998, a stipulation and order of dismissal was entered indicating that defendant had paid $3,500. Defendant appeals from this order.

Defendant's appeal centers around the initial service of process, contending that the trial court never obtained jurisdiction over him because the service of process was not made in accordance with the trial court's order for substituted service and that the default judgment was improperly entered because no default was entered before the judgment. The trial court rejected defendant's arguments in this regard. After reviewing the record carefully, we find that the trial court improperly entered the order for substituted service, and that plaintiff failed to comply with that order, invalidating any subsequent action by the court.

A summons and complaint may be served on an individual by delivery to the individual personally or by mailing the summons and complaint to the individual by registered or certified mail, return receipt requested, and delivery restricted to the addressee. MCR 2.105(A). A court may grant a motion for substituted service on a showing that service of process could not reasonably be made through the normal procedure. MCR 2.105(I)(1). A motion for substituted service must meet two criteria: (1) it must show that service of process could not reasonably have been made through the methods provided in the court rules; and (2) it must show that no better alternative means of notice is available than the substituted means requested. *Krueger v William*s, 410 Mich 144, 167-168; 300 NW2d 910 (1981).

In this case, with respect to the first requirement, plaintiff alleged that it unsuccessfully attempted to serve defendant by certified mail and by personal service. In support, plaintiff claimed that three pieces of documentary evidence were provided: Oakland County Deputy Sheriff Allen Webb's affidavit attesting that he attempted to personally serve defendant on "several" occasions and concluded that defendant was evading service; a copy of the certified mail envelope showing that plaintiff had been

notified twice but had failed to claim the mail; and written verification from the post office confirming plaintiff's last known address. None of these documents were in the record provided to this Court, and plaintiff offered no additional information to the trial court regarding what, if any, action was taken to ascertain plaintiff's correct address, place of employment, social security number, or driver's license number. Therefore, plaintiff failed to adequately show that service of process could not reasonably have been made through the methods provided in the court rules. Likewise, the trial court failed to explain why substituted service was warranted or on what evidence it based its conclusion.

In *Krueger, supra*, at 169, the Supreme Court acknowledged that a diligent effort may have been made to effectuate service but noted that evidence of that effort was not on the record. The Court also acknowledged that the nature and efforts to locate a defendant would vary from case to case, and that "the efforts required should be evaluated at least in part according to the type of substituted service proposed by the party seeking relief." *Id.* at 170. The trial court in this case allowed plaintiff to serve defendant by attempting to deliver five specified documents by regular mail, certified mail, and posting at defendant's last known address. However, the trial court failed to explain why this was deemed the most effective method in light of plaintiff's previous attempts. Therefore, substituted service was improperly granted and the trial court never obtained personal jurisdiction over defendant.

Additionally, regardless of whether the substituted service order was valid, plaintiff failed to comply with that order. Even more significant than plaintiff's failure to include all five documents in each attempted delivery, plaintiff failed to attempt service within the time provided by MCR 2.105(I)(3), which expressly provides that "[s]ervice of process may not be made under this subrule before entry of the court's order permitting it." The proofs of service with respect to the document mailings indicate that they were mailed on March 15, 1988, the day the complaint was filed, and nearly two months before the substituted service order was entered. Because plaintiff failed to comply with the order for substituted service, personal jurisdiction would not have been obtained even if the substituted service had been found valid. This Court has stated that relief must be granted if the judgment is void, and there is no time limit on attacking a void judgment, *DAIIE v Maurizio*, 129 Mich App 166, 171; 341 NW2d 262 (1983), and a complete failure of service warrants dismissal for improper service of process. *In re Gordon Estate*, 222 Mich App 148, 157-158; 564 NW2d 497 (1997). Thus, the subsequent default judgment is void ab initio and the trial court improperly assessed child support, costs, and sanctions.

We also note that numerous errors subsequent to the improper service would have warranted the same result. First, the default judgment was improperly entered. MCR 2.603(B) sets forth the procedure for requesting a default judgment, including application to the court for the judgment and the requirement that defendant be given notice of the request at least seven days before entry of the judgment. MCR 2.603(B)(1). The record provided to this Court contains neither plaintiff's application nor evidence of notice. The only document suggesting notice is a renotice of hearing; however, the record contains no proof of service with respect to either the request for entry of default judgment or the renotice of hearing. The renotice of hearing likewise does not include a statement that it was actually mailed to defendant or when it was mailed. Thus, there is no evidence in the record that plaintiff complied with the requirement that defendant be notified at least seven days before the entry of a default judgment, MCR 2.603(1)(b), and the default judgment is void.

In 1990, on the same day defendant was taken into custody pursuant to a bench warrant issued for failure to pay child support, plaintiff requested that the trial court issue a second summons, contending that it had been unable to serve process on defendant. Plaintiff requested an additional period of up to six months, acknowledging that the original summons "will expire on 09-13-88," a date eighteen months before the motion. The trial court granted the order, acknowledging that "additional time is necessary to effectuate service of process in this case," and ordering issuance of a second summons for "a definite period not exceeding one year from the date the complaint was filed." The only complaint filed in this matter was on March 15, 1988. Thus, it would have been technically impossible, or at least futile, to issue a summons on March 16, 1990, for a period not extending past March 15, 1989.

In addition to these problems, the trial court lacked authority to issue a second summons on the original complaint. MCR 2.102(D) allows the issuance of a second summons within ninety-one days after the date the complaint is filed. Because the second summons was not issued within ninety-one days of the complaint, it was outside the trial court's jurisdiction. Regardless, we note that the issuance of a second summons is an implied acknowledgment that the default judgment was invalid and effectively void for failure of valid service, because res judicata would have precluded a second against defendant regarding the same child if a valid final judgment had previously been entered. MCR 2.116(C)(6); *Hawkins v Murphy*, 222 Mich App 664, 671; 565 NW2d 674 (1997) (parties cannot raise the issue of paternity if it has already been conclusively determined in a prior adjudication); *In re Cook Estate*, 155 Mich App 604, 609; 400 NW2d 695 (1986) (res judicata applies to default judgments and consent judgments as well as to judgments derived from contested trials).

Presuming that, in spite of the procedural errors, defendant validly stipulated to submit to paternity tests in 1990, it is undisputed that he either canceled or failed to appear for three scheduled tests. As a result, plaintiff filed a motion requesting that the trial court dismiss the order to submit to paternity tests and require defendant to pay child support pursuant to the default judgment. Again, the procedural defects require reversal. The motion and signed order were filed with the trial court on October 29, 1990; however, those documents indicate that the motion was signed by the prosecuting attorney on October 25, 1990, and the subsequent order was signed by the court on October 26, 1990. The record does not contain a proof of service, indicating that defendant had no notice of the motion or hearing. Even if service was made, MCR 2.119(C)(1) requires that notice be given at least seven days before the hearing if defendant was personally served, or at least nine days before the hearing if defendant was served by mail, and MCR 2.119(C)(4) requires that a motion be filed at least seven days before the hearing. Defendant could not have received the required notice if the motion was signed by plaintiff on October 26, 1990, and signed by the court the next day. Neither was filed with the court until October 29, 1990, three days after the hearing, and defendant was merely served with a copy of both on October 30, 1990, depriving him again of his due process rights.

Assuming then, that the second summons validly commenced the paternity action, and that the stipulated order to submit to paternity tests was valid, plaintiff's motion to dismiss that order was improperly granted. The only real effect of this would have been that the order remained in place, requiring defendant to submit to paternity tests. Those tests showed that defendant was not the father of

the child. The trial court ultimately ordered defendant to pay costs and sanctions in the amount of $3,500, or spend ninety days in jail and pay child support arrearage of over $48,000, but this order was based on the improperly entered default judgment. Thus, there is no legal basis on which to hold defendant liable for the costs, sanctions, or child support ordered and collected in this matter. Accordingly, we reverse and remand for a determination of the amount of money improperly obtained from defendant and order it refunded in its entirety.

Reversal and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Kathleen Jansen

[1] Plaintiff had initially attempted to serve process at an address in the city of Hazel Park by regular, first-class mail, by certified mail, and later by personal service by an Oakland County Deputy Sheriff. None of these attempts was successful.